

become heated. Moderate Democrats are wary of distorting investment incentives in a pandemic, and if business interests are firmly against corporate tax increases because of their potential to decrease investment, it may be worth exploring possible alternatives. Increased taxes on capital could be less distortive to business investment.

Other than dramatic rate increases, Biden's campaign omitted more radical proposals for increasing the taxation of capital. But given their prevalence, it's likely that those kinds of ideas will become part of the discussion of how to raise revenue to offset the administration's ambitious spending plans. Taxing large accumulations of capital rather than increasing corporate taxes could be a better way to achieve the administration's goals. ■

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A Whistleblower's Cautionary Tale: Anonymity Isn't Guaranteed

by Kristen A. Parillo

A whistleblower has a message for Congress: Amend the IRS whistleblower statute to provide for a presumption of anonymity in Tax Court, or else insiders will stop providing valuable information on tax crimes.

Refusing to change the law will be especially worrisome to those outside the United States who are willing to provide evidence of unreported income, offshore bank accounts, and money laundering to U.S. tax authorities, the whistleblower says.

That warning comes from an offshore U.S. government informant who has been waging a five-year battle in the federal courts to anonymously challenge an IRS Whistleblower Office decision denying his award submission.

The whistleblower, who spoke on the condition that his identity wouldn't be revealed, said he hopes that sharing his story would spur Congress to change the law so that whistleblowers can proceed anonymously in Tax Court when challenging IRS award determinations.

The section 7623(b) whistleblower statute doesn't provide a mechanism for preserving anonymity. Instead, whistleblowers must file a motion under Tax Court Rule 345(a), which requires them to present a "sufficient, fact-specific basis for anonymity."

Tax Notes previously spoke with the whistleblower in 2013, when he detailed his frustrations with how the IRS Criminal Investigation division treated him as a confidential informant and how the Whistleblower Office handled his award submission.

The whistleblower met with the staff of Senate Finance Committee member Chuck Grassley, R-Iowa, in April 2013 to discuss his concerns. Grassley championed the 2006 legislation that overhauled the IRS whistleblower program, and Grassley's staff, according to the whistleblower, twice met with Treasury officials to discuss his case and were given assurances that the IRS would protect his confidentiality.

However, the whistleblower's attempts to anonymously challenge the Whistleblower Office's award denial were stymied when the Tax Court in November 2018 rejected his rule 345(a) motion. He argued to the D.C. Circuit that his case met the Tax Court's standard for anonymity, citing as support a March 2008 confidentiality agreement he received from CI, his concerns of physical harm, and the professional ostracism that he still faces from being a whistleblower. The D.C. Circuit didn't budge, affirming the Tax Court in a January 19 unpublished decision.

The whistleblower is now taking a two-pronged approach: He filed a petition for rehearing on April 19, and on April 21 he asked Grassley to submit an amicus curiae brief in support of the petition.

The letter to Grassley warns that the efforts by the IRS and the Justice Department to block the whistleblower's bid for anonymity have undermined the program's effectiveness and show that the government "is not to be trusted when it comes to preserving confidentiality and anonymity."

CI Informant

The whistleblower, an EU resident, filed a claim with the IRS in January 2008 saying he had information about a prominent U.S. attorney who allegedly had earned between \$30 million and \$40 million in unreported offshore income and kept the money in several undeclared offshore bank accounts in a variety of jurisdictions.

The whistleblower obtained the information through his job as a lawyer with a U.K. law firm. The IRS quickly put CI agents on the case, using agents in the London embassy, where the agency has a permanent criminal attaché.

The whistleblower said he insisted during his first few debriefings that the IRS issue him a confidentiality agreement. In March 2008 a CI agent sent him an email — with "Confidentiality" as the subject line — stating that the information he provided would be forwarded to the appropriate CI office in the United States and that if the office deemed the information useful, "they can number you as a confidential informant."

The letter attached to the CI email further said that "confidentiality is not an assurance of complete anonymity or secrecy, but an assurance

that the IRS will not disclose your cooperation or your identity unless absolutely required by law." The letter noted that exemption 7(D) of the Freedom of Information Act provides for the protection of records or information that can disclose the identity of a confidential source.

The IRS sent a letter to the whistleblower in August 2009 confirming that he was a numbered confidential informant.

In the first few months of CI's 3-1/2-year investigation of the U.S. target, the agents frequently contacted the whistleblower and directed him to retrieve more documentary evidence. This assistance enabled the agents to avoid applying for a subpoena or warrant, the whistleblower said. The constant attention eventually dissipated, however, with the IRS giving him no indication of its progress or any updates on the status of his award submission.

The Whistleblower Office finally issued a letter in February 2013 stating that it was denying him an award on the grounds that the submitted information didn't lead to any collected proceeds of unpaid taxes.

The experience ended up costing the whistleblower his job, he says, when the CI agent who signed the confidentiality agreement outed him as an IRS whistleblower to his employer. The law firm fired him and has refused to provide an employment reference. The whistleblower said he passed the New York bar exam in fall 2009 as part of an effort to expand his career options, but he is unable to be sworn in without a reference from the law firm.

Going to Court

Proceeding pro se, the whistleblower appealed the award determination in a March 2016 Tax Court petition. At the same time, he filed a rule 345(a) motion for a protective order of anonymity and sealing of court records.

His motion cited his status as a CI informant and the IRS's promise — as reflected by the March 2008 CI agreement — to shield his identity. The whistleblower said that disclosing his name would further jeopardize his career, given that the confidential information he gave the IRS was obtained in the course of his employment. He noted that he's been unable to land any law firm

jobs because of his previous employer's refusal to provide a reference.

The whistleblower also argued that anonymity was warranted because the U.S. target's brother had served time in prison for drug trafficking and money laundering and allegedly is connected to organized crime.

The IRS initially told the Tax Court it didn't oppose the whistleblower's bid to proceed anonymously, even saying that the information he submitted provided a sufficient basis for granting anonymity. Later on, however, the IRS decided to oppose anonymity.

In a November 2018 decision, the Tax Court rejected the rule 345(a) motion, holding that the whistleblower hadn't made a sufficient showing of potential harm that outweighs society's interest in knowing his identity. The court said it was applying the balancing test set out in *Whistleblower 14106-10W v. Commissioner*, 137 T.C. 183 (2011), which concluded that granting the request for anonymity "strikes a reasonable balance between petitioner's privacy interests as a confidential informant and the relevant social interests, taking into account the nature and severity of the asserted harm from revealing petitioner's identity and the relatively weak public interest in knowing petitioner's identity."

The Tax Court's rejection of the whistleblower's motion is notable, given that it has typically sided with whistleblowers in the handful of anonymity decisions it has issued since rule 345(a) took effect in 2012. The court's first decision denying a bid for anonymity was reversed by the D.C. Circuit, which concluded in a July 2019 opinion that the Tax Court abused its discretion when it took a whistleblower's status as a "serial filer" into account when deciding a rule 345(a) motion.

In his own appeal to the D.C. Circuit, the whistleblower who spoke with *Tax Notes* argued that the Tax Court failed to properly consider his confidential informant status and the IRS's pledges to protect his identity. In his view, the government's right to withhold the identity of confidential informants under FOIA exemption 7(D) translates to an express promise of confidentiality. He also cited his reliance on reg. section 301.7623-1(e), which states that the IRS "will use its best efforts to protect the identity of

whistleblowers," as well as a statement on the IRS website that the agency "will protect the identity of the whistleblower to the fullest extent permitted by the law."

The D.C. Circuit rejected those arguments, stating in a per curiam judgment that the Tax Court correctly balanced his legitimate interest in anonymity against countervailing interests in full disclosure. The court also said that FOIA exemption 7(D) is inapplicable.

Broken Promises

In his letter to Grassley, the whistleblower says he in good faith provided evidence of tax fraud, money laundering, and unreported offshore bank accounts to CI agents because they repeatedly assured him they would protect his identity.

Instead of keeping their word, the IRS outed him to his employer and blocked his bid to proceed anonymously in court, he says, noting that Kevin Sophia, the CI agent who disclosed his identity, is the same agent who outed another whistleblower to his bosses.

The IRS's willingness to identify whistleblowers despite its promises to maintain confidentiality "is part of a systematic abuse of discretion and general policy . . . to undermine, limit and reduce the effectiveness of the IRS Whistleblower Program," the letter says.

"I hope that the example of my case will act as salutary warning to all other U.S. Government 'Informers,' 'Whistleblowers' and 'Confidential Sources' that the U.S. government is not to be trusted when it comes to preserving confidentiality and anonymity," the letter continues. "Particularly, those U.S. government informants who are non-U.S. nationals residing outside the United States, beyond the protection of U.S. law enforcement and U.S. anti-retaliatory whistleblower legislation."

Whistleblower attorneys say that amending section 7623 to establish a presumption of anonymity in Tax Court proceedings would provide an essential safeguard for whistleblowers and would reduce the significant delays that can result when rule 345(a) motions are filed.

Dean Zerbe of Zerbe, Miller, Fingeret, Frank & Jadav LLP said that fears of retaliation and economic and physical harm can wreak havoc on

whistleblowers' lives. Zerbe said he sometimes gets the sense that chief counsel attorneys are too focused on the cases in front of them and not thinking as much about the long-term consequences for both individual whistleblowers and the whistleblower program itself.

"The IRS needs to think long and hard about the position they're taking on anonymity in these cases and consider whether it's consistent with the commitments they made to informants," said Zerbe. "For the informant, it may feel like the IRS is parsing its words and not keeping its promise to protect their identity."

Zerbe, who drafted the 2006 whistleblower reform legislation while serving as tax counsel to Senate Finance Committee Republicans, said the issue of preserving anonymity in Tax Court didn't come up at that time.

"Our biggest concern was getting the right to appeal award determinations in Tax Court, because the previous route of going to the Court of Federal Claims was a disaster," said Zerbe. "We thought having the protections the Tax Court usually provides would be enough. But we didn't anticipate the IRS's zeal to fight anonymity at times, although they seem to have backed off more recently."

Zerbe said that while he's found the IRS to be extremely focused on protecting whistleblowers' identities in his own practice, he noted that the

National Whistleblower Center sent a letter to members of the Senate Finance and House Ways and Means committees in July 2020 urging them to enact further reforms of the IRS whistleblower law. One of the suggested items was to establish a presumption of anonymity in Tax Court proceedings.

For Jeffrey A. Neiman, a former federal prosecutor now with Marcus Neiman & Rashbaum LLP, implementing that rule would be a no-brainer. "It takes a lot of courage for a whistleblower to come forward," he said, noting that some jurisdictions even make it a crime to blow the whistle.

Given the new anti-retaliation protections added to section 7623 by the 2019 passage of the Taxpayer First Act, amending the law to allow whistleblowers to proceed anonymously in Tax Court would be good public policy, Neiman continued. "I don't see how this is remotely controversial," he said. "I would think the IRS could embrace this policy on their own."

In an April 16 statement to *Tax Notes*, a spokesperson for Grassley said the senator is examining possible reforms to the IRS whistleblower statute. "Presumption of anonymity is a central part of that consideration," the statement said.

The IRS didn't respond to a request for comment. ■