

Stephanie Service
Clerk, U.S. Tax Court

Honorable Clerk:

Please accept these brief comments on the proposed change to Tax Court Rule 92 as it relates to whistleblower matters.

I strongly support a date certain for the administrative record to be supplied in whistleblower matters but I urge a different rule than that proposed. In whistleblower matters, please require that the administrative record be certified and filed by Respondent simultaneously with the filing of its answer and please make clear that this record is to be filed under seal with minimal redactions for third-party taxpayer information such as social security numbers.

My concern is that any Tax Court rule that allows the Respondent to withhold the administrative record from the petitioner creates an uneven playing field that favors Respondent and prejudices a petitioner's interest. For example, under the current rules, Respondent answers the petition, often citing details in the administrative record. But a whistleblower cannot substantively reply to that answer without the administrative record, yet the rules require whistleblowers to reply within a prescribed timeframe. Similarly, how does a whistleblower file a motion for summary judgment within the as-of-right timeframes when the record need not be produced until shortly before the trial date? In my view, the practice of withholding the administrative record until some number of days before the trial date undermines a whistleblowers ability to intelligently prosecute his/her matter or even decide whether it should be withdrawn. Equally important is that the Tax Court rules in general urge settlement of disputes but it is impossible for a whistleblower to engage in any kind of informed settlement without knowing details of the administrative record.

Let's instead have a rule requiring that the administrative record be supplied with Respondent's answer. That's how it works in New York State for proceedings challenging governmental determinations. These New York "article 78" proceedings generally involved judicial review of administrative determinations, typically without trial, making them similar to whistleblower petitions with the IRS. The article 78 rules require that the administrative record be certified and filed with the court and served to the petitioner when the Respondent files its answer. See New York State Civil Practice Laws and Rules (CPLR) Article 78. This article 78 procedure creates a level playing field for judicial review insofar as the parties and the court have the same evidentiary record that was before the administrative body. Certainly, that administrative record may be incomplete and may need to be supplemented but it creates a fair starting point for the adjudication. By contrast, whistleblower petitions have lopsided access to evidence with Respondent holding all the cards and the Petitioner and the court kept in the dark until Respondent chooses to file the administrative record.. This makes reconciliation of differences before trial almost impossible to accomplish. It also makes it practically impossible for a whistleblower to make a timely re-submission of a claim when the record shows some misunderstanding by the Whistleblower Office.

My personal experience with obtaining Whistleblower administrative records has been dissatisfying. Respondents' Attorneys typically have provided the record promptly when Respondent itself wishes to file a summary judgment motion. But otherwise, I have experienced considerable delays because Respondent controls the two steps. First, Respondent (and the Tax Court) typically require a

joint motion for protective order under Rule 103. Without a deadline for filing this motion, this currently required step can become an obstacle to provision of the record. In my experience, the Tax Court promptly grants this motion but there is no deadline for providing the administrative record once the motion is granted. Respondent has no incentive or deadline to provide the record because delays in judicial review work in tandem with the assessment statute of limitations clock. With a three year statute of limitations for an assessment of tax, Respondent can rest assured that several years of delays from judicial review will moot any controversy unearthed in the administrative record for a case where no assessment of tax was made.

I further propose that the Tax Court replace its current procedures (for a joint motion and court order) with a rule requiring that whistleblower petition materials include an unsworn Petitioner declaration made under penalty of perjury, committing to protection of the administrative record from disclosure and agreeing to the destruction or return of such materials when judicial review has ended. The IRS is already legally bound to protect such confidential taxpayer information; only the petitioner needs to be newly bound. So long as the whistleblower petitioner commits to maintain confidentiality of the administrative record, there should be no need for a joint motion or court order. That change in practice would eliminate the current procedural hurdles making it difficult for Whistleblowers to obtain the administrative record promptly.

The final matter that I would ask you to address is the degree to which a whistleblower administrative record may be redacted. Generally, administrative records in my dockets with trial dates have been filed under seal but I know of no general rule governing this. I would suggest your rule make it clear that whistleblower administrative records must be filed under seal. The need to redact items when the entire administrative record is filed under seal is unclear and seems to detract from the established scope of review. Please make clear that the administrative record will be filed under seal and that only limited redactions (such as taxpayer id numbers) will be permitted.

Personally, I have been waiting a very long time to receive some whistleblower administrative records. For example, I received a preliminary award determination letter dated April 10, 2018 involving 21 claims. The letter was sufficiently general and vague that I was unable to tell which claim or claims had been pursued and resulted in proceeds. The whistleblower office asked me to agree or disagree with the preliminary award but I had no basis to do either. When the Whistleblower office declined to provide details, I filed a Tax Court petition to try to obtain the administrative record. McCrorry v. Commissioner 156 T.C.6. Three years later, the petition was dismissed for lack of jurisdiction. Immediately thereafter, I received a final determination identical to the preliminary one and filed yet another Tax Court petition that has been pending for more than a year. I still await the administrative record and remain unable to evaluate whether I agree or disagree with the Whistleblower Office determination. Four years seems way too long to have this administrative record withheld.

Thank you kindly for your consideration of these comments.

Respectfully submitted,

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