

Whistleblower Anonymity in Tax Court Pleases Informant Representatives

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The Tax Court in a December 8 decision broke new ground in its continuing exploration of new rules governing whistleblower proceedings by allowing an informant to proceed anonymously in the court despite having his claim dismissed on the government's motion for summary judgment.

Practitioners praised the court's decision to allow the whistleblower to retain anonymity, saying the holding could encourage more informants to make claims through the IRS whistleblower program. One of the major concerns for whistleblowers was that challenging the IRS's determination would expose their identity, said George M. Clarke III of Miller & Chevalier. "If this [holding] is a trend, it will make it more likely that folks will challenge the IRS's initial determinations and thus ultimately make the program more attractive for claimants."

The whistleblower, a senior executive in an unnamed company, filed an informant claim with the IRS after allegedly witnessing the company significantly underpay its tax liability through noncompliance with the tax code. The IRS reviewed the informant's claim but concluded that there were no grounds to make an award under section 7623(b).

In timely petitioning the Tax Court to review the award claim denial, the whistleblower also filed a motion asking for a protective order that would either seal the record or allow him to proceed anonymously. Although the whistleblower had left the company he claimed was tax noncompliant, he argued that revealing his identity in court would create psychological and financial harm, including potential harmful employment repercussions. (For *Whistleblower 14106-10W v. Commissioner*, 137 T.C. No. 15 (Dec. 8, 2011), see *Doc 2011-25765* or *2011 TNT 237-13*.)

The Tax Court held that it had jurisdiction to hear the claim, affirming its opinion in *Cooper* that a letter from the IRS Whistleblower Office to an informant denying an award claim is a determination under section 7623(b)(4) that provides the court with jurisdiction to hear an appeal. But the court concluded that the IRS also properly denied the award claim because the threshold requirements for a claim were not met, even though the whistleblower's motion for a protective order was pending and no discovery had commenced. Because the IRS must both initiate an administrative or judicial proceeding and collect underpaid taxes, neither of which occurred in the case, the Tax Court granted the IRS's motion for summary judgment. (For *Cooper v. Commissioner*, 135 T.C. 70 (July 8, 2010), see *Doc 2010-15202* or *2010 TNT 131-3*.)

A Balancing Act

The Tax Court nonetheless explored the whistleblower's protective order request and held that he would be permitted to proceed anonymously. The court recognized that the anonymity request "presents novel issues of balancing the public's interests in open court proceedings against petitioner's privacy interests as a confidential informant." While the Tax Court's general approach is that litigation within its domain is a matter of public record, the court also has "broad discretionary authority," both as a statutory matter and under internal rules, to offer privacy protection, the majority stated.

Acknowledging the absence of explicit anti-retaliatory protections in section 7623 similar to those found in other informant statutes, the court looked to a wide body of case law on providing judicial anonymity. Factors in favor of granting anonymity included cases involving highly sensitive and personal information, a credible risk of bodily harm, and social or professional stigmas. That the Internal Revenue Manual treats whistleblowers as confidential informants also weighed in favor of allowing anonymity, the court said. Looking at all of the circumstances behind the whistleblower's motion, the court said it was inclined to take a position that "strikes a reasonable balance between petitioner's privacy interests as a confidential informant and the relevant social interests."

Rather than keep the record sealed, granting anonymity by requiring redaction of all identifying information -- both for the whistleblower and for the company referenced in the award claim -- was a "less drastic option," the court held. The compromise "preserves in large measure the public's ability to scrutinize judicial functioning," the opinion stated.

But the majority warned in a footnote that the precedent set forth in the opinion should not "necessarily result in anonymity for all tax whistleblowers," because "each request to proceed anonymously must stand upon its own."

Three concurring judges agreed that allowing anonymity in the case was justified but wrote that the majority was making it too easy as a general rule of law to claim the need for anonymity to avoid negative career repercussions in making a whistleblower claim. Congress could have included specific protections for whistleblowers in section 7623, yet chose to remain silent on the issue, the concurrence noted. "One could argue that Congress intended whistleblowers to bear the privacy risks inherent in asking for review of their whistleblower claims in a public forum," the concurring judges wrote.

The Right Result

Gregory S. Lynam, a tax partner at the Ferraro Law Firm, said the Tax Court's balanced approach reached the right result. "We are happy the court concluded the identity of the whistleblower should not be disclosed," he said.

Lynam also noted that his firm submitted comments to the court regarding the importance of protecting an informant's identity by allowing anonymous filings and

filings under seal and said the case marks the first time the court considered its rule changes covering whistleblower actions.

"The whistleblower may have lost the case, but won an important victory for all tax whistleblowers," said Scott A. Knott, also a tax partner at the Ferraro Law Firm. "It is great to see the Tax Court recognize the importance of protecting the identities of whistleblowers."

Dean Zerbe, national managing director at Alliantgroup LP and a former tax counsel to Senate Finance Committee Republicans, praised the Tax Court decision, saying, "Anonymity is vitally important in the decision of many whistleblowers to come forward." Whistleblowers are more likely to come forward and "not fear their name will be on the front page," he said. The opinion also brings the Tax Court in line with the IRS Whistleblower Office in recognizing the importance of protecting a whistleblower's identity, he said.

Zerbe called the majority opinion "another extremely thoughtful and considered opinion from the Tax Court that highlights that the court has a deep and clear understanding of the whistleblower program and how the historical policies and case law that have strengthened the False Claims Act and protected whistleblowers underpin and inform the IRS whistleblower law."

Although he praised the court's holding regarding anonymity, Lynam said informants may fear that their award determination appeal rights "have been gutted by the court's further holding that an affidavit by the IRS which states 'we didn't use your information' is enough to satisfy the court on a motion for summary judgment that the whistleblower is not eligible for an award."

Knott said that because section 6103 generally prohibits the IRS from disclosing information about a taxpayer to a whistleblower, including what the IRS has done with a whistleblower's information, "most whistleblowers who are not insiders of the taxpayer will have no evidence of what the IRS did with their information, if anything." Non-insider whistleblowers were relying on their judicial appeal rights to verify that they were properly treated under section 7623(b), but the Tax Court's holding "may dash their hopes of finding out what really happened with their information because the court didn't let the whistleblower issue discovery to find that out," he said. "Insiders, on the other hand, will have plenty of evidence to get past a motion for summary judgment on this issue so they are not affected by this part of the Court's decision."