

T A X A T I O N
tax practice & procedure

An Overview of the IRS's Whistleblower Program

By Juliet L. Fink

The IRS whistleblower program has been around since the 1800s. In December 2006, the Tax Relief and Health Care Act made fundamental changes to the IRS whistleblower awards program and the relevant section of the relevant section of the tax code. The key change in the law was the addition of IRC section 7623(b), under which awards are no longer discretionary. Prior to the amendment, the IRS retained complete authority to determine whether a reward would be paid, absent an express and definite agreement setting forth the claim and amount of the payment. Such contracts are unnecessary following the 2006 amendments, an administrative or judicial as the IRS is obligated to pay a 15% to 30% award (of the collected proceeds) if it commences an administrative or judicial action against a taxpayer based on the tips furnished by the whistleblower [see IRC section 7623(b)(6)(A)].

In addition to providing greater incentives to whistleblowers, the Tax Relief and Health Care Act required the IRS to establish a Whistleblower Office for processing whistleblower award applications received on or after December 20, 2006. More recently, the U.S. Treasury Department issued new regulations, effective August 12, 2014, to implement IRC section 7623. Those regulations apply generally to claims that are open as of the effective date.

Initiating 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 the other information requested under IRS Form 211, the whistleblower must provide: 1) 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; 2) supporting documentation (such as books and records) to substantiate the claim or a

part in the action that led to the underpayment of tax, or who benefitted from those actions, is still entitled to an award as long as he did not "plan or initiate" the action. No employees of the Treasury Department are entitled to such rewards,



description of such documents and their location if not in the whistleblower's possession; 3) 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 4) facts supporting the amount the whistleblower's claims is owed by the taxpayer.

Eligibility for Whistleblower Awards

If the whistleblower planned and initiated the actions that led to the underpayment of tax, then the IRS Whistleblower Office has discretion to reduce the award. If the whistleblower is "convicted of criminal conduct arising from his role" in the tax crime, the whistleblower is not eligible to receive any award [IRC section 7623(b)(3)]. A whistleblower who took

nor are other federal employees, if the information submitted to the IRS came to their knowledge during the course of official duties [Treasury Regulations section 301.7623-1(b)(2)(i)-(ii)]. In addition, under the regulations effective August 12, 2014, any "individual who is or was required by Federal law or regulation to disclose the information or who is or was precluded by Federal law or regulation from disclosing the information" is ineligible to receive a whistleblower award" [Treasury Regulations section 301.7623-1(b)(2)(iii)].

Determining the Amount of a Whistleblower Award

Under IRC section 7623(b), the IRS is now required to award an informant at least 15%, and a maximum of 30%, of all taxes,

interest, and penalties (excluding criminal fines) recovered by the IRS as a result of the information received, or up to 10% where the informant provided "less substantial contribution" [IRC section 7623(b)(1)-(2)]. Amounts collected subject to the whistleblower reward include criminal restitution for tax ordered by the court. No award will be given, however, to a whistleblower whose information leads to a denial of a refund claim.

The new 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 under IRC section 7623(a). 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 awards under IRC section 7623(b) that are open as of August 12, 2014, as well as information submitted after that date. 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 the whistleblower provided prompt notification of the noncompliance; whether the whistleblower identified an issue or transaction of a type not previously known to the IRS; whether the whistleblower provided the information in clear and organized manner, such that it saved the IRS work and resources; whether the informant provided identified assets of the taxpayer that could be used to pay liabilities; and whether the information provided identified taxpayer behavior that the IRS was unlikely to identify. Negative factors include whether the whistleblower delayed providing information to the IRS, whether the whistleblower was

involved in the tax noncompliance, and whether the whistleblower directly or indirectly profited from the underpayment of tax or tax noncompliance.

The starting point for the Whistleblower Office's award analysis will be the statutory minimum of 15% of collected proceeds. Then, the Whistleblower Office may increase the award percentage to 22% or 30% based on its analysis of the presence and significance of positive factors. Next, the Whistleblower Office 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 of 15%, 18%, 22%, 26%, or 30% of collected proceeds. This analysis cannot be reduced to a single mathematical equation, as factors are not exclusive and not weighed; the absence of negative factors does not necessarily mean that the award percentage will be larger than 15%.

Payment of Whistleblower Awards

The payment of whistleblower awards will not be made until all taxes, penalties, interest, additions to tax, as well as additional amounts that are ultimately determined to be owed to the IRS, have been collected. This often takes several years. The Whistleblower Office confirms that whistleblower awards issued less than three years after submission of information are extremely rare. Currently, the IRS Whistleblower Office is testing a proposal to evaluate the benefits and costs of providing annual status information on open whistleblower claims. Under the pilot proposal, beginning in March 2015, the Whistleblower Office will send letters to a random sample of whistleblowers who have claims that have been open for at least three years, informing them that the IRS still has their claim under consideration.

Outstanding Issues

Despite recent amendments and improvements to the IRS's whistleblower program, many issues still plague the Whistleblower's Office. Whistleblowers often submit extensive documentation to the IRS Whistleblower Office, but subsequently live in an information vacuum for years: Following a submission, the IRS will not provide whistleblowers with any information regarding actions it is considering

or has already taken. Furthermore, it often takes years before a whistleblower is issued an award, and if the IRS is unable to collect from the offending taxpayer, the whistleblower will not receive any award, regardless whether the information provided directly resulted in a civil examination or criminal indictment. The IRS Whistleblower Office has also been criticized for asserting hypertechnical arguments in order to deny awards to whistleblowers who may have put themselves at personal risk for the public good.

More communication and interaction with whistleblowers and their representatives would be a very important improvement for the IRS Whistleblower Office. In the author's opinion, the IRS should welcome the help of whistleblowers; it should make use of whistleblowers' expertise and their intimate knowledge of the facts at issue, and—in limited circumstances—even allow whistleblowers to assist the IRS in their investigations. □

Juliet L. Fink, JD, is an attorney at Kostelanetz & Fink, LLP, New York, N.Y. Her practice focuses on federal and state criminal and civil tax matters.

With over 100 years of experience as public insurance adjusters, Adjusters International/Basloe, Levin & Cuccaro provides the extensive knowledge needed to prepare your clients' property and business income insurance claims and to achieve the best settlement.

Contact us today for a free consultation.

Stephen T. Surace, CPA, CFF

 ADJUSTERS INTERNATIONAL
BASLOE, LEVIN & CUCCARO
The right way to settle claims®

www.aiblc.com | ssurace@aiblc.com