

OPINION POINT

Are Criminal Fines "Collected Proceeds"?

By Erica L. Brady*

A whistleblower who puts him or herself at risk to provide the Service with information about tax evasion should be paid an award under section 7623(b) based on all of the proceeds collected, including the criminal fines collected. However, the Service has taken the position that whistleblower awards should not be paid on criminal fines. The language of section 7623 expressly refers to criminal prosecutions as one of the actions that can result in payment of an award. Although the Service acknowledges that criminal prosecutions are expressly included as one of the actions that can result in an award, it chooses to ignore this part of the statute. The Service's position, articulated in PMTA 2010-60, Criminal Fines and Whistleblower Awards, and Internal Revenue Manual (IRM) 25.2.2.12, is that collected proceeds exclude criminal fines. Even though the language of section 7623 does not define the limits of collected proceeds, criminal fines are logically included in collected proceeds.

Section 7623(b)(1) states that a whistleblower shall receive a percentage, within the statutorily defined range, "of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from" the administrative or judicial action described in section 7623(a) in response to information provided by the whistleblower. The actions referred to in section 7623(a) are "(1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws" The statute expressly refers to criminal prosecutions as one of the actions that can result in payment of an award. Criminal fines are therefore logically within the definition of collected proceeds.

The language of the statute specifying what is included in collected proceeds is exemplary, rather than an exclusive list. Section 7623(b)(1) prefaces the list of monies included in collected proceeds with the term "including," which "when used in a definition contained in [Title 26] shall not be deemed to exclude other things otherwise within the meaning of the term defined," according to section 7701(c). Therefore, the list included in section 7623 should not be treated as an exhaustive list of the types of monies that make up collected proceeds. Rather, these are examples of types of monies that are included in collected proceeds. Moreover, the plain and ordinary meaning of "additional amounts" is amounts not

otherwise listed, which reasonably includes criminal fines.

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It is logical to conclude that Congress intended to include criminal fines in collected proceeds because at the time Congress enacted the enhanced award provisions, the Service included criminal fines in collected proceeds. The current Treasury regulations and other guidance that remains in effect evidence the Service's long-standing policy of including criminal fines. The current regulations—specifically section 301.7623-1(c), which was enacted prior to the change in the statute—expressly include fines in the types of monies collected that are used to pay an award. That section currently states, in part, "[p]ayment of a reward will be made as promptly as the circumstances of the case permit, but not until the taxes, penalties, or fines involved have

been collected." In light of the guidance existing at the time of the enactment, which includes criminal fines in the definition of "collected proceeds," if Congress intended to exclude criminal fines from collected proceeds, it would have expressly done so.

The Service consistently included criminal fines in collected proceeds when it issued guidance and in contracts with whistleblowers. For example, IRS Policy Statement 4-27 provides:

1. Rewards determined by value of information furnished and Computation and payment of rewards
2. The Internal Revenue Service will pay claims for reward applied for on Form 211 commensurately with the value of the information furnished voluntarily and upon the informant's own initiative with respect to taxes, fines, and penalties (but not interest) the Service collects. ...

IRM 1.2.13.1.12 (Approved Aug. 13, 2004). Additionally, Publication 733, *Rewards for Information Provided by Individuals to the Internal Revenue Service* (Obsoleted June 19, 2008), and the standard contract with whistleblowers included taxes, fines, and penalties (but not interest) in collected proceeds. The 2006 Treasury Inspector General for Tax Administration Report, *The Informants' Rewards Program Needs More Centralized Management*

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Oversight (2006-30-092, June 2006), states that "[t]he dollar amount of the reward is computed by multiplying the reward percentage by the amount of taxes, fines, and penalties (but not interest) collected." The Joint Committee on Taxation staff's technical explanation of H.R. 6408, The Tax Relief and Health Care Act of 2006, as introduced in the House on December 7, 2006 (JCX-50-06, Dec. 7, 2006), states that the law in effect at that time was that "[a]mounts are paid on a percentage of tax, fines, and penalties (but not interest) actually collected based on the information provided." JCX-50-06, at 88.

Nevertheless, the Service simply dismisses the idea that criminal fines can be considered part of collected proceeds in PMTA 2010-60 "because the IRS does not collect fines imposed by a court in connection with a criminal prosecution, [the Service does] not think that these fines can be considered 'collected proceeds.'" It should be noted that there is no statutory requirement that the Service collect the monies for inclusion in collected proceeds. The PMTA goes on to reason that criminal fines are excluded from collected proceeds because criminal fines that are collected for offenses against the United States are required to be deposited into the Crime Victims Fund under 42 U.S.C. section 10601, unless statutorily exempted. The PMTA acknowledges that criminal prosecutions can result in payment of an award, but disingenuously concludes that the Victims of Crimes Act of 1984 and section 7623 "can easily

be read harmoniously, giving full effect to Congressional intent for both statutes."

When a whistleblower has provided information that led to a conviction, the Victims of Crimes Act and section 7623(b) cannot be read harmoniously because each statute mandates that the monies collected be used in different ways. The Victims of Crimes Act mandates that criminal fines be deposited into the Crime Victims Fund, while section 7623(b) requires that the Secretary pay a percentage of the collected proceeds to the informant if the statutory requirements have been met. Where two statutes are in conflict, the one enacted most recently generally prevails, as it is the latest expression of legislative intent. *Blue Cross and Blue Shield of Alabama, Inc. v. Nielsen*, 116 F.3d 1406, 1410 (11th Cir. 1997); see also 73 Am. Jur. 2d Statutes § 169. The Service nevertheless concluded that due to the detailed exceptions provided in 42 U.S.C. section 10601, the award mandate of section 7623(b) should not act as an implied exception even though section 7623(b) is the later enacted statute. There was no conflict in the statutes prior to the enactment of the enhanced award provisions because awards were discretionary. The conflict in the law arose when Congress enacted the enhanced award provisions in 2006. Therefore, the criminal fines collected should be included in collected proceeds, and the balance of these criminal fines, after the award is paid, should be deposited into the Crime Victims Fund.

Moreover, PMTA 2010-60 claims, "a court has no authority to order such a payment because to do so would nullify Congress' authority under the Appropriations Clause of the Constitution." This statement is clearly false. If a court finds that criminal fines are, in fact, part of collected proceeds, then it may order an award to be paid from the criminal fines—without running afoul of the Appropriations Clause—because section 7623(b) mandates payment of an award from collected proceeds where certain statutory requirements are met. The court would not be ordering a payment for which there is no authority; rather the court would be interpreting the scope of what is properly included in collected proceeds under section 7623(b) and ordering a payment in accordance with its interpretation of the statute.

Congress intended to strengthen the whistleblower program by increasing incentives for whistleblowers to come forward. To that end, Congress expanded the pool of collected proceeds that formed the basis of an award by including interest in collected proceeds. If criminal fines are not included in the definition of collected proceeds, the pool of collected proceeds from which awards can be paid will contract, reducing the incentive available to entice whistleblowers to come forward, making it less likely the Service will receive information regarding the most egregious violations of internal revenue laws. ■