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*Tax Compliance*

### **Attorneys Say Recent Ruling Tests Power To Compel Audits of Whistleblower Claims**

A court case involving a whistleblower claim that the Internal Revenue Service declined to pursue is the first to test the Tax Court's ability to force IRS to audit a taxpayer for a claim of underpayment of taxes, several attorneys said.

In *Cooper v. Commissioner*, 136 T.C. 30 (2011), William Prentice Cooper III asked the Tax Court to undertake a complete re-evaluation of the facts on two claims he submitted to the IRS Whistleblower Office, and take whatever steps were necessary to detect an underpayment of tax. In the claims, Cooper alleged that certain parties had failed to pay millions of dollars in estate and generation-skipping tax (119 DTR K-1, 6/21/11).

While Cooper tried to get the court to review the IRS's decision not to pay an award, the Tax Court said a whistleblower award is dependent not only on the initiation of an administrative or judicial action, but also on collection of tax proceeds.

No proceeds were collected as a result of Cooper's information, the court said; therefore a Section 7623(b) award determination could not be made for his claims. "The petitioner did not identify any Federal tax issues upon which the IRS would take action," the court said. The petitioner's information did not result in the detection of any underpayment of tax.

"The Tax Court decided that good reason or not, the Tax Court is not in the audit business," Erica Brady, an attorney with the Ferraro Law Firm in Washington told BNA June 22.

Moreover, the court said although Congress authorized the court to review the secretary's award determination, it did not authorize the court to direct the secretary to proceed with an administrative or judicial action.

#### **Review of Denials**

In another case initiated by Cooper, the court agreed that it did have jurisdiction to review denials—in cases where IRS has collected monies—if the taxpayer feels cheated out of some or all of an award (*Cooper v. Commissioner*, 135 T.C. 4 (2010); 130 DTR K-5, 7/9/10).

"That is significant because it outlines the scope of the tax court's jurisdiction to review IRS determinations on awards," Bryan Scarlatos, partner with Kostelanetz & Fink in New York, said June 24.

The court can make sure that no action was taken, he said, and in fact, in the Cooper case, the court forced IRS to confirm that no judicial or administrative action had been taken. He added "Clearly the Tax Court didn't want to wade into the issue of forcing the IRS to make assessment and second guess the IRS."

#### **No Collection, No Award**

On the jurisdiction-to-review question, Brady said IRS essentially said to read the fine print. "No award

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determination, no jurisdiction,” IRS argued. The letter IRS sent Cooper concluded that Cooper was not entitled to an award, and provided an explanation for that conclusion, she said.

There is a difference between jurisdiction in a deficiency case and a whistleblower action, the court said. Jurisdiction under Section 7623(b) does not contemplate a redetermination of the tax liability of the taxpayer, it said.

Brady said there are numerous instances of quality information being provided to the whistleblower office where the IRS decided not to take action on that information for reasons unknown, but she said the service must allocate the resources they have available in an efficient manner.

She said the real danger in cases like *Cooper* is that it can suggest hostility toward tax whistleblower information, creating the impression that the IRS is still resistant to the assistance of whistleblowers.

“What *Cooper* says is, put your best package together, but if IRS decides not to pursue it, the whistleblower has no remedy,” Scarlatos said. The *Cooper* case was rightly decided, he said. If Congress wants the Tax Court to have jurisdiction to review the IRS's determination not to pursue a judicial or administrative remedy, then Congress will have to expressly state that, he said.

By Diane Freda