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UNITED STATES TAX COURT
WASHINGTON, DC 20217

LOYS VALLEE,)	SR
)	
Petitioner,)	
)	
v.)	Docket No. 13513-16W.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This is an action pursuant to section 7623(b)(4), to review the denial by the Internal Revenue Service (“IRS”) of petitioner Loys Vallee’s claim for a whistleblower award. (Unless otherwise indicated, all section references are to the Internal Revenue Code (26 U.S.C.; “Code”), and all Rule references are to the Tax Court Rules of Practice and Procedure. Mr. Vallee represents himself in this case. He is not an attorney. Now before the Court are Mr. Vallee’s motion to compel production of documents (Doc. 14) and the Commissioner’s motion for summary judgment (Doc. 18). The parties have filed their respective responses and replies to these motions. In his opposition to the Commissioner’s motion for summary judgment, Mr. Vallee makes a challenge to the sufficiency of the administrative record.

We will deny, without prejudice, the Commissioner’s motion for summary judgment; and we will defer ruling on Mr. Vallee’s motion to compel production of documents. In addition, we will order the Commissioner to file with the Court the entire administrative record, and we will order the Commissioner to respond to Mr. Vallee’s challenge to the sufficiency of the administrative record.

SERVED Jul 31 2018

Background

In June 2014, Mr. Vallee submitted to the IRS's Whistleblower Office ("WBO") a Form 211, "Application for an Award for Original Information", containing allegations of off-shore tax evasion schemes and estate tax evasion for 19 taxpayers in the 2012 and 2013 tax years. (Doc. 1 at 2, ¶4(a) and Doc. 18 at 2, ¶4). (We will refer to the target taxpayers, transactions, and amounts by the fictitious or generic terms as defined by the reference list of redacted information filed on May 16, 2017, as "Exhibit B 001-P". (Doc. 11))

The Commissioner set forth the following narrative of events in his motion for summary judgment. While Mr. Vallee does not dispute the events, he disputes the timeline and alleges that there are intervening events, which contradict certain statements made by the Commissioner regarding the handling and use of the information that he provided to the IRS (see Docs. 18-21; 33; and 34).

The case was assigned to Whistleblower Analyst Teresa Homola, who forwarded the Form 211 to the IRS's Large Business and International ("LB&I") International Individual Compliance ("IIC") Abusive Tax Avoidance Transactions ("ATAT") unit for review. LB&I Agent Tammy Oswald reviewed the allegations made by Mr. Vallee, and determined that "none of petitioner's claims were relevant to the work performed by [that] unit". Ms. Oswald referred the Form 211 to the Small Business/Self-Employed ("SBSE") Estate and Gift ("E&G") unit. (Doc. 18 at 3-4). SBSE E&G unit attorney Carolyn Sullivan reviewed Mr. Vallee's claims but did not find evidence supporting his allegations, did not reopen or examine the estate's return, and returned the case file to the WBO office. (Doc. 18 at 4-5; and Doc. 21 at 3, ¶5).

On May 11, 2016, after a review of the administrative file, Ms. Homola issued to Mr. Vallee a Final Determination letter, which denied his claim and stated that no action had been taken on the basis of the information he had provided. (Doc. 3 at 3, ¶4(m); Doc. 18 at 5-6, ¶12-13; Doc. 23, Ex. F). Mr. Vallee timely petitioned this Court, pursuant to section 7623(b)(4).

Motion to compel production of documents

On May 31, 2017, Mr. Vallee served the Commissioner with a discovery request. Unsatisfied with the Commissioner's responses, on July 18, 2017, he filed a motion to compel production of documents (Doc. 14). In his original discovery request, the remedy that Mr. Vallee sought was nearly the wholesale disclosure of

the IRS's files related to the target taxpayers for unspecified periods of time (i.e., "All documents made during a communication by any parties or persons regarding the Internal Revenue tax liability issues relevant to Petitioner's court claims"). (Doc. 14, p.6, ¶12; Doc. 15, Ex. A, p. "6/8").

The Commissioner objected to the vast majority of Mr. Vallee's requests for being "vague and overly broad" or stated that disclosure of the documents requested was prohibited by section 6103. (Doc. 26). Additionally, the Commissioner, in responding to Mr. Vallee's requests Nos. 6, 8, and 9, asserts that the requested documents do not exist. (See e.g. Doc. 26 at 14-15, ¶¶22-23).

Mr. Vallee seeks information specific to three taxpayers, Corporate D, Related A, and Related B. He alleges that these taxpayers entered into a settlement with the IRS, on the basis of some of the information he provided in his Form 211. (Doc. 14, pp.5-6, ¶¶10-11).

In Mr. Vallee's motion to compel production of documents, he does not explicitly allege that the administrative record was incomplete or that it had not been produced to him. However, in his response to the Commissioner's motion for summary judgment, he argues that the Commissioner's motion was premature because the Commissioner did not "certify that th[e administrative record provided to him wa]s genuine and constitute[d] the entire administrative record." (Doc. 33 at 12). Mr. Vallee also made more specific arguments pertaining to document requests Nos. 11 and 12 (with respect to Corporate D, Related A, and Related B), and attached additional information, which was not contained in his motion to compel production of documents or its attachments (Doc. 33 at 32; Doc. 34, Ex. R). We therefore will construe these portions of his response to the Commissioner's motion for summary judgment as supplementing his motion to compel production of documents.

Commissioner's motion for summary judgment

On August 1, 2017, the Commissioner filed a motion for summary judgment (Doc. 18). In his motion, the Commissioner argues that the IRS did not proceed with an administrative or judicial action based on Mr. Vallee's information, and that it did not collect any proceeds based on Mr. Vallee's information. In support of his motion for summary judgment, the Commissioner relies on the declarations of Ms. Homola, Ms. Oswald, and Ms. Sullivan, and on Ms. Oswald's and Ms. Sullivan's respective Forms 11369, Confidential Evaluation Report on Claim for Award. (Doc. 19; Doc. 20; Doc. 21; and Doc. 23, Exs. C, & D).

In opposition to the Commissioner's motion, Mr. Vallee alleges, among other arguments, that (as is discussed above) the administrative record is incomplete, that the IRS commenced a surreptitious examination based on the information he provided, and that the IRS reached a settlement with the target taxpayers. (Doc. 33 at 12, 18, 21 & 32; and Doc. 34, Exs. I & R). The Commissioner contends that he did provide the entire administrative record to Mr. Vallee and states that the examination of the target taxpayers commenced prior to WBO's referral of Mr. Vallee's Form 211 to LB&I. (Doc. 47 at 5-6).

Discussion

I. The nature of a "whistleblower" case

In the typical Tax Court case, such as a deficiency case brought under section 6213(a), the subject matter of the case is the tax liability of the petitioner who brought the case. The petitioner usually has superior access to the relevant information (since it concerns his own transactions). If the petitioner requests any relevant information that the IRS possesses, the IRS's disclosure of that information will not be barred by the general non-disclosure provisions of section 6103, since the petitioner himself is the taxpayer who is the subject of the requested information. See sec. 6103(e)(1)(A)(i).

It is not so in a "whistleblower" case brought under section 7623(b). In such a case, the subject matter is not the tax owed by or collected from the petitioner but from a different taxpayer, a third party that we call the "target". The petitioner's entitlement to an award will depend on action taken by the IRS with respect to the target (not with respect to the whistleblower-petitioner).

II. Mr. Vallee's motion to compel production of documents

Rule 70 entitles a party to engage in the discovery process to obtain information that is not privileged and is relevant to the subject matter involved in the pending case. See Rule 70(b).

As is discussed above, section 6103(a) generally prohibits the disclosure of any return or return information (as broadly defined in section 6103(b)(2)). However, an exception to that general rule is found in 6103(h)(4)(B), which provides that return information may be disclosed in a Federal judicial proceeding pertaining to tax administration "if the treatment of an item reflected on such return

is directly related to the resolution of an issue in the proceeding”. Cf. 26 C.F.R. sec. 301.6103(h)(4)-1(a) (applicable to administrative proceedings, effective for information submitted on or after August 12, 2014, and for claims for awards that are open as of August 12, 2014). Accordingly, in certain instances it is appropriate for the Commissioner to disclose information of target taxpayers to whistleblower-petitioners (such as Mr. Vallee), as long as it is “directly related to the resolution of an issue in the proceeding”.

Mr. Vallee’s original document requests (Doc. 14, p.5-6, ¶¶10-11) were overly broad, but the supplemental filings to his motion to compel production of documents provide a partial foundation for Mr. Vallee’s requests, and allow us to discern the tax periods for the information requested. Mr. Vallee alleges, with a level of specificity and citation to supporting documents not employed in some of his other arguments, that after receiving his Form 211, the IRS initiated a surreptitious examination of taxpayers identified in his Form 211, from the same location as the WBO, and collected proceeds from Corporate D, Related A, and Related B. (Doc. 33 at 20-21, 32; and Doc. 34 Exs. I, J, and R). Implicit in Mr. Vallee’s arguments is one of the exceptions to the administrative record rule, which allows supplementation of the administrative record “when an agency action is not adequately explained in the record”. See Kasper, 150 T.C. ___ (slip op. at 20).

The Commissioner argues that the evidence cited by Mr. Vallee shows only that “[Corporate D’s] return had already been selected for examination at the time petitioner’s information was forwarded to LB&I”, but the Commissioner fails to explain how the record now before us could enable the Court to reach that same conclusion. (Doc. 47 at 5, ¶15). The Commissioner also fails to state when the exam was initiated, to specify the duration of that exam, to identify where the exam was conducted, and to specify which IRS employee or employees conducted it.

The Commissioner also alleges that Related A and Related B are not targets of Mr. Vallee’s claim but instead are merely mentioned with “thousands of other taxpayers” in Mr. Vallee’s Form 211. (Doc. 26 at 6, n.5). However, the Court observes that neither party has filed Mr. Vallee’s complete Form 211 with the Court. Therefore the Court is unable to determine whether the specifically requested information is sufficiently related to claims that were advanced by Mr. Vallee in his Form 211, or if those documents should remain protected by section 6103. (Doc. 15, Ex. B).

Accordingly, we will order the Commissioner to file with the Court Mr. Vallee's complete Form 211, with its attachments, and we will defer ruling on Mr. Vallee's motion to compel until we have the opportunity to review the claims that were made by Mr. Vallee.

II. Motion for summary judgment

Where the pertinent facts are not in dispute, a party may move for summary judgment to expedite the litigation and avoid an unnecessary (and potentially expensive) trial. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b); see Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994); Zaentz v. Commissioner, 90 T.C. 753, 754 (1988).

The party moving for summary judgment (here, the Commissioner) bears the burden of showing that there is no genuine dispute as to any material fact, and factual inferences will be drawn in the manner most favorable to the party opposing summary judgment (here, Mr. Vallee). Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982). In order for the Commissioner to prevail on summary judgment here, he must affirmatively show that the IRS did not "collect[] proceeds as the result of an administrative or judicial action using the whistleblower's information". Kasper, supra, slip op. at 20. Thus, he must account for the WBO's handling of Mr. Vallee's information. He undertakes to do so by reference to Mr. Vallee's Form 211 and its attachments, and supports his factual assertions with the declarations of IRS personnel.

A. Complete administrative record

The question before us in a whistleblower case brought under section 7623(b) is "whether the IRS collected proceeds as the result of an administrative or judicial action using the whistleblower's information". Kasper v. Commissioner, 150 T.C. ___ (Jan. 9, 2018), slip op. at 20. As for the appropriate scope and standard of review in such a case, we review the administrative record, and we review it for an abuse of discretion. Id., slip op. at 20, 23-24.

However, "the Commissioner 'cannot unilaterally decide what constitutes an administrative record'", and we allow the record to be supplemented if an exception applies. Id., slip op. at 20-21, quoting Whistleblower One 10683-13W v. Commissioner, 145 T.C. 204, 206 (2015)).

Mr. Vallee argues that we should deny the Commissioner's motion for summary judgment because the Commissioner would not "certify that th[e] administrative record provided to him wa[s] genuine and constitute[d] the entire administrative record." (Doc. 33 at 12). In response to this allegation, the Commissioner contends that Mr. Vallee's "question did not provide any context to explain what he meant by 'this administrative record' nor did [Mr. Vallee] provide any exhibits or attachments or any reference to the documents marked as Bates Nos. 000001 to 000915, previously produced to petitioner by respondent". The Commissioner asserts that "[o]n January 24, 2017, [he] provided petitioner with a Bates stamped copy of the entire administrative record in this case." (ECF 47 at 3-4, ¶ 11).

We cannot resolve this dispute--either in the context of the Commissioner's current motion for summary judgment, nor later in these proceedings--without having the administrative file before us. This means that, at least for the time being, we must deny the Commissioner's motion. To enable us to resolve this dispute in due course, and to ensure that Mr. Vallee was provided with the entire administrative record, we will, in a manner analogous to Rule 217(b), order the Commissioner to file with the Court the entire administrative record, borrowing the definition from Rule 210(b)(12), appropriately certified as to its genuineness by the Commissioner or by an official authorized to act for the Commissioner in such situation.

B. Declarations in support of the Commissioner's motion

With his motion for summary judgment, the Commissioner filed declarations for the apparent purpose of showing the limited number of IRS personnel who had access to Mr. Vallee's Form 211 information. The Commissioner filed his motion before we issued our opinion in Kasper, which held that our review is confined to the administrative record. The Commissioner does not allege that the declarations were included in the administrative record before the WBO, and it seems clear that they were not.

Consequently, the proper purpose of those declarations is unclear. The Commissioner does not explicitly rely on them to resist discovery nor to resist a request to supplement the record, so we do not opine about their possible use for those purposes. However, the declarations are useful in the context of discussing Mr. Vallee's challenge to the sufficiency of the administrative record, to which we now turn.

III. Mr. Vallee's challenge to the sufficiency of the administrative record

In order for the WBO to determine whether the IRS had collected proceeds as a result of Mr. Vallee's information, the WBO needed to learn where his information had been sent and used within the IRS. In order for the WBO's final determination to be reviewable, the administrative record needed to account for the sending and use of that information.

1. Ms. Homola's declaration

The Commissioner filed the declaration of Ms. Homola in support of his motion for summary judgment. Attempting to show that the circulation of Mr. Vallee's information was very restricted, Ms. Homola's declaration states, inter alia, that:

6. On November 3, 2014, I began to evaluate the claim. Upon review, I made a determination to send [Mr. Vallee's] information to the Large Business & International Division, International Individual Compliance (LB&I IIC), Abusive Tax Avoidance Transactions (ATAT) unit. The claim was assigned to LB&I Revenue Agent, Ms. Tammy Oswald.

7. After her review, the LB&I Revenue Agent completed a Form 11369, Confidential Evaluation Report on Claim for Award, and returned the file to me. * * * *

* * * * *

9. The Whistleblower Office did not forward any of petitioner's Form 211 information to any other IRS operating division or examination team other than the LB&I Revenue Agent [i.e., Oswald] and the SBSE Examiner [i.e., Sullivan].

* * * * *

12. Neither the LB&I Internal Revenue Agent nor the SBSE Examiner made adjustments to the tax returns of any individuals or entities named in petitioner's Form 211 or any related taxpayer; therefore there were no proceeds collected from them. (Doc. 19 at 3, ¶9)

The only LB&I Revenue Agent identified in Ms. Homola's declaration is Ms. Oswald, and the only SBSE Examiner identified in the declaration is Ms. Sullivan. Ms. Homola's declaration does not discuss or mention sharing Mr. Vallee's information with any other IRS employee (such as Denise Nash, David Horton, or Susan Idleman, discussed below).

2. Mr. Vallee's challenge

In his motion for summary judgment, the Commissioner asserts:

The Whistleblower Analyst reviewed the claim and forwarded it to the Large Business & International (LB&I) Division International Individual Compliance (IIC) Abusive Tax Avoidance Transactions (ATAT) Offshore unit. There, the case was evaluated by Ms. Tammy Oswald, Revenue Agent, LB&I Compliance & Analytics (LB&I Revenue Agent). [Doc. 18 at 3, ¶8.]

In his response objecting to the Commissioner's motion for summary judgment, Mr. Vallee alleges--contrary to the Commissioner's contention--that the IRS used his information in an examination of one of the target taxpayers. In making an argument in support of that hypothesis, he states that the "recipient [of his Form 211 information] [wa]s not Miss Oswald but Miss Nash." (Doc. 33 at 22-23). He supports this argument by citing to a memorandum dated December 18, 2014 (Doc. 34, Exs. E), and an email dated January 12, 2015 (Doc. 34, Exs. K). That memorandum appears to have served as the initial notification, from the WBO to LB&I, of Mr. Vallee's claim. The memorandum listed the following documents as attachments: "Informant Submission -- Form 211 and attachments"; "IDRS research results"; "Flow Chart"; and a "Form 11369". The subsequent email sent from Ms. Homola to Ms. Nash stated that "[a]ttached you will find additional information/corrections for claim 2014-012087. This information was received in Ogden and scanned into eTrak. I was not sure if you had seen it."

Both of these communications were indeed sent from Ms. Homola, not directly to Ms. Oswald but to a Ms. Denise Nash, and they concerned the information contained in Mr. Vallee's Form 211. (Doc. 33 at 22-23). Mr. Vallee thinks this shows a distribution of his information that the WBO failed to account for.

However, the Court observes that the memorandum was addressed to David Horton, Director, International Individual Compliance, and was addressed to the attention of Denise Nash, SME (i.e., "subject matter expert") and Susan Idleman.

We also note that Ms. Nash's electronic signature appears under the heading "Manager's Approval Signature" on the April 15, 2015, Form 11369 that was prepared and signed by Ms. Oswald. The communications cited by Mr. Vallee and Ms. Nash's role are all consistent with the statement made in the Commissioner's motion for summary judgment, quoted above, to the effect that in LB&I, Mr. Vallee's information was evaluated by Ms. Oswald.

Nevertheless, these communications arguably contradict Ms. Homola's declaration since they demonstrate that Ms. Homola provided persons, in addition to those disclosed in her declaration, with Mr. Vallee's Form 211 information. Accordingly, we construe Mr. Vallee's allegation (that Ms. Nash, rather than Ms. Oswald, was the immediate recipient of his Form 211 information), to be a challenge to the sufficiency of the administrative record. The record, he contends, does not really show the IRS's circulation and use of his information.

3. Response to Mr. Vallee's challenge

The declarations that the Commissioner submitted in support of his motion for summary judgment show us the general nature of his likely response to Mr. Vallee's challenge to the sufficiency of the administrative record. However, for the reasons below, the declarations are factually insufficient for the apparent purposes for which they were offered: i.e., to account for all persons who were provided with and had access to Mr. Vallee's information; and to explain what, if any, action was taken based on that information.

The Commissioner's motion, Ms. Oswald's declaration, and the Commissioner's reply all fail to discuss any disclosure of Mr. Vallee's information to Ms. Nash (or Mr. Horton or Ms. Idleman), and fail to discuss whether any other person could have accessed or did access Mr. Vallee's Form 211 information that was uploaded into the eTrak system by Ms. Homola (which, in her email to Ms. Nash, she claimed to have done). This leaves open the possibility that other persons may have received Mr. Vallee's information, and does not show whether or how those persons may have used it.

The declaration leaves the Court and Mr. Vallee to wonder about who else might have been provided with the information contained in Mr. Vallee's Form 211, and what those persons might have done with that information. Therefore, Ms. Homola's declaration is arguably deficient in its scope, since she does not affirmatively state to whom she provided the subject information and does not state that no other person had access to that information while it was in her possession.

The Court also observes that a statement (like Ms. Homola's) that one "did not forward any of petitioner's Form 211 information to any other" group or person than those stated in the declaration is absent from the respective declarations of Ms. Sullivan and Ms. Oswald. We stress that we do not find that any of these declarants did circulate Mr. Vallee's information beyond what they disclosed; rather, we observe that their declarations, as drafted, fail to show that the WBO was given information sufficient to conclude that Mr. Vallee's information had not been further disseminated and used.

We will order the Commissioner to respond to Mr. Vallee's challenge to the sufficiency of the administrative record.

To give effect to the foregoing, it is

ORDERED that the Commissioner's motion for summary judgment is denied without prejudice. It is further

ORDERED that petitioner's motion to compel production of documents shall be held in abeyance. It is further

ORDERED that, no later than August 31, 2018, the Commissioner shall file (1) what it contends constitutes the complete administrative record, appropriately certified as to its genuineness and completeness, and (2) the Commissioner's response to petitioner's challenge (as inferred above) to the sufficiency of the administrative record. It is further

ORDERED that petitioner may, no later than September 28, 2018, file with this Court, (1) a response to the Commissioner's filing of the administrative record, alleging, with as much specificity as possible, any factual disputes concerning the contents or completeness of the administrative record, and (2) a reply to the Commissioner's response to the challenge to the sufficiency of the administrative record.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
July 31, 2018