

Tax Court Can't Force IRS to Reconsider Whistleblower Award Denials

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The Tax Court cannot order the IRS Whistleblower Office to take a second look at a whistleblower claim once it has issued a claim denial, the Tax Court held June 20 in a case of first impression under the new section 7623(b) whistleblower framework involving enhanced rewards.

William Prentice Cooper III submitted two whistleblower claims to the IRS in 2008, alleging that a taxpayer had impermissibly modified two trusts to avoid paying estate and generation-skipping transfer taxes. The IRS sent Cooper a notice of receipt regarding the submitted claims; nine months later, he received a letter from the IRS Whistleblower Office denying the claims on the grounds that they did not identify specific tax issues or result in the detection of underpaid taxes. Cooper filed petitions in the Tax Court regarding the IRS's determinations, and the IRS sought to have the cases dismissed for lack of jurisdiction.

As a preliminary matter, in July 2010 the Tax Court held that it had jurisdiction to hear Cooper's petitions, characterizing the letters the IRS Whistleblower Office had sent Cooper as determinations. For purposes of section 7623(b)(4), the Tax Court's jurisdiction "is not limited to the amount of an award determination but includes any determination to deny an award," the court said. (For prior coverage, see *Doc 2010-15219* or *2010 TNT 131-1*.)

But despite that earlier ruling, the June 20 opinion found the IRS had explained why it determined there was no estate or gift tax due, then had not collected any tax. The court's "jurisdiction in whistleblower cases does not include opening an administrative or judicial action to predetermine the tax liability," wrote Judge Diane Kroupa. Cooper's assertion that the IRS failed to properly investigate his claims was not sufficient for the court to compel the IRS to "undertake a complete re-evaluation" of the case, she said. (For *William Prentice Cooper III v. Commissioner*, 136 T.C. No. 30 (Jun. 20, 2011), see *Doc 2011-13460*.)

The court held that because "Congress did not authorize the Court to direct the Secretary to proceed with an administrative or judicial action" in a whistleblower case, the IRS retains its discretion in pursuing tax underpayments. "If the Secretary does not proceed, there can be no whistleblower award."

Dean Zerbe, national managing director at Alliantgroup and a former tax counsel to Senate Finance Committee Republicans, told Tax Analysts that the Tax Court made the right decision. "The law doesn't allow the Tax Court to direct the IRS to conduct an examination," he said. "However, the law does allow the IRS Whistleblower Office to conduct its own investigations. If the IRS Whistleblower Office viewed the case as having merit, it should have considered engaging in its own review."

Alternatively, if the whistleblower's case appeared meritorious and worth a hard look, under the law the IRS could have contracted with the whistleblower and his attorney at no cost to review the matter further, Zerbe said. "The Tax Court came up with the right answer, but the IRS needs to ensure it has the right policies in place to take full advantage of information provided by whistleblowers and the whistleblower law."

Gregory S. Lynam of the Ferraro Law Firm said the Tax Court's decision was proper. "The IRS determinations to not make award determinations were the same as zero dollar award determinations that gave the Tax Court jurisdiction but the Tax Court cannot make the IRS investigate something it does not want to," he said. "We call it the 'you can lead a horse to water but you cannot make him drink' rule." To have held otherwise would seriously call into question the separation of powers clause, he said.

"The first Cooper decision is necessary, however, because what if he had come forward and said, 'The IRS collected money from the taxpayer and is trying to cheat me,'" said Lynam. "That would be a different case as the Tax Court would not be compelling the IRS to act or not act but rather determining if there were collected proceeds and if so, is the tax whistleblower entitled to an award."

Bryan C. Skarlatos of Kostelanetz & Fink LLP said, "This decision is not entirely unexpected." IRS agents have special skills and training that make them uniquely qualified to determine whether to assess and collect a tax, he said. "More importantly, if Congress had intended to give the Tax Court the ability to conduct a *de novo* review of the IRS determination to proceed against a particular taxpayer, it could have just enacted a full blown *qui tam* type of provision."

On the other hand, the IRS's failure to use whistleblower tips and pay rewards was one of the primary considerations that led Congress to enact the new whistleblower provisions and to give the Tax Court the jurisdiction to review IRS determinations regarding rewards, Skarlatos said. If an IRS decision not to proceed with an administrative or judicial action is not subject to review by the Tax Court, one problem that existed under the old law -- the IRS's failure to follow up on some whistleblower information -- could remain unchanged by the new statute, he said.

"Perhaps it would be appropriate for Congress to expressly provide that the Tax Court does have some limited jurisdiction to review the IRS's determinations not to proceed with an administrative or judicial action," such as granted jurisdiction to review IRS determinations under an abuse of discretion standard, he said, or in cases in which the IRS already had decided to propose an assessment. "Regardless, it does seem that the statute was intended to allow the Tax Court to review at least some limited aspect of an IRS decision on whether to proceed with an administrative or judicial action."