

## Federal Claims Court Chides IRS for Erroneous Whistleblower Appeals Instructions

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The U.S. Court of Federal Claims on January 28 admonished the IRS for giving incorrect instructions to a whistleblower regarding where to file an appeal following a denial of his award claim.

In 2003 Robert Colman filed a whistleblower claim with the IRS alleging that his mother's accountant embezzled money from her accounts that was not reported on the adviser's tax returns. The IRS eventually sent Colman a letter denying an award under section 7623 (now section 7623(a)) for his submitted information and informing Colman that an appeal of the determination must be filed in the Court of Federal Claims.

Colman then filed suit in the Court of Federal Claims for damages in the amount of 15 percent of the proceeds that the IRS collected from the accountant, who pled guilty and paid back taxes for the unreported amounts.

The court held that it did not have jurisdiction to hear Colman's appeal of the IRS award determination, despite the content of the IRS letter. Colman's claim lacked any proper "money-mandating statute" upon which the court could properly hear the case, said Judge Thomas C. Wheeler. "The parties are powerless to establish jurisdiction by consent," he wrote. The court granted the government's motion to dismiss the case. (For *Robert Colman v. United States*, No. 10-219T (Ct. Fed. Cl. Jan. 28, 2011), see *Doc 2011-2082* or *2011 TNT 21-15*.)

Nonetheless, the court criticized the IRS for providing erroneous advice in its denial letter. "The public rightly should expect better from its federal agencies," the court wrote. The opinion revealed that the court had difficulty getting answers from the IRS about why it told whistleblowers that claims had to be filed in the Court of Federal Claims, saying the agency's response involved "vague and unexplained assertions" that were "insufficient." Ultimately, the IRS's actions were "unfortunate" in causing Colman to file a useless suit, the court said.

Dean Zerbe, national managing director at Alliantgroup and a former tax counsel to Senate Finance Committee Republicans who was responsible for drafting section 7623(b), said the opinion highlights why a revised whistleblower framework was necessary. "The new whistleblower statute positively changed the program for whistleblowers, providing more substantive rights," he said.

Although not mandated by the court, Zerbe said, the IRS would "do right" by revisiting Colman's claim to see if he was entitled to some amount of award. "The new law was meant to get at large insider transactions such as the one [Colman] alleged, so it seems reasonable for the Whistleblower Office to double check that the IRS got

the right answer, even if under a prior version of the statute," he said. "Taxpayers want to know the law is working."

The letter that the IRS now sends to whistleblowers when their award claim is denied no longer contains language directing them to file appeals in the Court of Federal Claims, but practitioners said the faulty instructions are indicative of the many problems that whistleblowers have had with the IRS in the claims process. "We will never know if Mr. Colman is telling the truth because he will never have a chance to challenge his treatment. What is he supposed to do, write an angry letter to Commissioner Shulman and try to shame the IRS into paying the award?" said Gregory S. Lynam, a tax partner at the Ferraro Law Firm.

Section 7623(b)(4) clarifies that whistleblowers may appeal an adverse award determination under the mandatory, higher payout provisions of subsection (b) to the U.S. Tax Court. "Ultimately more of these award determination appeals will properly be before the Tax Court rather than in the Court of Federal Claims or the federal district courts fighting about jurisdiction," said Scott A. Knott, also a tax partner at the Ferraro Law Firm. "At that point, the Tax Court will be able to address the substance of the case and make sure the whistleblower got a fair deal."

"You can't blame the whistleblower for taking a shot at an appeal," Knott added. "Many whistleblowers whose cases fall under the old section 7623 feel that they have been treated unfairly by the IRS, and unfortunately the law that applies to those cases gives them little recourse."

Lynam agreed, saying the case demonstrates why Sens. Chuck Grassley, R-Iowa, and Max Baucus, D-Mont., worked to modify section 7623 to allow Tax Court jurisdiction. The modifications were passed as part of the Tax Relief and Health Care Act of 2006, when Grassley chaired the Finance Committee and Baucus was ranking minority member.

"Without the ability to turn to the courts as a check, there is nothing to prevent the mistreatment of tax whistleblowers by the IRS," Lynam said. "Well-represented tax whistleblowers can rest assured that under the new section 7623(b), if the IRS tries to avoid paying an award where the IRS has used the information and collected taxes, the Tax Court will be a forum to force compliance with the law."

In a statement provided to Tax Analysts, the IRS said that its current letters "do not refer to appeal rights, except in cases where we make an award determination under the 2006 amendments." The IRS does not include "any appeals language in denial cases -- only in those where we determine an award is payable under the 2006 amendments where the amount in dispute is over \$2 million."

The IRS said that "the letter we will use when we make an award determination under 7623(b) has a statement regarding appeal to Tax Court, but we haven't made an award under 7623(b) yet, so we haven't used this letter. The Service's position is that Tax Court jurisdiction is limited to these cases, and that there is no avenue to appeal in 7623(a) cases."