

Current Overview of the IRS's Whistleblower Program

By Juliet L. Fink

Section 7623 of the Internal Revenue Code (IRC) allows for the payment of financial awards to those who blow the whistle on individuals or corporations that have deliberately underreported or underpaid their taxes. Such awards are based on the amount ultimately paid in such cases. This article explains the details of the whistleblower award program, including recent legislation and litigation that affect whistleblowers and their claims.

How to Initiate a Whistleblower Claim

Applications for whistleblower awards are made by submitting IRS Form 211, Application for Reward for Original Information, to the IRS Whistleblower Office. Among other information, the whistleblower must provide—

- specific and credible information regarding the taxpayer or entities that the whistleblower believes have failed to comply with tax laws and that will lead to the collection of unpaid taxes;
- supporting documentation (e.g., books, records) to substantiate the claim, or a description of such documents and their location if not in the whistleblower's possession;
- a description of how the information forming the basis of the claim came to the whistleblower's attention, how it was acquired, and the whistleblower's relationship to the taxpayer; and
- the facts supporting the amount the whistleblower claims is owed.



satisfy a tax liability incurred because of the information provided.”

The Treasury Department asserted in the regulations, however, that collected proceeds were limited to amounts “collected under the provisions of Title 26, United States Code,” and thus did not include money collected as a result of criminal fines or forfeitures or money collected as a result of Report of Foreign Bank and Financial Accounts (FBAR) penalties, since such penalties are not administered under Title 26.

In February 2018, Congress amended IRC section 7623 to clarify that criminal fines and forfeitures, as well as money collected under

the FBAR statute, constitute collected proceeds for purposes of the whistleblower statute. Congress did so by creating a new subsection (c) to the statute, which refines the term “collected proceeds” to include “(1) penalties, interest, additions to tax, and additional amounts provided under the internal revenue laws, and (2) any proceeds arising from laws for which the Internal Revenue Service is authorized to administer, enforce, or investigate, including (A) criminal fines and civil forfeitures, and (B) violations of reporting requirements.”

Determining the Amount of a Whistleblower Award

Mandatory award incentives under IRC section 7623(b) are available only in cases where the tax liability, penalties, and interest uncovered as a result of the informant's tip exceed \$2 million and where the target taxpayer has annual gross income exceeding \$200,000 for any taxable year subject to the whistleblower claim [IRC section 7623(b)(5)]. If either of these monetary thresholds is not met, the informant is limited to the 15% discretionary award available prior to the Tax Relief and Health Care Act of 2006. The amount and payment of discretionary awards under section 7623(a) for information received prior to August 12, 2014, will be paid under the rules provided in Chapter 25 of the Internal Revenue Manual.

Treasury Regulations section 301.7623-4, which contains the rules for determining the amount and payment of awards, applies to claims for award under section 7623(b) that are open as of August 12, 2014, and to information submitted after that date.

'Collected Proceeds' Subject to Award

Under IRC section 7623(b), the IRS is required to award an informant at least 15% and as much as 30% of the “collected proceeds” or settlement from any resulting enforcement action, or up to 10% where the informant provided a “less substantial contribution” [IRC section 7623(b)(1)-(2)].

“Collected proceeds” was defined in the 2014 Treasury Regulations to include “tax, penalties, interest, additions to tax, and additional amounts collected because 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

Treasury Regulations section 301.7623-4(b) provides positive and negative factors to be considered when determining where in the award range a whistleblower award should fall. Positive factors include whether 1) the whistleblower provided prompt notification of the noncompliance; 2) the whistleblower identified an issue or transaction of a type not previously known to the IRS; 3) the whistleblower provided the information in a clear and organized manner, such that it saved the IRS work and resources; 4) the information provided identified assets of the taxpayer that could be used to pay liabilities; or 5) the information provided identified taxpayer behavior that the IRS was unlikely to identify. Negative factors include whether the whistleblower 1) delayed providing information to the IRS; 2) was involved in the tax noncompliance; or 3) directly or indirectly profited from the underpayment of tax or tax noncompliance identified.

The starting point for the whistleblower award analysis will be the statutory minimum of 15% of collected proceeds. The Whistleblower Office may increase the award percentage to 22% or 30% based on its analysis of the presence and significance of positive factors, and it may decrease that enhanced award percentage based on its analysis of the presence and significance of negative factors. Using this approach, the Whistleblower Office will determine awards, as a percentage of collected proceeds, of 15%, 18%, 22%, 26%, or 30%. This analysis cannot be reduced to a single mathematical equation, as factors are not exclusive and not weighted, and an absence of negative factors does not necessarily mean that the award percentage will be larger than 15%.

New Disclosure Requirements

Recent amendments to the whistleblower statute outline disclosures that the IRS must make to whistleblowers who have submitted a claim. The Whistleblower Office will notify the whistleblower when a case for which the whistleblower has provided information has been referred for

audit or examination, and when the taxpayer has made a tax payment with respect to which the whistleblower's information relates. In addition, the Whistleblower Office must respond to a whistleblower's written request for information on 1) the status and stage, or action related to such information; or 2) the reason for the determination of the amount of any award made under IRC section 7623(b).

New Antiretaliation Protections

In July 2019, Congress again amended the whistleblower statute to provide anti-retaliation protections to tax whistleblowers. Congress did so by creating a new subsection (d) to the statute, which protects a broad range of disclosures by employees about potential tax violations. The new subsection protects not only disclosures to government entities such as the IRS and the Department of Justice, but also internal disclosures, including an employee's disclosure to "a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct."

An employee has 180 days from the date the employee first learned of the retaliatory action to file a complaint. The complaint must initially be filed with the Occupational Safety and Health Administration (OSHA), which will investigate the claim. To prevail, an employee must show that the protected whistleblowing activity was a "contributing factor" to the adverse action. The employer can avoid liability only if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected whistleblowing activity. If OSHA determines there is reasonable cause to believe a violation occurred, OSHA can order relief, including reinstatement of the whistleblower, double back pay with interest, and compensation for any "special damages."

New Case Law Defining the Standard of Review

It generally takes five to seven years, or more, to complete the process of issu-

ing a whistleblower award. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary award recommendation to submit comments to the Whistleblower Office. The preliminary recommendation letter is not appealable to the Tax Court or any other court.

The Tax Court held in 2018 that appeals of whistleblower awards are evaluated using an administrative record scope of review and an abuse of discretion standard of review [*Kasper v. Comm'r*, 150 T.C. No. 2 (2018)]. Although the Tax Court ruled in *Kasper* that the scope of review is the administrative record, it recognized that there are exceptions, such as when—

- the IRS action is not adequately explained in the record,
- the IRS failed to consider relevant factors,
- the IRS considered evidence that it failed to include in the record,
- the case is so complex that a court needs more evidence to understand the issues clearly,
- there is evidence that arose after the IRS action showing the decision was correct or not, and
- the agency's failure to take action is under review.

If one of these exceptions exists, the court will allow the record to be supplemented.

The Tax Court's announcement of an abuse of discretion standard of review and administrative record scope of review has also led courts to conclude that the appropriate result in most whistleblower appeals in which the claimant has demonstrated errors made by the IRS or its Whistleblower Office in denying an award is for the court to simply remand the case back for further consideration. □

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