

February 26, 2018

Issues in Whistleblower Litigation
Tax Court Judicial Conference
Chicago Illinois
3:30 - 4:50 p.m., March 27, 2018

1. Statistics (**attachment #1**)
2. Jurisdiction and other select issues
 - a. *Cooper v. Commissioner*, 135 T.C. 70 (2010) (Cooper I) (I.R.S. letter denying claim constitutes a determination sufficient to permit whistleblower to invoke the Court’s jurisdiction);
Cooper v. Commissioner, 136 T.C. 597 (2011) (Cooper II) (“[The Court’s] jurisdiction under section 7623 does not contemplate that we redetermine the tax liability of the taxpayer * * * Congress did not authorize the Court to direct the Secretary to proceed with an administrative or judicial action”).
 - b. Other jurisdictional issues

Ringo v. Commissioner, 143 T.C. 297 (2014) (I.R.S. letter prematurely denying claim constitutes a determination sufficient to permit whistleblower to invoke the Court’s jurisdiction);
Comparini v. Commissioner, 143 T.C. 274 (2014) (an I.R.S. letter issued after the first denial stating that the whistleblower not eligible for award constitutes a determination sufficient to permit whistleblower to invoke the Court’s jurisdiction).
 - c. Voluntary dismissals; waiver

Jacobson v. Commissioner, 148 T.C. No. 4 (2017) (a whistleblower’s motion to voluntarily dismiss a petition filed under sec. 7623 granted in the absence of prejudice to the Commissioner);
Whistleblower 4496-15W v. Commissioner, 148 T.C. No. 19 (2017) (the Whistleblower Office’s issuance of a check was a determination; the Commissioner was entitled to judgment where whistleblower had

knowingly and explicitly waived his right to challenge the amount of an award he had otherwise accepted).

3. Amount in dispute and collected proceeds

a. “Amount in dispute”

Bipartisan Budget Act of 2018, Pub. L. No. 115-123, sec. 41108(c) “DISPUTED AMOUNT THRESHOLD.- Section 7623(b)(5)(B) is amended by striking “tax, penalties, interest, additions to tax, and additional amounts” and inserting “proceeds”.

Smith v. Commissioner, 148 T.C. No. 21 (2017) (the phrase “amounts in dispute” in sec. 7623(b)(5)(B) is not limited to only those amounts directly or indirectly attributable to the whistleblower information); *Lippolis v. Commissioner*, 143 T.C. 393 (2014) (the \$2 million requirement in sec. 7623(b)(5)(B) is an affirmative defense and is not jurisdictional);

Gonzalez v. Commissioner, T.C. Memo. 2017-105, (the Commissioner’s motion for summary judgment denied for failure to establish facts showing that “amounts in dispute” did not exceed \$2 million threshold under sec. 7623(b)(5)(B) when the Commissioner did not assert or deny that the I.R.S. has documents showing that more than \$2 million was in dispute); *Lippolis v. Commissioner*, T.C. Memo. 2017-104 (same).

Whistleblower 22716-13W v. Commissioner, 146 T.C. 84 (2016) (FBAR civil penalties are not “additional amounts” within the meaning of sec. 7623(b)(5)(B) and therefore must be excluded from determining whether the \$2 million “amount in dispute: requirement has been satisfied)

b. Criminal fines and civil forfeitures, FBAR civil penalties, etc.

Bipartisan Budget Act of 2018, Pub. L. No. 115-123, sec. 41108(a) and (b): new sec. 7623(c) defining “proceeds” to include “(A) criminal fines and civil forfeitures, and (B) violations of reporting requirements.”

Whistleblower 21276-13W v. Commissioner, 147 T.C. 121 (2016) (the phrase “collected proceeds” is not limited to amounts assessed and collected; target taxpayer’s payments of criminal fines and civil forfeitures constituted “collected proceeds” within the meaning of sec. 7623(b)(1)).

The Tax Court’s decision in this case is on appeal to the U.S. Court of Appeals for the D.C. Circuit; two amicus briefs in support of Tax Court position, including one filed on behalf of Senator Charles Grassley.

- c. Amounts voluntarily paid by the taxpayer

Whistleblower 16158-14W, 148 T.C. No. 12 (2017) (target taxpayer’s voluntary payments in compliance with the Code do not constitute “collected proceeds” for purposes of sec. 7623(b)(1)).

4. Scope and standard of review

- a. *Kasper v. Commissioner*, 150 T.C. No. 2 (January 9, 2018) (whistleblower determinations are subject to review for abuse of discretion and normally the scope of review is limited to the administrative record).
- b. Administrative record (**sample order issued in several cases in which motions for protective order were granted, attachment #5**)
- c. Exceptions to the limited scope of review
 - I. When agency action is not adequately explained on the record
 - ii. When the agency failed to consider the relevant facts
 - iii. When the agency considered evidence which it failed to include in the record
 - iv. When a case is so complex that a court needs more evidence to enable it to understand the issues clearly

- v. When there is evidence that arose after the agency action showing whether the decision was correct or not; and
 - vi. Where an agency's "failure to action" is under review
 - d. Standard of review: abuse of discretion
5. Discovery
- a. Discovery of I.R.S. audit and related records may be required.

Whistleblower One 10683 v. Commissioner, 145 T.C. 204 (2015) (standard of relevance in discovery action is liberally construed and whistleblower's discovery request was relevant to determining the proper composition of the administrative record).
 - b. I.R.S. administrative issues when assembling the file.
 - i. I.R.S. procedures for compiling a record
 - ii. issues with I.R.S. record keeping
 - iii. Taxpayer confidentiality issues – see below
 - c. Depositions

Depositions taken without consent are an "extraordinary method of discovery" in the Tax Court. Rule 74(c)(B). Will they be more commonly used in whistleblower cases?
6. Section 6103 issues
- a. Interaction between sec. 6103 and sec. 7623.
 - b. I.R.S. civil and criminal liability
 - c. Sec. 6103 Orders (**sample order granting a motion for protective order attachment #2**)

- d. Sealing and redacting documents and sealing the record – see below
7. Other privacy interests of the taxpayer/target (**sample orders granting motions (1) for protective order and (2) to proceed anonymously (attachment #3)**)
- a. Reputational harm
 - b. Breach of contractual confidentiality with the whistleblower
 - c. Theft of taxpayer documents
 - d. How can the taxpayer/target defend against allegations by a whistleblower
 - e. Involvement in discovery – i.e. requests from the I.R.S. or trial subpoenas
8. Privacy interests of whistleblowers/Motions to proceed anonymously
- a. Retaliation
 - b. Reputational harm
 - c. Whistleblowers with multiple claims for awards.

Whistleblower 14377-16W v. Commissioner, 148 T.C. No. 25 (2017)
(whistleblower who brought multiple cases involving award claims related to numerous taxpayers not entitled to proceed anonymously because public interest in such matters outweighs whistleblower's interest in anonymity) (interlocutory appeal pending– U.S. Court of Appeals for the D.C. Circuit)

9. Tools and procedures for protecting whistleblowers and targets

- a. Procedures (**sample order granting petitioner's motion to proceed anonymously, attachment #3**)
- b. Sealing documents and sealing the record vs. redaction
- c. Closing the courtroom for hearings and trial (**sample calendaring order for a sealed session, attachment #4**)