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238 DTR K-6

Tax Procedure

Tax Court Whistleblower Anonymity Ruling Aids Informants, Foreshadows Other Changes

By Diane Freda

The U.S. Tax Court's ruling Dec. 8 that a whistleblower can remain anonymous in court proceedings is a victory for all whistleblowers worried about revealing their identity, practitioners told BNA Dec. 9, and marks the first step toward the IRS setting up additional procedures for handling the cases.

In *Whistleblower 14106-10W v. Commissioner*, 137 T.C. No. 15 (Dec. 8, 2011), the U.S. Tax Court said for the first time that a whistleblower can remain anonymous in court proceedings when prosecuting a whistleblower claim as a confidential informant (237 DTR K-2, 12/9/11).

The request by the petitioner to have the record sealed, or alternatively proceed anonymously, "presents novel issues" of balancing the public's interests in open court proceedings against the petitioner's privacy interests as a confidential informant, Judge Michael Thornton said.

"The Tax Court decision continues the precedent set by the Court of Federal Claims to protect whistleblowers from retaliation," Erica Brady, with the Ferraro Law Firm, told BNA. "By allowing the whistleblower to proceed anonymously, the Court has ensured that whistleblowers will be able to exercise their statutory right to judicial appeal. Forcing a whistleblower to choose between anonymity and their right to appeal has a chilling effect on appeals."

The parties in the case were ordered to redact information that would tend to reveal the petitioner's identity as the case progresses through appeals and additional litigation.

The anonymous whistleblower in question filed a claim for an award under tax code Section 7623. The claim was denied because Judge Thornton said the petitioner failed to meet the threshold requirements for an award.

Under that tax code section, a whistleblower award is dependent on both the initiation of an administrative or judicial action—and collection of tax proceeds, Thornton said. He granted IRS's motion for summary judgment.

On the other hand, Brady said whistleblowers may feel that their appeal rights have been gutted by the Tax Court's holding that an affidavit by the IRS that simply states that the service did not use a whistleblower's information is enough for granting of a motion of summary judgment.

"Because Section 6103 generally prohibits the IRS from disclosing information about a taxpayer to whistleblowers, most whistleblowers who are not still insiders of the taxpayer will have no evidence of what the IRS did with their information," she said.

Precursor to Other Confidentiality Issues

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According to Bryan Skarlatos, the case is the first step in showing how the Tax Court will protect confidential information.

Case by case, the court is developing procedures for handling whistleblower cases, and it will be a big job for them as more make their way to the court, the Kostelanetz & Fink partner told BNA.

There are many other big issues waiting to be developed, such as how to maintain the confidentiality of the target, he said. The court will also need to protect the identity of the taxpayer being informed on, and the information regarding the taxpayer's tax filing, he said.

"There are situations in which somebody may contest the amount of an award," he said. That type of case has not made it to the Tax Court yet. In contesting the amount of the award it is likely the taxpayer's name will become an issue as well as the facts of the taxpayer's tax return positions, he said.