

Birkenfeld Could Nab Bigger Slice of Collected Proceeds

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UBS whistleblower Bradley Birkenfeld could be getting more money from the IRS now that the Tax Court has sent his case back to the agency to reconsider his award under the expanded definition of collected proceeds.

Birkenfeld, the former UBS banker who in 2012 received a [record-breaking \\$104 million](#) from the IRS for blowing the whistle on Swiss banking secrecy, filed a Tax Court petition in May 2017 challenging the size of a separate IRS award he was given in 2017 for proceeds collected in the period after January 1, 2013.

In a [May 1 order](#), Tax Court Judge Michael B. Thornton remanded the case to the IRS Whistleblower Office to consider whether non-Title 26 proceeds were collected as a result of information Birkenfeld provided about 47 taxpayers who held undisclosed offshore accounts.

The Whistleblower Office issued a final determination letter to Birkenfeld in April 2017 that awarded him \$2,229,553 in Title 26 proceeds collected from those 47 taxpayers. In his Tax Court petition appealing the award determination, Birkenfeld contended that the IRS failed to include amounts collected “through provisions of Titles 18 or 31, or from any related actions or settlements.”

The IRS filed a motion to remand the matter to the Whistleblower Office, saying “it is unknown but likely” that one or more of the investigations of the 47 taxpayers resulted in the collection of non-Title 26 proceeds, such as foreign bank account report penalties collected under 31 U.S.C. section 5321(a)(5).

The IRS told the court the Whistleblower Office didn’t consider non-Title 26 proceeds when it made the award determination because at that time the agency interpreted the definition of collected proceeds in [section 7623\(b\)](#) as being limited to amounts assessed and collected under Title 26. The IRS took that position despite the Tax Court’s decision in [Whistleblower 21276-13W v. Commissioner](#), 147 T.C. 121 (2016), which held that collected proceeds aren’t limited to Title 26.

Congress essentially codified the Tax Court’s decision when it enacted [section 7623\(c\)](#) as part of the [Bipartisan Budget Act of 2018](#). That provision clarifies that the definition of collected proceeds encompasses proceeds arising from criminal fines, civil forfeitures, and violations of reporting requirements, such as FBAR penalties.

Birkenfeld said that while he wasn’t opposed to having his case remanded to the Whistleblower Office, he wanted the court to put limitations in place “to prevent the remand from leading to further unnecessary delay.”

Remand

In his order granting the remand, Thornton wrote that “to ensure against unnecessary delay and preserve petitioner's right to receive judicial review of the ultimate administrative determination, the Court will retain jurisdiction and monitor progress on remand, as petitioner has requested.”

The order requires the parties to file a joint status report by June 2 proposing a mutually agreed-upon timetable for any future administrative proceedings.

Birkenfeld's attorney, Dean Zerbe of Zerbe, Miller, Fingeret, Frank & Jadav LLP, told *Tax Notes* he was happy to see the court respond to his concerns that a remand would slow things down.

“Too often, remanded whistleblower cases are like the refugees in the movie *Casablanca* — ‘wait and wait and wait,’” Zerbe said. “It is good to see the Tax Court recognize it has an important role to play in ensuring the IRS makes a timely decision on remanded cases.”

Zerbe said Birkenfeld filed the case “to protect the rights of all whistleblowers.”

“Brad's intention is that with any award he may receive, he will look to help other whistleblowers, as well as support communities hit hardest by the coronavirus,” Zerbe said. “Brad's courage in coming forward and blowing the whistle on UBS began the avalanche of the U.S. government's prosecution of banks and individuals engaged in illegal offshore accounts. These prosecutions have resulted in billions and billions of dollars being recovered — to the benefit of U.S. taxpayers.”

The case is *Birkenfeld v. Commissioner*, Dkt. No. 9896-17W.