Tax Collectors Among Us– The New IRS Whistle Blower Program

By Steven Toscher and Heather Kim Lee

Steven Toscher and Heather Kim Lee examine opportunities for informants, dangers to taxpayers and problem areas for tax administrators created by the new IRS whistle blower program.

Outsourcing is a hot topic among tax policy makers. What they are typically referring to is the use of private collection agencies to collect taxes already assessed and determined to be owed. Congress recently took this a step further by deputizing any disgruntled employee, ex-spouse, ex-partner or former business associate to become part-time Internal Revenue Agents in order to ferret out persons who have not been paying all of their taxes. It's called the new IRS whistle blower program. While the new whistle blower program will likely be a revenue raiser (its primary purpose) it also raises a host of legal issues, opportunities for informants, dangers to taxpayers and some potential problem areas for tax administrators.

The New Legislation

In the Tax Relief and Health Care Act of 2006 ("the 2006 Act"),[1] effective October 20, 2006, Congress amended Section 7623 of the Internal Revenue Code, substantially enhancing the IRS' informant or whistle blower program. The new legislation follows a series of changes over the last 10 years expanding the IRS informant program.

Rewarding persons that inform on taxpayers has been around since the earliest of our tax laws and pre-dates the income tax law.[2] A form of the current statutory provision has been around since at least the 1939 Code and in its earliest versions, authorized the IRS to pay rewards to informants largely for information leading to criminal tax violations.[3] The statute was substantially amended in 1996 to clearly authorize payment of rewards for information relating to civil violations and to pay rewards out of proceeds collected by reason of the information provided.[4] In 1997, the IRS raised the reward ceiling from $100,000 to $2 million, although amounts can exceed the ceiling under an express contract with the IRS.[5] In 2004, the IRS raised the reward ceiling to $10 million.[6]

The 2006 Act substantially amended Code Sec. 7623 by creating a statutory right entitling informants to rewards of 15 percent to 30 percent of the collected proceeds for information that directly leads to an administrative or judicial action by the Secretary of the Treasury, and providing that the computation of the amount of the reward would include not only the tax and penalties, but also the statutory interest collected. The legislation also provides for an award of up to 10 percent of the collected proceeds for "less substantial" information and eliminated any cap on the amount of potential recoveries, which previously was $10 million.[7] The 2006 Act reflects Congress' intent to move the IRS program closer to that under the False Claims Act ("FCA"), which permits remedial actions by private citizens.[8]

No contract with the IRS is necessary for an individual to have a legal right to an award under Code Sec. 7623.[9] The 2006 Act allows informants to appeal

Steven Toscher is a Principal and **Heather Kim Lee** is an Attorney at Hochman, Salkin, Rettig, Toscher & Perez, P.C., in Beverly Hills, California.

award determinations by granting Tax Court jurisdiction to review such cases. Under the prior law, judicial review of an IRS' award determination was limited to cases with an express contract with the IRS.[10]

Finally, the 2006 Act established the IRS Whistleblower Office ("WBO") to centrally process and manage the tax informant reward program. The WBO will establish the strategic direction of the program, define specific goals and operating guidelines, and communicate and implement guidelines to ensure success of the informant's program.[11]

TIGTA Report on Informant's Reward Program

The 2006 Act was in response to deficiencies pointed out in a report by the Treasury Inspector General for Tax Administration ("TIGTA") entitled "The Informant's Reward Program Needs More Centralized Management Oversight" (the "TIGTA Report").[12]

The TIGTA Report reached two primary conclusions. First, it concluded that the IRS informant program has been an effective method of identifying and collecting unpaid taxes and was a cost-effective and efficient method of detecting and collecting underpaid taxes. Its review of the annual information IRS reported to Congress from 2001 through 2005 reflected that of $340,329,427 recovered due to informant information during this period, an average reward of 10.9 percent of the collected proceeds (excluding interest) was paid to the informants. TIGTA reported that examinations based on informant's information involved taxpayers or issues that were not otherwise been selected by the IRS and were more productive than examinations initiated using the IRS' usual methods.[13]

Second, the TIGTA Report concluded that the effectiveness of the informant program was compromised by a lack of standardized procedures and limited managerial oversight. No database existed to allow management to track and monitor claims on a nationwide basis. For informant claims paid in 2005, 45 percent of the case files reviewed had a problem with basic control issue (*e.g.*, copies of key forms or letters to informants were missing). In most cases, reviewers noted their decisions (and reward percentages in approved cases) but provided little or no description of the basis for their decisions. In 32 percent of the paid claims reviewed, TIGTA was unable to determine the justification for the percentage granted. In 76 percent of the rejected claims reviewed, TIGTA was unable to determine the rationale for the reviewer's decision to reject the claim.[14]

Significant Changes to Program

The new legislation makes a number of significant changes to encourage informants to come forward—especially in cases involving large tax liabilities.

Code Sec. 7623(a) authorizes the Secretary of Treasury to pay a reward in "such sum as he deems necessary for (1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. ..." The newly enacted Code Sec. 7623(b) entitles an informant to receive as a reward of at least 15 percent (but no more than 30 percent) of the collected proceeds, including penalties, interest, additions to tax, and additional amounts, resulting from any administrative or judicial action or from any settlement thereof (hereinafter "Collected Proceeds") for specific information that caused the investigation and resulted in the recovery.[15] While the statute mandates the WBO to consider the extent to which the individual substantially contributed to an action in determining the amount, it is silent on how WBO is to determine whether such information caused the IRS action. The Joint Committee has suggested that the standard be whether or not the information "substantially or directly" caused the action—which provides little guidance.[16] If the Secretary proceeds with any administrative or judicial action based on "less substantial" information, *i.e.*, "disclosures of specific allegations resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media," the amount of the award is not to exceed 10 percent of the Collected Proceeds.[17] While the statute does not define what is "less substantial" information, if the informant is the original source of information upon which the Secretary proceeds with an action, then the information is not deemed "less substantial."[18]

Statutory Entitlement

The new legislation's statutory entitlement of prescribed percentages only applies with respect to any information relating to an individual (nonentity) taxpayer, if the individual's gross annual income exceeds

$200,000 for the applicable tax year and the potential indebtedness for taxes, penalties and interest exceeds $2 million.[19] Where the taxpayer is a corporation or other taxpaying entity, there is no threshold requirement as in the case of individuals.

The statutory threshold for individual taxpayers reflects a balance reached by the Congress, which will help the IRS avoid spending limited resources on an avalanche of informant claims that have little revenue potential.[20]

If the individual taxpayer does not meet this criteria, it is likely the informant will be able to claim a reward under the law and administrative practice as it existed prior to the 2006 Act—meaning that any reward would generally be subject to the IRS' discretion. One would suspect that the WBO will follow the guidelines it develops under the new statutory scheme.

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Anyone, except certain present and former employees of the Department of Treasury, may submit information relating to a violation of the internal revenue law and be eligible to file a claim for reward under Code Sec. 7623.[21] Someone who was involved in the tax cheating could even be eligible for a reward. The statute expressly provides that if the claim for an award is brought by an individual who "planned and initiated" the actions that led to the underpayment of tax or the violation of internal revenue laws, the WBO may appropriately reduce the award. The WBO *must* completely deny the award if such individual is convicted of criminal conduct arising from his role in planning and initiating the actions that led to the underpayment of tax.[22]

This presents some potentially odd results. A planner and initiator of some tax plan or scheme—whether criminal or not—can benefit from his own wrongdoing. It appears the WBO is only empowered to totally deny the reward if there is a criminal conviction of the informer. If the planner or initiator is the first to get in the door at the IRS or Department of Justice, and negotiates an immunity deal (which would imply no criminal conviction), the wrongdoer could not only escape criminal punishment, but could receive up to 30 percent of the tax, penalties and interest collected from the taxpayers who entered into the plan or scheme. The WBO is empowered to reduce the reward in this circumstance (perhaps to a *de minimis* amount if the culpability of the informer is substantial) but is not apparently empowered to eliminate it all together, if the informant substantially contributed to an action by the Secretary of Treasury.

Filing a Whistle Blower Claim

Information about potential tax violations can be reported to the IRS by mailing a completed IRS Form 3949-A or letter; by placing telephone call[23]; or by visiting an IRS walk-in office.[24] Instructions to Form 3949-A (revised 12-2005) state that the form should be mailed to Internal Revenue Service, Fresno, CA 93888. An informant may be represented by counsel.[25] To receive an award, information must be submitted under penalty of perjury.[26]

Information reported in letter form should include the following information: (1) name and address of the person being reported; (2) the taxpayer identification number; (3) a brief description of the alleged violation, including the nature of the discovery of the information; (4) the years involved; (5 the estimated dollar amount of any unreported income; and (6) name, address and daytime telephone number of the informant or informant's representative. Instructions to Form 3949-A state that the individual is not required to identify himself, although it is helpful to do so and the identity is kept confidential. The identity of the informant will have to be disclosed, however, when making the claim for a reward.[27] Once the information has been furnished, a claim for reward is made by filing IRS Form 211, which must be mailed to Ogden Campus Center, Internal Revenue Service, 1973 N. Rulon White Blvd., MS/4110-ICE, Ogden, UT 84404.[28]

Historically, it has taken about seven and a half years to receive the reward after a claim is filed because payment cannot be made until the IRS completes its administrative or judicial action and collects the tax.[29] If the claim is rejected, it takes about six months for the informant to receive the letter.[30] It is

expected that the process of administrating informant claims will be accelerated under the new WBO.

To get the IRS' attention on an informant's claim, it is important to present a case with strong supporting facts and documents, and develop the case as much as possible for the IRS. In determining the amount of reward, the WBO is required to consider the extent the informant "substantially contributed" to the IRS' action on the matter. Theories and speculation unsupported by facts and documents will not get the IRS' attention.

Judicial Review of Whistle Blower Claims

For the first time in its history, the IRS informant program will be subject to judicial review by the U.S. Tax Court. This may be the most significant change made by the legislation. Under the new law, any determination regarding an award may be appealed to the Tax Court within 30 days of such determination.[31] This change raises many questions concerning the standard of review of the WBO's determinations and the procedures which will be adopted by the Tax Court to meaningfully engage in such review.

Given the express statutory authorization granting the Tax Court jurisdiction to review of these determinations, any limited jurisdiction the federal district or claim court once had may no longer be available.[32]

A basic limitation to the judicial review could be Code Sec. 6103, which permits disclosure of taxpayer and tax return information only in limited and statutorily prescribed circumstances. The new legislation does not address this issue and the disclosure limitations historically asserted by the IRS regarding the taxpayer information will likely continue.

Under prior law, in the absence of an express contract with the IRS, informants could not seek judicial review of the IRS' denial of the reward claim or dispute the amount of the award.[33] The courts consistently held that the United States was not contractually bound merely by invoking Code Sec. 7623 and were without jurisdiction to hear claims disputing reward determinations. In *F. Carelli,*[34] the plaintiff brought suit to recover amounts allegedly due to him for furnishing information to the IRS under Code Sec. 7623. Plaintiff filed a claim for a reward, which was denied without explanation and without accounting for any monies collected as a result of his information. The court dismissed the case for lack of jurisdiction.[35]

The statute does not specify the Tax Court's standard of review of the IRS determination with respect to any reward. The IRS' determination could be reviewed *de novo,* like most tax deficiency determinations by the Tax Court, or only for an abuse of discretion or some combination thereof. Since the statute is silent and does not expressly limit review for an abuse of discretion like other statutes granting the Tax Court review,[36] general principals of administrative law should apply, allowing for plenary review unless the determination has been committed to agency discretion.[37]

Prior law suggests the WBO will be given wide latitude at least within the statutory ranges prescribed by Congress. In one case where the court was able to find jurisdiction to review a reward determination under prior law, the court stated that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves question of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong," and the "judicial function is exhausted when it is found that there is a rational basis for the conclusions of the administrative agency."[38] The fact that the reward was less than the 10 percent mentioned in the regulation as a possible upper limit did not authorize the court to set aside the award and order a trial to determine adequate or reasonable compensation. The court found that the plaintiff failed to establish that there was no rational basis for the District Director's decision and the reward was within the range contemplated by the statute and the regulation.[39]

Impact on Tax Enforcement

Informants have always been a good source of both criminal and civil investigations for the IRS. Now they should become a better source. A disgruntled employee working for an employer might previously have decided to move on and not go to the IRS. The reward program was largely discretionary and amounts were limited. Now, there is more certainty and a greater inducement to go to the IRS.

Let's say a corporation decides to engage in a transaction to avoid or evade taxes. A low-level accounting or tax employee who worked on the plan—who then thought it was aggressive and clever—does not get his or her promotion. He remembers the tax savings to the company would be $100 million in taxes and now thinks the plan was too clever and perhaps even illegal. He has access to all the internal analysis and documents. This employee realizes he does not need a promotion. He has what may be a "golden parachute." With penalties

and interest, the amount involved can easily double to $200 million. The employee, subject to perhaps some reduction if he was a "planner and initiator," could be looking at a minimum statutory reward of 15 percent ($30 million up to $60 million). These numbers are large for demonstration purposes but reflect very strong financial inducement to go to work for the IRS.

The new legislation will have an impact on both civil and criminal tax enforcement. Most significant informant claims are screened first for criminal potential. If the employee has information suggesting traditional badges of fraud (backdating or other concealment activity), the IRS criminal investigation division might be interested. The IRS is always looking for a vehicle to remind corporate America of its tax obligations. Nothing gets a company and its officers' attention quicker than an IRS criminal investigation.

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If the criminal investigation and prosecution is dependent upon the credibility of the employee and the criminal case comes down to—he said she said—the potential criminal case may be fraught with problems. On the other hand, if the employee is just bringing information to the IRS that can be corroborated with evidence developed in a criminal investigation, employers have little legal protection in this area regardless of the large financial inducement to the employee.

Due Process Challenges

Fifth Amendment due process challenges by taxpayers relating to whistle blower activities in criminal tax cases have been made but rejected by the courts. In *R.G. Wilson*,[40] the issue was whether the defendant's due process was violated because government's witness in a criminal tax case was granted immunity and expected to receive rewards of up to $11 million, a figure neither disputed or affirmed by the government. Defendants Wilson and Bogus were convicted of tax evasion, aiding and abetting tax evasion, mail fraud, wire fraud and conspiracy to commit mail and wire fraud.

Wilson purchased an offshore corporation to trade in government securities as a tax shelter for individual investors. UMS, a company where defendant Bonus was a director, handled the marketing of the program. The offshore company did not trade in securities, but Joseph Tritt, a broker retained by Wilson, fabricated a paper trail purporting to represent actual trades. Wilson and Bogus contended that they were unaware of this and believed that Tritt was engaged in genuine transactions. Tritt and his then-wife Katherine reached a plea agreement with the government, under which they testified at trial that they had discussions with Wilson regarding the elaborate measures to be taken to simulate trading losses to match the tax losses desired by investors. Tritt and Katherine would retrospectively calculate the purchase and sales that would hypothetically have produced the trading losses required, and would then issue false confirmations of trades to Wilson's company. Tritt also testified that Bogus suggested that false trade confirmation slips already prepared but not allocated to any client's account be retrospectively allocated to clients for an additional fee. Backdated promissory notes were issued to mislead the IRS regarding why fees for certain trades were received after the end of a given tax year.

Defendants argued that because the amount of the eventual reward depended on the quality of the informers' testimony, their testimony was in effect given on a "contingent fee" basis, and that so impaired the witnesses' credibility as to deny them of due process.

Notwithstanding that witnesses' cooperation in the criminal trial was a factor in determining the amount of reward (per a letter from IRS to informants), the court held that defendants' due process rights were not violated. Due process requires four specific procedural safeguards: (1) government must not deliberately use or encourage the use of perjured testimony; (2) there must be a complete and timely disclosure of the fee arrangement; (3) there must be adequate opportunity for cross-examination regarding the arrangement; and (4) a defendant is entitled to a special cautionary jury instruction on the credibility of an accomplice or a government informer if he requests it and the testimony implicating the accused is elicited solely from the informer or accomplice.

The court found no basis to conclude that informants committed perjury. Defendants were aware that the Tritts had applied for awards under the statute and cross-examined both at length regarding the scope of their agreement with the IRS. The special-cautionary instruction requirement was also met because the trial judge sufficiently reminded the jury of the special credibility issue posed by the testimony of contingently motivated witnesses.

Defendants also raised a pure proportionality challenge, arguing that the enormous amounts the Tritts expected to recover so compromised the trial as to violate due process. The court rejected this argument because while arrangements involving large fees are suspicious, the jury is able to employ that suspicion to determine the credibility to be given to the informant. Additionally, the court noted that this is not a case in which the informant was paid to initiate criminal activity in hope of receiving a large payoff, and the Tritt's reward will largely be determined by the amount of tax recovered from nondefendant investors, not the conviction of Wilson or Bogus, and under the (prior) statute should normally not exceed 10 percent. The court held that in this case, given the size of the potential rewards to informants, defendants' due process was not violated.

Under the new statute, it should be noted that because of the informants' criminal plea for their role in the conduct, the WBO would be required to completely deny any reward.[41]

> Taxpayers, informants and the IRS all need to proceed cautiously in this new bounty hunting environment.

Fourth Amendment Challenges

A taxpayer might fair better on Fourth Amendment grounds if the whistle blower became an agent of the IRS and conducted an illegal search. The Fourth Amendment to the U.S. Constitution protects individuals from unreasonable searches and seizures by the government, and excludes information obtained in violation thereof from evidence. While Fourth Amendment applies to improper searches and seizures by the government, it does not apply to improper searches and seizures by private individuals. Thus, once the incriminating documents are delivered to the IRS without violating the Fourth Amendment, the IRS does not need a warrant to read their contents.

Our constitutional jurisprudence recognizes that an IRS Agent cannot engage in a surreptitious search of our home or office. But at what point does an informant become an agent of the IRS, and thus implicate a violation of the Fourth Amendment and the exclusionary rule. The line may not be clear, although the reported decisions appear to give much—perhaps too much—leeway to the IRS.

In analyzing this issue, courts have looked among other factors: (1) whether the government knew of, and acquiesced in, an the improper search conducted by a private party; (2) whether the private informant conducted the search for his own purpose or for the purpose of assisting the government; and (3) whether the government requested the action.[42] The analysis is done on a case-by-case basis in light of all the circumstances. The moving party has the burden to establish by a preponderance of evidence that the private party informant acted as a government instrument or agent.

In *R.V. Snowadzki*,[43] defendant worked as a branch supervisor to Cooper Aeromotive, and sold new aircraft parts and accessories in that capacity. Additionally, he privately engaged in the resale of used aircraft engines, but did not report the sales to the IRS. Defendant's co-worker ("Pugh") contacted and told the IRS that defendant had significant unreported income, and asked if copies of IRS records would be helpful. The IRS agent said they would. Pugh also inquired about a reward and discovered that one might be available. Pugh took the log books from defendant's private desk, copied them, and delivered them to the IRS agent on the following day. He had no authority to enter the desk or copy the documents. Defendant was tried and convicted on two counts of filing false tax returns. Defendant contended that Pugh's seizure of his documents violated the fourth amendment and those documents should be excluded from evidence.

The issue was whether Pugh acted on his own or as a government agent. The Ninth Circuit upheld the lower court's decision that Pugh was not an agent of IRS because (1) the IRS had nothing to do with where and how the records were going to be obtained, and merely answered the question that the records would be helpful; and (2) while Pugh could have acted in part from a desire for reward, there was no evidence that the seizure was motivated by IRS prompting or encouragement.

In *E.K. Feffer*,[44] the informant (Langron) participated in the defendant's attempts to defraud the IRS, and contacted the IRS and gave incriminating documents against the defendant out of fear of what might happen to her. The IRS criminal agents told Langron about becoming a numbered informant and about the rewards for which she could apply. The agents and Langron met six or eight times, at Langron's request, and Langron provided additional documents during subsequent meetings. The agents never asked Langron to produce additional documents and had no knowledge that Langron would do so, though the agents came to her

home for a meeting prepared, in one occasion with a microfilm copier in their car. While the agents never instructed her to obtain specific documents, they did indicate that they could use such and such records.

Although the IRS agents' conduct came close to being improper, the district court found that it did not come close enough. Moreover, while the IRS agents knew or should have known after their initial meeting with Langron that she would be producing additional documents, and thus they acquiesced in the intrusive conduct, the district court found that the agents never requested any documents and never participated in obtaining any of the documents. Further, the district court found that Langron's search was driven by her fear of possible consequences to her and to get even with the defendant for firing her live-in boyfriend, who was formerly employed by the defendant. Accordingly, the district court found that Langron was not motivated by a desire to assist the law enforcement agencies, and the agents did not actively encouraged Langron to gather records.

The Seventh Circuit affirmed the lower court's ruling as not clearly erroneous. However, the appellate court noted that "by this we do not condone the agents' conduct ... we remind the IRS and its agents that attempts to circumvent the warrant requirements of the fourth amendment through the use of a private party will not be tolerated."

Don't Forget– Informants Rewards Are Taxable

Many have heard the anecdotal story about the informant who received a reward, failed to pay tax on it and was criminally prosecuted.

A reward received under Code Sec. 7623 is taxable as ordinary income. The IRS has characterized a reward under Code Sec. 7623 as service income, presumably for the act of furnishing information to the IRS and the act of uncovering the information as well.[45] The reward is taxed in the year of receipt for individual taxpayers since individual taxpayers report income on cash basis, despite the fact that the "service" could be performed over several years in some cases.

The 2006 Act also added Code Sec. 62(a)(21) to allow an above-the-line deduction for attorney fees and court costs incurred by the taxpayer in connection with an award under Code Sec. 7623(b), but not in excess of the amount includible in gross income on account of such award.[46] Code Sec. 62(a)(21) is broadly drafted to include attorney fees incurred to present the information to the IRS and to file and negotiate the reward with the IRS, and not just the costs of litigating the determination of the reward.

The new legislation appears to be having its intended effect. The Director of the WBO recently indicated that since its enactment, the IRS has received about 20 reward claims, some involving hundreds of millions of dollars. "They're coming in with big, fat piles of paper, and they have, at least on the surface ... some credibility about the information they're bringing to us."[47]

Taxpayers, informants and the IRS all need to proceed cautiously in this new bounty hunting environment. While we are all reminded of the tax gap and the need to close it, the economic incentive to become a deputized tax collector is substantial and may create more mischief than it was designed to uncover. Time will tell.

Endnotes

1 Act Sec. 406(a) of the Tax Relief and Health Care Act of 2006 (P.L. 109-432).

2 *See An Act to Amend Existing Laws Relating to Internal Revenue and for Other Purposes,* Ch. 169, 7 and 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."

3 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."

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

5 IRS Publication No. 733 (1997), *Rewards for Information Provided by Individuals to the Internal Revenue Service*. The IRS Publication No. 733 currently available on the IRS Web site is the 2004 version. *See www.irs.gov/pub/irs-pdf/p733.pdf.*

6 IRS Publication No. 733 (Rev. 10-2004).

7 *Id.*

8 31 USC §3729 *et. seq.* (2000).

9 Section 7623(b)(6)(A) of the Internal Revenue Code of 1986, as amended ("the Code") (Code Sec. 7623(b)(6)(A)). Under prior law, a contract with the IRS was necessary to enforce an award. *See G.C. Krug,* FedCl, 98-2 USTC ¶50,617, 41 FedCl 96.

10 *G.C. Krug, id.*

11 IRS IR-2007-25 (Feb. 2, 2007).

12 TIGTA Report (June 6, 2006), Reference Number 2006-30-092, is available on the Web at *www.treas.gov/tigta/auditreports/2006reports/200630092fr.html.*

13 *Id.*

14 *Id.*

15 See Joint Committee Taxation (JCT Rep. No. JXC-50-06). Collected Proceeds also includes amounts collected prior to receipt of the information if the information leads to the denial of a claim for refund that otherwise would have been paid. Reg. §301.7623-1(a).

16 Joint Committee Taxation (JCT Rep. No. JXC-50-06).

17 Code Sec. 7623(b)(2)(A).

18 Code Sec. 7623(b)(2)(B).

19 Code Sec. 7623(b)(5).

20 Congress has considered lowering the threshold

ENDNOTES

for individuals. Participants in a Senate Finance Committee roundtable on the new IRS whistle blower program on February 2, 2007, largely agreed, however, that lowering the threshold could be detrimental to the program and could invite a flood of frivolous claims based on bad and personally motivated tips that could abuse accused taxpayers. *See* 2007 TNT 25-5.

[21] Reg. §301.7623-1(b). If an individual was an officer or employee of the Department of Treasury at the time the individual came into possession of information relating to the violation, or at the time the individual divulged such information, the individual is not eligible for reward under Code Sec. 7623.

[22] Code Sec. 7623(b)(3).

[23] The toll-free number is 1-800-829-0433. *See* IRS Publication No. 733. IRS Form 3949-A is available on the Web at *www.irs.gov/pub/irs-pdf/f3949a.pdf.*

[24] Generally, an IRS employee receiving an allegation of a potential tax violation will record the information on an Information Report Referral (Form 3949).

[25] Code Sec. 7623(b)(6)(B).

[26] Code Sec. 7623(b)(6)(C).

[27] *See* IRS Form 211. *See also www.irs.gov/compliance/enforcement/article/0,,id=106778,00.html.*

[28] IRS Form 211 is available on the Web at *www.irs.gov/pub/irs-pdf/f211.pdf.*

[29] *See* Treasury Inspector General for Tax Administration Report (June 2006) entitled *The Informant's Reward Program Needs More Centralized Management Oversight* (the "TIGTA Report").

[30] *Id.*

[31] Code Sec. 7623(b)(4). The appeal may be assigned to a special trial judge. Code Sec. 7443A(b)(6).

[32] *See J.F. Hinck*, SCt, 2007-1 USTC ¶50,496, 127 SCt 2011, holding that statutory change in Code Sec. 6404(h) vested exclusive jurisdiction in the Tax Court.

[33] The Tucker Act, 28 USC §1491, grants jurisdiction to Federal District Court and Claims Court to render judgment upon any claim against the United States upon an express or implied contract with the United States.

[34] *F. Carelli*, CA-6, 82-1 USTC ¶9131, 668 F2d 902.

[35] These suits have been denied whether brought under the Tucker Act, 28 USC §§1346(a)(2), 1491, the Administrative Procedure Act, 5 USC §701 *et seq.*, the Federal Tort Claims Act, 28 USC §§1346(b), 2671 *et seq.*, Code Sec. 7623 and 28 USC §§1340 and 1346(a)(2), or 28 USC §1361 as an action in the nature of mandamus. *See D. Diamond*, CtCls, 77-1 USTC ¶9388, 213 CtCls 766; *J. Silverstein*, DC-NY, 76-1 USTC ¶9434; *J. De La Forest*, DC-NY, 75-2 USTC ¶9619; *J. Saracena*, CtCls, 75-1 USTC ¶9187, 508 F2d 1333; and *S. Schein*, DC-NY, 73-1 USTC ¶9264, 352 FSupp 182.

[36] *See, e.g.*, Code Sec. 6404(h), concerning review of IRS determinations of requests for the abatement of interest, which expressly provides for review under an abuse of discretion standard.

[37] *See R.D. Fisher*, CA-10, 95-1 USTC ¶50,113, 45 F3d 396.

[38] *Saracena, supra* note 34, quoting from *Shimer*, 367 US 374 (1961).

[39] *Id.*

[40] *R.G. Wilson*, CA-11, 90-2 USTC ¶50,368, 904 F2d 656.

[41] Code Sec. 7623(b)(3).

[42] *J.K. Hall*, CA-7, 142 F3d 988, at 993; *R.V. Snowadzki*, CA-9, 84-1 USTC ¶9157, 723 F2d 1427.

[43] *R.V. Snowadzki, supra.*

[44] *E.K. Feffer*, CA-7, 87-2 USTC ¶9614, 831 F2d 734.

[45] Rev. Rul. 70-576, 1970-2 CB 331, held that a reward under Code Sec. 7623 is compensation for services rendered to the U.S. government for supplying information and was exempt from U.S. tax under the U.S.-Canada income tax treaty as compensation for personal services performed during the tax year within the United States.

[46] Code Sec. 62(a)(21), enacted by Act Sec. 406(a)(3) of the Tax Relief and Health Care Act of 2006 (P.L. 109-432). *See also* Joint Committee Taxation (JCT Rep. No. JCX-50-06) on whistle blower reforms.

[47] Tom Herman, *Whistleblower Law Scores Early Success*, WALL ST. J., May 15, 2007, at D3.