Practice

By Charles P. Rettig

The IRS Whistleblower Program: Making Money the Old Fashioned Way!

The IRS Whistleblower Office processes financial awards to people who provide information about the tax indiscretions of others. It can be lucrative for the informant and greatly enhance the ability of the IRS to pinpoint tax noncompliance without having to unnecessarily utilize limited tax enforcement resources. The IRS may pay awards to people who provide specific and credible information to the IRS if the information results in the collection of taxes, penalties, interest or other amounts from the noncompliant taxpayer. They look to receive solid information, not an "educated guess" or unsupported speculation. Information provided by disgruntled former spouses, former employees and business competitors is often highly suspect. Absent a real and significant tax issue—it is not a program for resolving personal problems or disputes about a business relationship. If the IRS uses information provided by the whistleblower, based on recently finalized Treasury regulations the whistleblower can receive up to 30 percent of the additional tax, penalty and other amounts collected or refund denied!

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Historical Perspective

Some form of informant award has been available since March 1867, allowing the Secretary of the Treasury to pay such amounts, as he deems necessary "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same."[1] A form of the current statutory provision has been around since at least the 1939 Code and in its earliest versions, authorized discretion for the IRS to pay awards to informants largely for information leading to criminal tax violations.[2]

Prior to 2006 the only substantive change since 1867 was in 1996, when a clause was added to clearly authorize payment of awards for informa-

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tion relating to civil violations, allowing payments to be made "for detecting underpayments of tax" as another basis for an informant award, and making the payments from proceeds collected rather than appropriated funds.[3] In 1997, the IRS raised the award ceiling from $100,000 to $2 million, although amounts can exceed the ceiling under an express contract with the IRS. In 2004, the IRS again raised the award ceiling to $10 million. The courts have considered attempts to challenge award decisions under this law and uniformly found that the discretion to make, or not make, an award is essentially not reviewable. As such, historically, the program was discretionary, the maximum award percentage was 15 percent of collected taxes and penalties, the maximum award was limited to $10 million, awards were generally not paid when the disclosures were based on public information or when the informant participated in the tax non-compliance, the whistleblower was not required to be an individual and there was no requirement that the whistleblower sign a Form 211.

Statutory Limitations

There are currently two basis types of whistleblower awards. Pursuant to Code Sec. 7623(b), if the taxes, penalties, interest and other amounts in dispute exceed $2 million, and a few other qualifications are met, the IRS will pay 15 percent to 30 percent of the amount collected. If the noncompliant taxpayer is an individual, his or her annual gross income must exceed $200,000.[4] There is no limit on the dollar amount of the award. A reduced award amount of up to 10 percent is available in cases based principally on disclosure of specific allegations resulting from: (1) judicial or administrative hearings, (2) from a governmental report, hearing, audit or investigation, or (3) from the news media.[5] The award is reduced if the whistleblower "planned and initiated" the non-compliance and the award is to be denied if the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating the non-compliance.[6] Awards are subject to appeal to the U.S. Tax Court.[7]

If the thresholds in Code Sec. 7623(b) are not satisfied, Code Sec. 7623(a) authorizes, but does not require, the IRS to pay for information relating to violations of the internal revenue law that result in recovery of tax.[8] The maximum award is 15 percent of up to $10 million. In addition, these awards are discretionary and the whistleblower cannot dispute the outcome of the claim in Tax Court.

Filing a Whistleblower Claim

All whistleblower claims must be submitted under penalty of perjury on Form 211, Application for Award for Original Information, whether submitted under Code Sec. 7623(a) or (b). Form 211 should be mailed to Internal Revenue Service, Whistleblower Office, SE: WO, 1111 Constitution Ave., NW, Washington, D.C. 20224. The claim must include a declaration under penalty of perjury stating "I declare, under penalty of perjury, that I have examined this application and my accompanying statement and supporting documentation and aver that such application is true, correct and complete, to the best of my knowledge." It must also include an explanation of how the information that forms the basis of the claim came to the attention of the claimant, including the date(s) on which this information was acquired, and a complete description of the claimant's present or former relationship (if any) to the person that is the subject of the claim (*e.g.,* family member, acquaintance, client, employee, accountant, lawyer, bookkeeper, customer). If the claimant identifies multiple person(s) as the subject of a claim, describe his or her relationship to each person.[9] A whistleblower that wishes to report possible instances of tax fraud by another individual, and does not want an award, should complete IRS Form 3949A, Information Referral, or provide the information via a letter.

Examples of claims that will not be processed under Code Sec. 7623(b) include situations where the whistleblower is an employee of the Department of Treasury, or is acting within the scope of his or her duties as an employee of any federal, state, or local government; the individual is required by federal law or regulation to disclose the information, or the individual is precluded by federal law or regulation from making the disclosure; the individual obtained or was furnished the information while acting in his or her official capacity as a member of a state body or commission having access to such materials as federal returns, copies or abstracts; the individual had access to taxpayer information arising out of contract with the federal government that forms the basis of the claim; the claim is found to have no merit or the claim lacked sufficient specific and credible information; the claim was submitted anonymously or under an alias; the claim was filed by a person other than an individual (*e.g.,* corporation or partnership); or the alleged noncompliant taxpayer is an individual whose gross income is below $200,000.

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If the documents or supporting evidence are known to the whistleblower but are not in his/her possession, the whistleblower should describe these documents and identify their location to the best of his or her ability. Except in the most unusual cases involving boxes of data, the whistleblower should include the evidence with the initial submission. Under no circumstance will the IRS expect or condone illegal actions taken to secure documents or supporting evidence.

Evaluating the Whistleblower's Claim

An analyst in the Whistleblower Office will initially consider the information provided by the whistleblower. Effective January 1, 2012, the Informant Claims Examination Unit (ICE) was realigned from IRS Campus Compliance in the Small Business/Self Employed Operating Division to the Whistleblower Office. The ICE Unit was the focal point for the IRS informant program prior to the 2006 legislation that created the Whistleblower Office, and continued to manage the process for claims that did not appear to meet the $2 million "amount in dispute" threshold established for the mandatory award program by those amendments. The Whistleblower Office has worked with Campus Compliance and the ICE Unit to promote consistent treatment of claims, including a requirement that the Director of the Whistleblower Office, currently Steve Whitlock, approve all awards. Receipt, control, evaluation and award processing are now incorporated in a single organization, streamlining management responsibility and program accountability.

Claims involving at least $50,000 of unreported income per year are routed to IRS Criminal Investigation (CI) for review.[10] A threshold requirement for any award under Code Sec. 7623 is that the information must lead to judicial or administrative action—an audit or investigation resulting in the collection of proceeds. In the case of a large corporate taxpayer whose returns are audited each year, an administrative action can mean the creation of a new issue under the Audit Plan or a change in the way information about an issue is collected or analyzed, which would not otherwise have occurred without the information provided by the whistleblower. In other cases, an administrative action can mean placing a taxpayer under audit who was not already under audit.

An action is based on the information provided by the whistleblower if the IRS would not have acted but for the receipt of the information from the whistleblower. Action by the IRS may include the initiation of an examination or investigation that would not otherwise have been undertaken, or the modification of a pending or planned examination or investigation as a result of information provided by the whistleblower. All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, will be taken into account by the Director in determining whether an award will be paid, and, if so, the amount of the award.[11]

Generally, a related action is (1) any action involving the taxpayer from the original action and that is based on, either directly or indirectly, the same information on which the original action is based, and (2) in cases in which the information provided identifies a promoter, preparer, or other similar person and describes underpayments of tax or violations of the tax laws by one or more taxpayers that directly relate to the promoter's activities, any action (involving any taxpayer) that is directly based on the information provided.[12]

> If a whistleblower identifies a single issue with respect to a taxpayer and the IRS subsequently identifies three different issues with respect to the same taxpayer, then the collected proceeds from the action only include proceeds from the single issue identified by the whistleblower. If, however, a whistleblower identifies a single instance in which a taxpayer engaged in a particular improper activity and the IRS identifies other instances in which the taxpayer engaged in the improper activity (or a substantially similar improper activity), then the collected proceeds may include proceeds from all identified instances of the improper activity.
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> If a whistleblower identifies specific facts relating to an issue with respect to a taxpayer as well as a specific Code section or specific legal theory associated with those facts but the Service ultimately collects proceeds based upon a different Code section or different legal theory, the whistleblower will nevertheless be entitled to an award based on the entirety of those collected proceeds.
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> If a whistleblower identifies a promoter and an improper activity, then the collected proceeds may include proceeds from other clients of the promoter that engaged in the improper activity

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(or a substantially similar improper activity). Proceeds collected from clients that engaged in different activities and proceeds collected from clients of other promoters, regardless of whether those clients engaged in the improper activity identified by the whistleblower, are not included in collected proceeds for purposes of calculating the whistleblower's award.[13]

Processing the Claim

The process, from submission of complete information to the IRS until the proceeds are collected, may take five to seven years and longer when there are protracted appeals or collection actions.[14] The requirement that claims be paid from collected proceeds generally means that payment will not be made until there is a final determination of tax liability (including taxes, penalties, interest, additions to tax and additional amounts) owed to the government and such amounts have been collected by the IRS. A final determination of tax does not occur until the statutory period for filing a claim for refund expires or there is an agreement between the taxpayer and the IRS that there has been a final determination of tax for a specific period and a waiver of the right to file a claim for refund is effective. Therefore, the IRS may not make payments for several years after the whistleblower has filed the claim.

Common examples of when a final determination of tax liability can be made include, but are not limited to, at the administrative level when the IRS and the taxpayer enter into a closing agreement wherein the taxpayer conclusively waives the right to appeal or otherwise challenge a deficiency or additional tax liability determined by the IRS; if a taxpayer petitions United States Tax Court; when a decision becomes final within the meaning of Code Sec. 7481; and after the expiration of the statutory period for a taxpayer to file a claim for refund and to file a refund suit based on the claim against the United States, or if a refund suit is filed, when the judgment in that suit becomes final. A finding of fraud in a tax case carries some significant additional implications for penalties, fines and a possible period of incarceration for the taxpayer.

"Collected proceeds" are the monies the IRS obtains directly from a taxpayer(s) which are based upon the information the whistleblower has provided. Effective February 22, 2012, Reg. §301.7623-1 defines "amounts collected and collected proceeds" as including: tax, penalties, interest, additions to tax and additional amounts collected by reason of the information provided; amounts collected prior to receipt of the information if the information provided results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information provided. Significantly, the final regulations did not include a reduction in loss carryforwards resulting in increased future tax liabilities within the term "collected amounts." Criminal fines, which must be deposited into the Victims of Crime Fund, cannot be used for payment of a whistleblower award.[15]

A whistleblower award is dependent upon both the initiation of an administrative or judicial action and collection of tax proceeds. If the IRS does not proceed, notwithstanding receipt of information and an otherwise valid claim, there can be no whistleblower award.[16]

Calculating the Amount of the Claim

For claims filed after December 20, 2006, in which the amount in dispute exceeds $2 million (and in the case of an individual taxpayer, the taxpayer had gross income exceeding $200,000 for at least one tax year in question), awards will be paid in proportion to the value of information furnished voluntarily with respect to proceeds collected, including taxes, penalties, interest, additions to tax and additional amounts. The amount of the award will be at least 15 percent but no more than 30 percent of the collected proceeds in claims filed in which the Whistleblower Office determines that the information submitted by the whistleblower substantially contributed to the IRS' detection and recovery of taxes, penalties, interest, additions to tax and additional amounts.

For claims filed on or after July 1, 2010, in which the amount in dispute does not exceed $2 million (and in the case of an individual taxpayer, the taxpayer did not have gross income exceeding $200,000 for at least one tax year in question), awards will be paid under the discretionary authority of Code Sec. 7623(a). Whistleblowers will not have an opportunity to review and comment on the award recommendation nor will they be entitled to seek Tax Court review of the Whistleblower Office determination.

For claims filed under Code Sec. 7623(b)(1), an individual who provides information that leads to

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an administrative or judicial action resulting in the collection of taxes, penalties interest, additions to tax and additional amounts shall receive an award of at least 15 percent but not more than 30 percent of the collected proceeds resulting from such action (including any related actions), or from any settlement in response to such action, in cases in which the IRS determines that the information submitted by the whistleblower substantially contributed to the IRS' detection and recovery of tax. The amount of any award under Code Sec. 7623(b)(1) depends on the extent of the whistleblower's substantial contribution to the action.

The starting point for the Whistleblower Office's analysis will be the statutory minimum of 15 percent of collected proceeds.[17] The Whistleblower Office will apply various factors below to the facts of a case to determine whether the case merits a larger award percentage. The factors are described as positive or negative factors, but the analysis may not be reduced to a simple mathematical equation. The factors are not exclusive and are not weighted. In the particular circumstances of a case, one factor may out-weigh several others and result in a unique or exceptional award determination. Negative factors can offset positive factors, but cannot result in an award that is less than the statutory minimum. The absence of negative factors does not mean that the award percentage will be larger than 15 percent. The Whistleblower Office will determine awards of 15, 18, 22, 26 or 30 percent. The Whistleblower Office will begin its analysis at the starting point of 15 percent. The Whistleblower Office may increase the award percentage based on its analysis of the presence and significance of positive factors and may decrease that enhanced award percentage based on its analysis of the presence and significance of negative factors.

Positive factors include: (1) prompt action by the whistleblower to inform the government or the taxpayer of the tax noncompliance may, depending on the acts, be a positive factor. For example, providing the government with an opportunity to address the tax noncompliance early can help mitigate the impact of the noncompliance; (2) the whistleblower submitting information that identifies an issue of a type previously unknown to the government or a taxpayer behavior that the government was unlikely to identify or was especially difficult to detect through the exercise of reasonable diligence; (3) submissions in which the whistleblower thoroughly presents the details of the noncompliance in a clear and organized manner may, depending on the facts, be a positive factor saving examination resources of the IRS; (4) the whistleblower (and/or his/her representative) provided exceptional cooperation and assistance during the audit, investigation, or trial, including useful technical or legal analysis of the taxpayer's records; (5) the whistleblower identified assets of the taxpayer that could be used to pay the taxpayer's liability or assets not otherwise known to the IRS; (6) the whistleblower identified connections between transactions, or parties to transactions, which enabled the IRS to understand tax implications that might not otherwise have been revealed; and (7) and the impact of the report on the behavior of the taxpayer. For example, the whistleblower's report may, directly or indirectly, cause the taxpayer to correct an improper position.[18]

Negative factors include: (1) the whistleblower delayed reporting after learning the relevant facts, and the delay had an adverse impact on the ability of the IRS to pursue the issues raised. Delayed reporting can allow the noncompliant activity to be repeated, increasing the magnitude of the noncompliance and, in some cases, compromising the ability of the government to assess and collect; (2) the whistleblower's role in the underpayment of tax reported, such as when a whistleblower actively and knowingly participates in carrying out the tax noncompliance. If the whistleblower directly or indirectly profits from the noncompliance, this may also be considered a negative factor; (3) a whistleblower puts the tax case at risk. For example, a whistleblower's premature disclosure to the taxpayer of the existence or scope of IRS planned enforcement activity may be a negative factor if the whistleblower disclosed information regarding the IRS interest in a matter in such a way that permitted the affected taxpayer(s) to impede IRS access to relevant information and thus impeded the exam or audit; (4) whistleblowers will normally be given specific instructions regarding permissible and impermissible activities; violation of these instructions may be a negative factor in determining the award percentage if it causes the IRS to expend additional resources it would not otherwise have spent.[19]

Under Code Sec. 7623(b)(3), the Whistleblower Office may appropriately reduce an award determination made under either Code Sec. 7623(b)(1) or (b)(2) if the whistleblower planned and initiated the actions that led to the tax underpayment or actions described in Code Sec. 7623(b)(2). The applicable range for this category is 0-30 percent. The whistleblower need

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not have been the only person involved in planning and initiating for Code Sec. 7623(b)(3) to apply. The Whistleblower Office will use the same framework as for the 0-10 percent and 15-30 percent ranges, whichever applies, to reach what would be the award result if the whistleblower had not triggered the application of Code Sec. 7623(b)(3) by planning and initiating the actions that led to the tax underpayment. The Whistleblower Office will then evaluate the whistleblower's role in planning and initiating the actions that led to the underpayment and, based on this evaluation, categorize the whistleblower's role as a planner and initiator as significant, moderate or minimal.[20]

The Whistleblower Office will reduce the awards of (1) significant planners and initiators by 66 to 100 percent, (2) moderate planners and initiators by 33 to 66 percent, and (3) minimal planners and initiators by 0 to 33 percent. No award will be paid if the informant is convicted of criminal conduct arising from the role played in the planning and initiating of the actions that led to the underpayment of tax. Planning and initiating factors applicable to Code Sec. 7623(b)(3) determinations include: (1) was the whistleblower the sole decision maker, one of several contributing planners and initiators, or an advisor to a decision maker?; (2) the nature of the whistleblower's planning and initiating activities. What did the whistleblower do—was it reasonably legitimate tax planning or objectively unreasonable, were steps taken to hide the actions at the planning stage, was there any identifiable misconduct (legal, ethical, etc.) that was either not criminally prosecuted, for whatever reason, or did not result in a criminal conviction (which results in a zero award)?; (3) the extent to which the whistleblower knew or should have known that tax noncompliance was likely to result from the course of conduct; (4) the extent to which the whistleblower acted in furtherance of the noncompliance, including efforts to conceal the true nature of the transaction; and (5) the whistleblower's role in identifying and soliciting others to participate in the actions reported, whether as parties to a common transaction or as parties to separate transactions.[21]

Multiple Claims or Joint Claimants

When multiple and independent claims are submitted with respect to the same proceeds, the Whistleblower Office Director may evaluate the contribution of each individual to the assessment and collection of the proceeds and may make an award to each individual commensurate with his or her contribution to the action(s) that resulted in the collection of proceeds.[22] In such a case, the Director shall determine whether the IRS as a result of the information previously submitted by any other individual would have obtained the information submitted by each individual. If the Director determines that multiple individuals submitted information that would not have been obtained based on a prior submission, the Director shall determine the amount of each individual's award based on the extent to which each individual substantially contributed to the action(s). The aggregate award payment in cases involving multiple and independent claims shall be within the range of 15 to 30 percent of collected proceeds, unless one of the reduction of award percentage provisions applies.

When multiple individuals jointly submit a claim, the Director shall pay an award in equal shares to the joint claimants, unless the joint claimants specify a different allocation in a written agreement, signed by all joint claimants and notarized and submitted with the claim. The aggregate award payment in cases involving joint claimants shall be within the range of 15 to 30 percent of collected proceeds, unless one of the reductions of award percentage provisions applies.

Tax Treatment of Awards

All awards will be subject to current federal tax reporting and withholding requirements. The whistleblower will receive a Form 1099 or other form as may be prescribed by law, regulation or publication.

Confidentiality and Disclosure for Whistleblowers

Although the IRS will attempt to protect the identity of the whistleblower, the specific nature of later government inquiries often serves to help the noncompliant taxpayer identify the whistleblower. The identity of the whistleblower will only be disclosed within the IRS on a "need to know" basis in the performance of their official duties in accordance with Code Sec. 6103.[23] To the extent that the IRS Whistleblower Office determines that an individual is a "whistleblower" under Code Sec. 7623, such individual shall be deemed to be a confidential informant whose identity shall be protected in accordance with Code Sec. 6103(h)(4). Any contact made between the

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IRS and the whistleblower will not be a third-party contact under Code Sec. 7602(c). IRS personnel are required to treat the identity of the whistleblower and the whistleblower's information as highly confidential and to exercise extreme security precautions. Also, if the whistleblower is an essential witness in a judicial proceeding, it may not be possible for the government to avoid the identity of the whistleblower.

Once a claim is submitted, the whistleblower may be told only the status and disposition of the claim—not the action taken in the taxpayer case. A claim can be denied if: (1) the IRS already had the information from another source, (2) an audit or investigation is conducted but leads to no finding of taxpayer liability, (3) a finding or liability is made but the taxpayer is successful in an administrative or judicial appeal, or (4) a finding of liability is made and sustained but there is no collection because the taxpayer has no known assets that the government can collect. Information about the taxpayer is covered by privacy laws and Code Sec. 6301, which impose strict limits on what the IRS is able to disclose.

Whistleblowers Who Are Current Employees of the Taxpayer

It is generally assumed that a current employee whistleblower has access to information that may be subject to a privilege that has not been affirmatively waived by the taxpayer. Accordingly, the IRS is particularly sensitive to the privilege issues that may be present in current employee situations. These cases may also raise other issues, such as Constitutional issues and confidentiality issues, which could limit the IRS's ability to use information received from the informant in any subsequent litigation. To ensure that any adjustments dependent on information received from current employee informants cannot be successfully challenged on evidentiary grounds, the IRS will coordinate a taint review with Operating Division Counsel in current employee cases.[24]

To avoid potential limitations on the evidentiary use of information received from a current employee, the IRS should act as a passive recipient of information in every case in which an informant is a current employee of a taxpayer and is providing information regarding the taxpayer/employer. This means that IRS personnel must not encourage, or acquiesce in, any actions taken by the informant. Further, IRS personnel should, however, be ready and willing to accept any and all information from a current employee informant at the initial meeting between the IRS and the informant. Debriefing procedures applicable to civil cases are discussed at IRM 25.2.2.6.

On a case-by-case basis, the IRS may also initiate limited follow-up contacts, including debriefings, with a current employee informant to clarify information previously received from the informant. Operating Division Counsel should be present to provide support with respect to all follow-up contacts and debriefings.

A current employee informant may submit additional information to the IRS following the initial submission of information. Generally, the IRS may receive and use this "supplemental" information for the sole purpose of clarifying previously submitted information. Supplemental information includes information that reasonably relates to the previously submitted information, based on an analysis of all the facts and circumstances relating to the information and the IRS's contacts with the informant, but does not include information that relates to new issues. The IRS must coordinate the analysis with Operating Division Counsel. If Counsel advises that the IRS should not use the information, based on its analysis of the legal risks, then the appropriate IRS Executive will determine whether or how to proceed.

Whistleblowers Who Are Current Representatives of a Taxpayer

The IRS will not accept any information from a whistleblower regarding a taxpayer (or related taxpayers) when the whistleblower is also that taxpayer's representative in any administrative matter pending before the IRS, *e.g.,* an income tax examination, or in any litigation involving issues in which the IRS has any interest (Tax Court and refund litigation, collections suits, summons enforcement actions, etc.).[25] If a taxpayer's representative makes a direct or indirect overture about becoming a whistleblower, *e.g.,* either orally or by filing a Form 3949A, Information Referral, or Form 211, Application for Reward for Original Information, there should be no further interaction with that person as the taxpayer's representative and the representative must be informed of this outcome immediately. It is the responsibility of the whistleblower to attempt to explain the reason for being excluded

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from the matter as the taxpayer's representative under these circumstances. In addition, IRS employees should have no further interaction or contact with, or receive any further information from, the current representative as a whistleblower. The same rules apply and the same results are reached if an individual's status as a whistleblower regarding a taxpayer (or related taxpayers) predates that individual's appearance as the taxpayer's representative in any administrative matter pending before the IRS or in litigation.

Appeal Rights

The Whistleblower Office will communicate the final claim determination, in writing to the claimant. Final determinations regarding awards under Code Sec. 7623(b) may, within 30 days of such determination, be appealed to the United States Tax Court.[26] The IRS does not have the authority to extend the 30-day time period for filing an appeal. Decisions under Code Sec. 7623(a) may not be appealed to the Tax Court. A letter from the IRS Whistleblower Office denying a claim on the grounds that no award could be made under Code Sec. 7623(b) constitutes a determination conferring jurisdiction upon the Tax Court.[27]

Recently, the Tax Court permitted a whistleblower to pursue his claim anonymously by requiring redaction of all identifying information—both for the whistleblower and for the company referenced in the award claim.[28] The whistleblower, a senior executive in an unnamed company, filed an informant claim with the IRS after allegedly witnessing the company significantly underpay its tax liability through noncompliance with the tax code. The IRS reviewed the informant's claim but concluded that there were no grounds to make an award under Code Sec. 7623(b). In timely petitioning the Tax Court to review the award claim denial, the whistleblower also filed a motion asking for a protective order that would either seal the record or allow him to proceed anonymously. Although the whistleblower had left the company he claimed was tax noncompliant, he argued that revealing his identity in court would create psychological and financial harm, including potential harmful employment repercussions. While the Tax Court's general approach is that litigation within its domain is a matter of public record, the court also has "broad discretionary authority," both as a statutory matter and under internal rules, to offer privacy protection.

In a footnote, the Tax Court warned all whistleblowers should not expect anonymity because each request to proceed anonymously must stand upon its own. Some noted that the Tax Court was making it too easy as a general rule of law to claim the need for anonymity to avoid negative career repercussions in making a whistleblower claim. Congress could have included specific protections for whistleblowers in Code Sec. 7623, yet chose to remain silent on the issue. As such, it might be that Congress intended whistleblowers to bear the privacy risks inherent in asking for review of their whistleblower claims in a public forum.

Amounts Collected and Awards Paid under 7623(a) FY 2005-2010

	2006	2007	2008	2009	2010
Cases Received	4,295	2,751	3,704	5,678[16]	7,577
Awards Paid	220	227	198	110	97
Collections over $2 million	NA	12	8	5	9
Total Amount of Awards Paid[18]	$24,184,458	$13,600,205	$22,370,756	$5,851,608	$18,746,327
Amounts Collected	$258,590,435	$181,784,287	$155,985,834	$206,032,872	$464,695,459

Annual Report to Congress

Treasury must conduct a study annually and report to Congress on the use of Code Sec. 7623, including an analysis of the use of such section during the preceding year and the results of such use.[29] For FY 2010 (the year ending September 30, 2010), the IRS received 431 submissions that appear to meet the Code Sec. 7623(b) criteria, identifying 5,429 taxpayers that appeared to meet the $2 million of tax, penalties, interest and additions to tax threshold.[30] Only 9 of 97 full paid claims in FY 2010 involved collections of more than $2 million. For the fiscal year 2007, there were 49 submissions identifying 587 taxpayers; for 2008 there were 378 submissions identifying 1366 taxpayers; and for 2009 there were 470 submissions identifying 2150 taxpayers. Many of the individuals submitting this information claim to have inside knowledge of the transactions they are reporting and often provide extensive documentation to support their claims.

At the beginning of FY 2010, the Whistleblower Office staff of 17 included 10 analysts with decades of experience in a broad array of IRS compliance programs. After reviewing case intake levels and expected workload as the first award determinations were made under Code Sec. 7623(b), the IRS authorized a staff increase to 21 in August 2010. Recruiting for the additional staff was in progress as of the end of FY 2010.

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Through FY 2010, all awards the IRS paid have been based on information received before December 20, 2006, the date of the amendment of Code Sec. 7623. Therefore, the IRS paid all of the awards, including those paid in 2010, based on the prior law, what is now Code Sec. 7623(a). Thus, the applicable award percentages were those established in prior IRS policy, not the higher percentages set by Code Sec. 7623(b). The number and amount of awards paid each year can vary significantly, especially when a small number of high-dollar claims are resolved in one year (as was the case in 2006 and 2008).

One factor contributing to lower award payments in FY 2009 was a change in the IRS definition of the point at which proceeds in a tax case are available to make an award payment. In the past, the IRS monitored the tax case to ensure that it collected proceeds before processing the award claim. Where the taxpayer filed an administrative or judicial appeal, the IRS did not pay claims until the court finally resolved the appeal. After consultation with the Office of Chief Counsel, the IRS determined that it should not pay claims even when the taxpayer has not filed an appeal until the period for filing an appeal has lapsed. The general rule is that a taxpayer may file a claim for refund within two years of the last payment, unless he or she has waived that right. Thus, beginning in July 2009, the IRS monitors cases for both collection and the lapse of the period for filing a claim for refund. As a result, the IRS did not pay some claims that it would have otherwise paid in FY 2009 until FY 2010 or FY 2011.

Endnotes

1 *See* An Act to Amend Existing Laws Relating to Internal Revenue and for Other Purposes, Ch.169, 7, 14 Stat. 471, 473 (1867), authorizing the commissioner of internal revenue to pay amounts "deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws."

2 The 1939 Code and the 1954 Code authorized payments to persons "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same."

3 *See* Committee Report on P.L. 104-168, the Taxpayer Bill of Rights 2 (1996).

4 Code Sec. 7623(b).

5 Internal Revenue Manual (IRM) 25.2.2.2 (06-18-2010).

6 Code Sec. 7623(b)(3).

7 Code Sec. 7623(b)(4).

8 Code Sec. 7623(a) and Reg. §301.7623-1.

9 IRM 25.2.2.3 (06-18-2010).

10 IRM 25.2.1.2 (12-23-2008).

11 IRM 25.2.2.2 (06-18-2010).

12 IRM 25.2.2.2 (06-18-2010).

13 IRM 25.2.2.2 8 (06-18-2010).

14 *See* IRS Whistleblower Office, *Fiscal Year 2010 Report to the Congress on the Use of Section 7623*.

15 IRM 25.2.2.12 (06-18-2010).

16 *W.P. Cooper,* 136 TC 597, 600, Dec. 58,665 (2011).

17 IRM 25.2.2.9.2 (06-18-2010).

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 IRM (IRM) 25.2.1.2 (12-23-2008).

24 IRM Exhibit 25.2.2-6 Memorandum from Steven T. Miller, Deputy Commissioner for Operations Support, Feb. 17, 2010.

25 *Id.*

26 Before 2006 there was no express statutory provision for judicial review of tax whistleblower claims. *See Colman,* 96 FedCl 633, 638, 2011 U.S. Claims LEXIS 21 (2011) (stating that the pre-2006 tax whistleblower law "cannot serve as the substantive law on which to predicate" jurisdiction of the Court of Federal Claims). This situation changed with the enactment of Code Sec. 7623(b)(4), which provides that the Tax Court shall have jurisdiction with respect to any determination regarding an award under Code Sec. 7623(b)(1), (2), or (3). *See J. DaCosta,* FedCl, 2008-2 USTC ¶ 50,444, 82 FedCl 549, 553-555 (2008) (holding that claims under Code Sec. 7623(b) are within the exclusive jurisdiction of the Tax Court).

27 *W.P. Cooper,* 135 TC 70, 73, Dec. 58,265 (2010).

28 *Whistleblower 14106-10W*, 2011 U.S. Tax Ct. LEXIS 47 (T.C. Dec. 8, 2011).

29 IRM 25.2.2.14 (06-18-2010).

30 *See* IRS Whistleblower Office, Fiscal Year 2010 Report to the Congress on the Use of Section 7623.

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