Whistleblower 22716-13W v. Commissioner, 146 T. C. 84 (2016)

The U. S. Tax Court ruled that Foreign Bank Account Report (FBAR) penalties, which are assessed under Title 31, do not count toward the $2 million threshold for mandatory whistleblower awards under I. R. C. § 7623(b). This decision clarifies that only penalties under the Internal Revenue Code can be considered for eligibility in such awards, impacting how whistleblowers can qualify for nondiscretionary rewards in cases involving offshore accounts.

Parties

Whistleblower 22716-13W, the petitioner, sought review of the IRS Whistleblower Office's denial of his claim for an award. The Commissioner of Internal Revenue, the respondent, moved for summary judgment, contending that the petitioner's claim did not meet the $2 million threshold for a nondiscretionary award under I. R. C. § 7623(b).

Facts

In 2010, the petitioner filed a Form 211 with the IRS Whistleblower Office, alleging cooperation with the Department of Justice and IRS Criminal Investigation Division concerning an investigation into two Swiss bankers, Martin Lack and Renzo Gadola. The petitioner claimed that his cooperation led to information about these bankers' involvement in tax evasion by U. S. persons using undeclared offshore accounts. In 2011, the petitioner filed a claim for an award after learning that Taxpayer 1, who had been assisted by Gadola, agreed to pay a substantial FBAR civil penalty as part of a guilty plea for filing a false tax return. Taxpayer 1 admitted to using Swiss bank accounts to conceal income and assets from U. S. authorities, and agreed to pay an FBAR penalty exceeding $2 million and a small amount of restitution for unpaid federal income tax. The petitioner's claim was based on the total amount paid by Taxpayer 1, asserting that his involvement in Gadola's arrest led to Taxpayer 1's arrest and subsequent penalties.

Procedural History

The IRS Whistleblower Office initially informed the petitioner of a legal opinion concluding that FBAR penalties, being assessed under Title 31, were not eligible for nondiscretionary awards under I. R. C. § 7623(b). The petitioner sought immediate review in the U. S. Tax Court, but the court dismissed the case for lack of jurisdiction, as no final determination had been made. On September 6, 2013, the IRS issued a final determination letter denying the petitioner's claim on two grounds: the government obtained information about Taxpayer 1's offshore accounts directly from the Swiss bank without the petitioner's assistance, and the claim did not meet the $2 million threshold because FBAR penalties were not considered "additional amounts" under I. R. C. § 7623(b)(5)(B). The petitioner timely petitioned the Tax Court for review. The Commissioner filed an answer, raising the $2 million

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threshold as an affirmative defense. On May 29, 2015, the Commissioner moved for summary judgment based on the petitioner's failure to satisfy the $2 million threshold, which the court granted.

Issue(s)

Whether FBAR civil penalties assessed under Title 31 constitute "additional amounts" within the meaning of I. R. C. § 7623(b)(5)(B), thereby counting towards the $2 million threshold for eligibility for a nondiscretionary whistleblower award?

Rule(s) of Law

I. R. C. § 7623(b)(5)(B) provides that a whistleblower is eligible for a nondiscretionary award only if "the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000. " The term "additional amounts" is a term of art in the Internal Revenue Code, specifically referring to civil penalties set forth in Chapter 68, Subchapter A, which are assessed, collected, and paid in the same manner as taxes. FBAR penalties are assessed under 31 U. S. C. § 5321, not under the Internal Revenue Code, and thus are not "additional amounts" as defined by I. R. C. § 6665(a)(1).

Holding

The U. S. Tax Court held that FBAR civil penalties do not constitute "additional amounts" within the meaning of I. R. C. § 7623(b)(5)(B) and therefore must be excluded in determining whether the $2 million "amount in dispute" requirement has been satisfied for eligibility for a nondiscretionary whistleblower award.

Reasoning

The court's reasoning was based on a textual analysis of the statute. It noted that the term "additional amounts" is a term of art in the Internal Revenue Code, consistently used to refer to specific civil penalties under Chapter 68, Subchapter A. The court referenced prior decisions such as *Bregin v. Commissioner* and *Pen Coal Corp. v. Commissioner*, which established that "additional amounts" refers to penalties assessed, collected, and paid in the same manner as taxes under the Internal Revenue Code. The court also cited *Williams v. Commissioner*, which held that FBAR penalties do not fall within the court's jurisdiction as "additional amounts. " The court rejected the petitioner's arguments based on the broader language of I. R. C. § 7623(a) and the term "collected proceeds" in § 7623(b)(1), emphasizing that the specific language of § 7623(b)(5)(B) controlled the issue at hand. The court also dismissed policy arguments suggesting that FBAR penalties should be treated as taxes for whistleblower purposes, stating that any gaps in the statute could only be addressed by Congress.

Disposition

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The court granted the Commissioner's motion for summary judgment, ruling that the petitioner's claim did not satisfy the $2 million threshold under I. R. C. § 7623(b)(5)(B) and was therefore ineligible for a nondiscretionary whistleblower award.

Significance/Impact

This decision has significant implications for whistleblowers seeking awards under I. R. C. § 7623(b), particularly in cases involving undisclosed offshore accounts. By excluding FBAR penalties from the calculation of the $2 million threshold, the court's ruling may reduce the incentives for whistleblowers to report such violations, as these penalties can often exceed the related income tax liabilities. The decision underscores the importance of statutory text in determining eligibility for whistleblower awards and highlights the distinction between penalties under Title 26 and Title 31. Subsequent courts have followed this interpretation, and it remains a key precedent in whistleblower litigation involving offshore accounts and FBAR penalties.

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