

USE AND PROTECTION OF TAXPAYER RETURN INFORMATION IN WHISTLEBLOWER CASES¹

Bryan C. Skarlatos
Kostelanetz & Fink, LLP

1. Taxpayer confidentiality issues arise out of the interaction between the IRS Whistleblower statute and the requirements of IRC §6103 governing taxpayer confidentiality.
 - a. IRC §7623 contemplates that taxpayer return information may be disclosed in whistleblower cases.
 - i. IRC §7623(b)(1) provides that, if the Secretary proceeds with an any administrative or judicial action based on information provided by a whistleblower, the whistleblower shall receive an award of 15% and 30% of the collected proceeds.
 - ii. IRS §7623(b)(4) provides that any determination of an award may be appealed to the Tax Court.
 - iii. While the Tax Court has determined that its review is limited to the administrative record, the Court also has determined that there are many exceptions to this rule, such as where IRS' decision is not adequately explained in the record or where the IRS has failed to consider relevant factors, etc., that would allow the record to be supplemented by things that would constitute taxpayer return information. *Kasper v. Commissioner*, 150 T.C. No 2 (2019).
 - b. IRC §6103 (a) provides that returns and return information shall be confidential.
 - i. IRC §6103 (b)(2) defines taxpayer return information broadly.
 - ii. IRC §6103 (h)(4)(B) provides that a return or return information may disclosed in a Federal or State judicial or administrative proceeding pertaining to tax

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administration but only if the treatment of an item reflect on such return is directly related to the resolution of an issue in the proceeding.

- c. *Treas. Reg. § 301.6103 (h)(4)–1* (2017) provides that “[p]ursuant to section §6103 (h)(4)...the Whistleblower Office may disclose returns and return information...to a whistleblower (or the whistleblower’s legal representative.)”
 - d. The Tax Court has recognized that the disclosure exception found in IRC §6103 (h)(4) permits the disclosure of taxpayer information in IRS whistleblower cases. *See Insigna v. Commissioner, Dkt No. 9011-13W* (Order dated January 2, 2017) (holding that IRC §6103 (h)(4)(B) exception is an exception to IRC §6103 that applies to whistleblower proceedings and “warn[ing] respondent again an unduly narrow construction of subparagraph §6103 (h)(4)(B).”)
 - e. Whether particular taxpayer return information is “directly related” to a specific issue in a whistleblower case is a factual issue.
 - i. In general, courts have held that the confidentiality exception in IRC §6103 (h)(4)(B) should be interpreted broadly to permit disclosure. *E.g. Norman E. Duquette, Inc. v. Commissioner*, 110 F. Supp, 2d 16, 22 (D.D.C. 2000) (“The Court will adopt the majority position that Section §6103 (h)(4) should be interpreted broadly...”); *Gardner v. United States*, 213F.3d 735, 739 (D.C. Cir. 2000) (recognizing the “broad language” of the disclosure exceptions in IRC §6103 (h)(1) and (4)); *United States v. Lloyd*, 992 F.2d 348, 352 (D.C. Cir. 1993)(rejecting argument that IRC §6103 (h)(4)(D) disclosure exception imposed a “very heavy burden” on the party seeking disclosure).
2. The Tax Court has developed procedures to help protect taxpayer return information in whistleblower cases.
- a. Tax Court Rule 345(b) provides that “Except as otherwise directed by the Court, in an electronic or paper filing with the Court in a whistleblower action, a party or nonparty

making the filing shall refrain from including, or shall take appropriate steps to redact, the name, address, and other identifying information of the taxpayer to whom the claim relates. The party or nonparty filing a document that contains redacted information shall file under seal a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed...”

- i. In some cases, the Court may direct a party to simply file the un-redacted document under seal with the Court instead of filing a reference list under seal.
- b. Further, the Tax Court has developed a procedure to further protect IRC §6103 return information by issuing an Order requiring
 - i. the parties to designate documents containing return information as “CONFIDENTIAL – Section §6103 Information Subject to Protective Order”; and
 - ii. that any designated §6103 information that respondent provides to petitioner or petitioner’s counsel shall not be disclosed directly or indirectly by petitioner or petitioner’s counsel to any person except for the sole bona fide purpose of pretrial preparation and in accordance with the provisions of the Order, and
 - iii. any person receiving any designated §6103 information to sign a copy of and comply with the terms of the Order; and
 - iv. that any person who has received any designated §6103 return information subject to the Order to return all copies of such information to respondent when the case becomes final.