

US TAX COURT  
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US TAX COURT  
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JUN 2 2017

GARTH SPENCER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent

ELECTRONICALLY FILED

Docket No. 8760-17W

RESPONDENT'S MOTION TO DISMISS

CERTIFICATE OF SERVICE

UNITED STATES TAX COURT

GARTH SPENCER, )  
 )  
 Petitioner, )  
 )  
 v. ) Docket No. 8760-17W  
 )  
 COMMISSIONER OF INTERNAL REVENUE, ) Filed Electronically  
 )  
 Respondent. )

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM  
UPON WHICH RELIEF CAN BE GRANTED

RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 40, that this case be dismissed for failure to state a claim upon which relief can be granted.

IN SUPPORT THEREOF, respondent respectfully states:

1. On May 7, 2015, respondent's Whistleblower Office received petitioner's Form 211, Application for Award for Original Information ("Form 211" or "Claim"). The Form 211 contained information alleging that Taxpayer, an exempt organization, failed to pay excise tax as required by I.R.C. § 4943, relating to a private foundation's possession of excess business holdings.

2. On April 10, 2017, respondent sent a final determination letter to petitioner denying petitioner's claim because respondent took no action based on the information petitioner provided. A copy of the April 10, 2017 final determination letter was attached to the petition.

3. On April 24, 2017, petitioner filed the petition in this case. Respondent was served on April 26, 2017.

4. In the petition, petitioner failed to plead that respondent (1) proceeded with an action against Taxpayer based on petitioner's information and (2) collected proceeds as a result. Instead, petitioner claimed he does not know if respondent proceeded with an action against Taxpayer. Moreover, petitioner fails to allege any facts regarding collected proceeds:

Although the Commissioner's denial letter states that the IRS took no action based on the information that Petitioner provided, Petitioner lacks sufficient information to confirm or disprove the accuracy of that assertion, and such information is in the exclusive possession of the Commissioner.

Pet. at ¶5A.

Petitioner reiterates:

Unless Petitioner is permitted to obtain discovery from the Commissioner, Petitioner has no means to obtain (within the time period when he may petition the Tax Court) information to confirm or disprove the IRS' assertion that no action was taken based on Petitioner's information.

Pet. at ¶J.

5. Petitioner does not allege that respondent proceeded with an administrative or judicial action based on petitioner's information. Instead, petitioner seeks additional information regarding the decision not to take such action.

6. Petitioner seeks three prayers for relief. In Count One, petitioner requests that the Court "Permit reasonable discovery of information in the Commissioner's exclusive possession, including but not necessarily limited to review of the administrative claim file for Petitioner's whistleblower claim regarding the taxpayer." Pet. at Prayer A.

7. In Count Two, petitioner asks the Court to "If necessary, reverse the Commissioner's denial of Petitioner's claim for an award, and determine the appropriate award amount." Pet. at Prayer B. Petitioner makes this prayer, however, without pleading any facts to support it.

8. In Count Three, petitioner requests any other relief the Court deems fit and proper. Pet. at Prayer C.

#### DISCUSSION

9. A petition should be simple, concise and direct. Cohen v. Commissioner, 139 T.C. 299, 301-02 (2012), aff'd, 550 F. App'x 10 (D.C. Cir. 2014), (citing T.C. Rule 31(b)). Nevertheless, a petition must contain allegations respecting all the material elements necessary to sustain recovery. See Ascon

Properties, Inc. v. Mobil Oil Co., 886 F.2d 1149, 1155 (9<sup>th</sup> Cir. 1989) (discussing the requirements of a complaint filed in federal district court).

10. Pursuant to Tax Court Rule 341(b)(3)-(5), a whistleblower petition must provide the basis upon which petitioner disagrees with the determination by respondent's Whistleblower Office, the facts upon which petitioner relies to support petitioner's position and a prayer setting forth the relief sought. Id. citing T.C. Rule 341(b)(3)-(5).

11. The Tax Court construes all pleadings to do substantial justice. Id. citing T.C. Rule 31(d). However, the Court may dismiss a petition for failure to state a claim upon which relief can be granted. Id. citing T.C. Rule 40. Dismissal for failure to state a claim is appropriate where, even if all of the allegations contained in a pleading are true, a claim fails as a matter of law. Id. citing Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008). In order to withstand a motion to dismiss for failure to state a claim, Petitioner must plead factual allegations sufficient to raise a right to relief above the speculative level. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (abrogating the Court's plaintiff-deferential standard in Conley v. Gibson, 355 U.S. 41 (1957)). However, the Supreme Court has cautioned, it is not enough to make "Threadbare recitals of the elements of a cause

of action, supported by mere conclusory statements..." Ashcroft v. Iqbal, 556 U.S. 662, 678 (citing Twombly at 555).

12. It is well settled that the elements of a whistleblower award under section 7623(b) require proof that respondent (1) initiated an administrative or judicial action against a taxpayer based on petitioner's information and (2) collected tax proceeds from the target of that action based on such information. See Cooper v. Commissioner, 136 T.C. 597, 600 (2011) (Cooper II).

13. In this case, petitioner has failed to state a claim upon which relief can be granted because he has failed to allege any facts that respondent (1) proceeded with an administrative or judicial action against a taxpayer based on his information; and (2) collected tax proceeds based on his information.

14. Petitioner has failed to allege the existence of the first element of a claim pursuant to § 7623(b) - that respondent proceeded with an administrative or judicial action based on petitioner's information. In fact, petitioner concedes that he does not know whether respondent took action based on his information. Specifically, petitioner states "petitioner lacks sufficient information to confirm or disprove the accuracy of that assertion." Pet. at ¶5A.

15. Moreover, petitioner has failed to plead that he has met the second element of a claim pursuant to § 7623(b) - that

respondent collected proceeds based on petitioner's information. Petitioner makes no allegation of fact regarding whether respondent collected proceeds based on his information.

16. The petition filed in this case does not allege any justiciable error with respect to respondent's determination in the final determination letter, and no justiciable facts in support of such error are extant therein as required by T.C. Rule 34(b)(4) and (5).

17. Accordingly, petitioner has failed to state a claim upon which relief can be granted.

18. Petitioner objects to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

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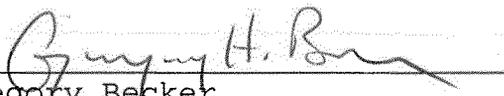
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED was served on petitioner by mailing the same on June 2, 2017 in a postage paid wrapper addressed as follows:

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