



FEDERAL TAX WEEKLY

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Tax Court Considers Standards for Evaluating Discovery Requests in Whistleblower Case

J. Berenblatt, 160 T.C. —, No. 14, Dec. 62,220

An informant's motions to compel discovery from the IRS seeking information and documents from the IRS Office (WHO) were partially denied. He did not make any significant showing of bad faith or an incomplete record in connection with his requests for document production. However, the informant made a limited showing of an incomplete record with respect to one of his interrogatory requests. In a case of first impression, the Tax Court addressed the proper standards for evaluating discovery requests in the specific context of appeals under Code Sect. 7623.

The IRS had interviewed the informant as part of an investigation that ultimately led to large recoveries from various institutional and individual taxpayers. Several years later, the informant filed Form 211, Application for Award for Original Information, with the WBO. However, the WBO denied the informant's claim for award because the IRS had already known the relevant information before the informant's interview.

Jurisdiction of Tax Court

The Tax Court had jurisdiction over this case because the IRS had proceeded with an administrative or judicial action against the target taxpayers and, at some point after the informant provided information, collected proceeds in connection with the issue raised by the informant.

Informant's Motions to Compel

In evaluating the strength of the whistleblower's showing, an agency is presumed to have properly designated the administrative record, absent a substantial showing made with clear evidence to the contrary. The Tax Court held that whistleblower discovery requests are appropriate upon a significant showing that (1) there is material in the IRS's possession indicative of bad faith on the IRS's part in connection with the case, or (2) there is material in the IRS's possession indicating that the designated record omits material the WBO actually considered (directly or indirectly) or that otherwise falls under a category listed in Reg. § 301.7623-3(e). The court deemed all materials listed in Reg. § 301.7623-3(e) to be necessary parts of the complete record.

The informant's motions to compel were partially denied because he did not support them with any evidence of bad faith on the IRS's part, and he specifically disclaimed

any such allegation. The informant contended that the record produced by the IRS excluded certain documents to his claim for award, making the production of administrative record incomplete. However, he failed to show that the WBO indirectly considered the interview documents and subpoenaed records. There was no good evidence that any of the

documents at issue were a part of the complete administrative record.

Compelling Additional Answers to Interrogatories

One of the informant's interrogatory requests aimed to identify all documents

pertaining to his interview, including notes from a revenue agent who was present at the interview. However, the IRS left unclear whether or not the revenue agent took notes. Therefore, the IRS was compelled to clarify whether the revenue agent took notes during the whistleblower's interview and, if so, whether such notes still existed, were lost, or were destroyed.

IRS Properly Certified Taxpayer's Seriously Delinquent Tax Debt

P.A.H.A. Meduty, 160 T.C. —, No. 13, Dec. 62,219

The certification of a taxpayer as a taxpayer owing a seriously delinquent tax debt was not erroneous. The taxpayer had unpaid, legally enforceable federal income tax liabilities and frivolous tax penalties for eight years. Additionally, the Tax Court did not have jurisdiction to review the taxpayer's challenges to the IRS's compliance with the notice requirements.

Certification of Seriously Delinquent Tax Debt

If the IRS certifies that a taxpayer has a seriously delinquent tax debt, the certification is sent to the Secretary of State, for action with respect to the denial, revocation, or limitation of the taxpayer's passport. The IRS notifies the taxpayer of the certification.

For a seriously delinquent tax debt:

- a federal tax liability must be assessed,
- the liability must exceed \$50,000 (adjusted for inflation), and

- the liability must be unpaid and legally unenforceable.

Additionally, notice of lien must have been filed and either administrative rights have been exhausted or lapsed, or a levy is made under Code Sec. 6331.

If certification is erroneous or the certified debt is fully satisfied or ceases to be seriously delinquent, the IRS must reverse certification and notify the Secretary of State and taxpayer.

The IRS met the criteria to certify that the taxpayer had seriously delinquent tax debt by supplying Forms 4340, Certification of Assessments, Payments and Other Specified Matters, for the income tax liabilities and frivolous return penalties. Although the taxpayer contested the validity of the underlying claims, the Tax Court lacked jurisdiction to review the liabilities underlying the tax debt.

The IRS also demonstrated that for each year and type of liability, a levy pursuant to Code Sec. 6331 was made. This was based on Forms 4340 and the testimony of a IRS senior program analyst who reviewed the taxpayer's Integrated Data Retrieval

System (IDRS) transcripts and found that the transcripts displayed action codes created to identify tax periods for which levy action had occurred.

Jurisdiction

In addition to a number of frivolous arguments, the taxpayer raised one non-frivolous argument regarding the Tax Court's jurisdiction to review challenges to the IRS's compliance with the notification requirements in Code Sec. 7345(d).

Under Code Sec. 7345(e), the Tax Court has jurisdiction to review the IRS's certification of seriously delinquent tax debts. The requirement to provide notice to the taxpayer of the right to bring a civil action was not a prerequisite to a proper certification of a seriously delinquent tax debt under the statute. Further, there was no prejudice to a taxpayer who did not receive proper notice of the certification, as there is no period of limitations for review and a taxpayer who did not receive proper notification can still challenge the certification.

REFERENCE KEY

USTC references are to **U.S. Tax Cases**
Dec references are to **Tax Court Reports**

FEDERAL TAX WEEKLY, 2023 No. 22. Published by Wolters Kluwer, 2700 Lake Cook Road, Riverwoods, IL 60015.
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Chief Counsel Issues Advice on Exception to Stock Held by Partnerships

IRS Advice Memorandum AM 2023-003

The regularly traded exception under Code Sec. 897(c)(3) did not apply to a partnership (P1) which held eight percent of the stock of in a corporation (C1). A nonresident alien individual (NRA) owned a 25 percent interest in the capital and profits of P1. The other partners of PRS were United States citizens, unrelated to the NRA. C1 was a United States real property holding

corporation (USRPHC). It had a single class of stock outstanding.

The stock was considered a United States real property interest (USRPI) with respect to any foreign partner of P1. When P1 disposed of its stock of C1, the NRA was allocated its allocable share of the gain recognized on the disposition. Under Code Sec. 897(a), NRA's gain on the disposition was effectively connected income.

Further, the NRA held stock of C1 directly. Due to the Code Sec. 318(a)(2)(A) attribution rules, the NRA was also treated as holding NRA's proportionate share of stock held by P1. Therefore, the NRA was treated as indirectly owning an additional one percent of the stock of C1. When the NRA disposed of its stock of C1, the stock was considered a USRPI. NRA's gain recognized on the disposition was effectively connected income under Code Sec. 897(a).

Third Quarter 2023 Interest Rates Remain Unchanged

Rev. Rul. 2023-11; IR-2023-104

The over and underpayment interest rates for the third quarter of 2023 remain unchanged. The third quarter begins on July 1, 2023. The rates will be:

- 7 percent for overpayments,
- 6 percent for corporate overpayments,
- 7 percent for underpayments, and
- 9 percent for large corporate underpayments.

The interest rate for the part of a corporate overpayment exceeding \$10,000 is 4.5 percent.

Computation of Third Quarter 2023 Interest Rates

The IRS computes these interest rates quarterly. The third quarter rates are based on the federal short-term rate for April 2023 which is 4 percent.

For noncorporate taxpayers:

- the overpayment rate is the short-term rate plus 3 percent, and
- the underpayment rate is the short-term rate plus 3 percent.

For corporate taxpayers:

- the underpayment rate is the short-term rate plus 3 percent
- the overpayment rate is the federal short-term rate plus 2 percent.
- the rate on the part of a corporate overpayment that exceeds \$10,000 for a tax period is the short-term rate plus 0.5.
- the underpayment rate for large corporations is the short-term rate plus 5 percent.

TAX BRIEFS

Gift Tax

The period of limitations to assess the gift tax expired before the Commissioner issued the notice of deficiency because the taxpayer had adequately disclosed the gift on his prior year's return. The IRS argued that the taxpayer had failed to comply with the requirements of Reg. §301.6501(c)-1(f)(2), but the Tax Court determined that he had strictly or substantially complied with the requirements to provide a description of the transferred property and any consideration he received, provide the

identity of, and his relationship to, each transferee, and provide a detailed description of the method used to determine the fair market value of property transferred. His compliance caused the three-year assessment period to commence, and the period of limitations to assess the gift tax expired before the Commissioner issued the notice of deficiency. The Tax Court therefore granted summary judgment in favor of the taxpayer.

Schlapfer, TC, Dec. 62,218(M)

Self-Employment Tax

An individual was not exempt from self-employment tax under treaties between the Chippewa tribe and the government. The language in the treaty, while guaranteeing a right to make a modest income from such activities as hunting and fishing, did not guarantee a modest, tax-free living nor did it extend to practicing law and conducting research. The absence of tax terms in a treaty did not mean that Indians were exempt from taxation, but rather that an exemption from tax did not exist.

Bibeau, TC, Dec. 62,221(M)