

IRS Whistleblower Office Reports Increased Claims, Award Activity in 2010

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The IRS Whistleblower Office in fiscal 2010 received 431 submissions under the enhanced section 7623(b) award criteria but made no payouts from those claims, according to the office's annual report submitted to Congress on July 20.

The number of high-dollar claims slipped some from fiscal 2009, but the 431 submissions identified more than 5,400 taxpayers alleged to have avoided significant tax liabilities. The report said that "many of the individuals submitting information to the IRS claimed to have inside knowledge of the reported transactions, often with extensive documentation to support their claims." (For the report, see *Doc 2011-15784*.)

Dean Zerbe, national managing director at Alliantgroup LP and a former tax counsel to Senate Finance Committee Republicans, told Tax Analysts that the report is "good news that despite all the naysayers, the whistleblower law continues to be a source of first-rate information for the IRS on tax fraud." Despite the improvements over previous years detailed by the report, there is "still much more that can be done to help policymakers and managers understand what is happening in the program and give whistleblowers more confidence," Zerbe said.

Increase in Awards

A chart of award payments made by the office in 2010 did not list any payments made under the enhanced subsection (b) criteria. Out of nearly 7,600 submissions received under section 7623(a), the IRS paid 97 awards totaling almost \$18.75 million, including 9 cases involving collections of more than \$2 million. The total the IRS collected as a result of the whistleblower submissions was more than \$464 million, representing a nearly 2,500 percent return for the agency in enforcing the tax code through the whistleblower program.

Those figures represent a marked increase from 2009, when the IRS paid 110 awards worth \$5.85 million from 5,678 claims that resulted in \$206 million collected. (For the 2009 report, see *Doc 2010-26593* or *2010 TNT 240-19*. For prior coverage, see *Doc 2010-26590* or *2010 TNT 240-4*.)

The popularity of the whistleblower program is evident, said Gregory S. Lynam, a tax partner at the Ferraro Law Firm. "At 7,577 whistleblower submissions made to the IRS in FY 2010, they are receiving more tips than ever before," he said.

Scott A. Knott, also a tax partner at the Ferraro Law Firm, said that despite the increased amount of collections the IRS has made as a result of whistleblower submissions, the amount of award payments remains "irregularly low" because of a

chief counsel decision to delay payment until after the section 6511 refund claim period has run, which is either three years from filing or two years from the date of payment. "That decision is still greatly reducing the awards paid in fiscal 2010," he said.

Knott said the increase in the number of taxpayers identified in submissions in 2010 is likely the result of claims involving promoters or industry issues, but could also represent an outlier of a single submission involving many taxpayers.

Although it has been several years since the reworked award framework was established, the delay in paying out enhanced awards has been the result of waiting for proceeds to be collected and for appropriate administrative guidance covering award determinations and payments to be issued. The report says the office expected to begin paying awards for section 7623(b) claims in the second quarter of 2011. According to one whistleblower representative, the office paid out the first award for a section 7623(b) claim in April to a CPA for more than \$4.5 million for alerting the IRS to a *Fortune* 500 financial services company's \$20 million unreported tax liability. (For prior coverage, see *Doc 2011-7587* or *2011 TNT 69-4*.)

The report also notes that the office's internal staff is growing, with authority for 21 employees, up from 17 the previous year. The office has also finished implementing a new case management system to record and track all section 7623 claims.

More Guidance Coming

Included in the summary of the office's activities was mention of proposed regulations issued in January that expand the definition of collected proceeds on which a whistleblower could receive payment. The proposed rules were offered after a significant backlash from whistleblower representatives and a member of Congress in response to internal administrative guidance dealing with a collection definition made last June in the Internal Revenue Manual. The office intends to finalize the regulations in 2011, the report says. (For REG-131151-10, see *Doc 2011-880* or *2011 TNT 11-11*. For prior coverage, see *Doc 2011-883* or *2011 TNT 11-3*. For a collection of comments on the proposed regs, see *Doc 2011-9899* or *2011 TNT 90-33*.)

In 2011 the IRS expects to issue comprehensive proposed regulations under section 7623 to reflect changes to the statute made by the 2006 amendments. The IRS recently issued final regulations under section 6103(n) on disclosing return information in connection with IRS contracts with whistleblowers. (For T.D. 9516, see *Doc 2011-5298* or *2011 TNT 50-7*.)

Knott said that although the office is working on final regs and a set of proposed rules, the bigger problem is that the IRM needs to reflect recent guidance, including a chief counsel memo addressing the definition of collected proceeds, as well as the finalized regs. (For PMTA 2010-62, see *Doc 2011-8490* or *2011 TNT 77-10*.)

The IRS Whistleblower Office noted several difficulties in administering the program. One problem stems from the lack of statutory definitions for gross income and amounts in dispute, two elements in the threshold requirement giving the Tax Court jurisdiction to hear appeals of award determinations. Also of concern to the office is that it has a

limited ability to learn about the extent of a whistleblower's contribution in criminal cases. A third noted problem is that tax whistleblowers are not given statutory protection against potential retaliation.

The report does not mention that the Tax Court has issued several important decisions about its ability to hear appeals of award determinations by the IRS Whistleblower Office. Last July the court held that an IRS letter denying whistleblower awards qualifies as a determination letter necessary to confer jurisdiction on the court. (For *William Prentice Cooper III v. Commissioner*, 135 T.C. No. 4 (July 8, 2010), see *Doc 2010-15202* or *2010 TNT 131-3*.)

The court confirmed that approach this month, denying the IRS's motion to dismiss for lack of jurisdiction regarding an individual's petition for review of denial of a whistleblower claim. The court held that the denial letter from the IRS was a determination under section 7623(b)(4) and that because the IRS did not prove the letter was mailed as it claimed, the individual's petition was timely because it was made within 30 days of the mailing of a copy of the letter. (For *Kenneth William Kasper v. Commissioner*, 137 T.C. No. 4 (July 12, 2011), see *Doc 2011-15200* or *2011 TNT 134-7*.)

Disclosing Taxpayer Information

The report says the IRS has had to develop nuanced procedures to protect unauthorized disclosure of taxpayer information while also providing a whistleblower with information necessary to pursue appeal of an award determination. The information provided in award determinations will include details on the "extent to which the IRS took action based on the information the whistleblower provided, and the degree to which the whistleblower's information substantially contributed to that action." Also, the administrative record of a whistleblower claim may include information on the agency's consideration of penalties, abatement requests, reasonable cause defenses, and collection issues. If the whistleblower claimant wants a detailed explanation of the office's award recommendation, a confidentiality agreement must be signed.

But the report identified weaknesses in the structure for protecting taxpayer information, including the lack of an effective sanction to punish disclosures that violate a confidentiality agreement. There is also no provision that prevents a whistleblower from identifying taxpayer information in a Tax Court award determination appeal, according to the report.

Future Concerns

Future reports by the IRS Whistleblower Office "need to provide a better and clearer picture of where cases stand," Zerbe said. Information that should be added includes the status of whistleblower cases, cases that are in the pipeline, which cases are being worked and which are not, which cases are complete and waiting for statutes to run to make payments, and the amount of tax potentially at issue. Providing that information in a year-by-year format for the year the claim was submitted will "help everyone get their arms around what is happening and not happening," he said.

Zerbe said a coming Government Accountability Office report on the IRS Whistleblower Office will "put a lot of meat on the bone on improving the report, and more importantly, suggest other ways to make the whistleblower program a greater success." One of the most important issues facing whistleblowers is communication from the IRS, but the report provided little discussion or focus about improving that area, he said.