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# Federal Tax Course Letter

## TAX PRACTICE & PROCEDURE

# New Guidance Released on Whistleblower Program

Code Sec. 7623 authorizes the IRS authority in its discretion to pay awards to whistleblowers ranging from 15 percent to not more than 30 percent from the proceeds of amounts collected as a result of information provided by the informants. The Tax Relief and Health Care Act of 2006 expanded the scope of this program by creating a Whistleblower Office within the IRS to handle informant award claims, increasing the monetary incentive for informants to report alleged violations of the tax laws and offering an enhanced mechanism through which whistleblowers could enforce an award. In addition, the new law expanded the Tax Court's jurisdiction to hear appeals of certain award determinations made by the IRS's Whistleblower Office and added Code Sec. 7623(b), which sets forth the threshold requirements for filing a claim with the Whistleblower Office. Since the Whistleblower Office was created in December 2006, the IRS reports that it has received more than 80 claims.

In Notice 2008-4, IRB 2008-2, 253, the IRS provided guidance

regarding the filing of claims with the Whistleblower Office under Code Sec. 7623. The guidance addresses a host of threshold filing requirements and outlines how informants should report information relating to alleged noncompliance. The guidance also clarifies that existing outdated regulations issued under Code Sec. 7623(a), which grants the IRS the authority to pay awards, do not apply to the award program authorized by Code Sec. 7623(b).

### Form 211

Individuals submitting information under Code Sec. 7623 first file new Form 211, *Application for Award for Original Information*, which requires a claimant to provide information such as an estimate of the tax owed, facts related to the claim, an explanation of how the informant obtained the information, and documentation to substantiate the claim.

### Eligibility

To be eligible for an award under Code Sec. 7623(b), the tax, penalties, interest, additions to tax

and other additional amounts in dispute must exceed \$2 million and the individual against whom the charges are made also must have gross income that exceeds \$200,000 for each tax year at issue [Code Sec. 7623(b)(5)]. In addition, no award will be paid unless the information submitted to the IRS is submitted under penalty of perjury [Code Sec. 7623(b)(6)(C)]. If the threshold requirements of Code Sec. 7623(b) are not met, claims submitted under this provision are processed under Code Sec. 7623(a) which authorizes, but does not require, the IRS to pay for information relating to violations of the tax law that results in the government's recovery of tax. The Tax Court appeal provisions are applicable exclusively to award claims under Code Sec. 7623(b). Thus, there is no right to appeal to the Tax Court for claims under Code Sec. 7623(a).

### Awards Subject to Tax

All whistleblower awards must be reported as gross income on the recipient's federal income

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tax return and are subject to withholding requirements. Award recipients will receive a Form 1099, or other similar form detailing the award. In addition, an above-the-line deduction is permitted for costs and attorneys' fees paid in connection with any whistleblower award for providing information regarding violations of the tax laws. However, the deduction may not exceed the amount includible in the taxpayer's gross income as a result of such award [Code Sec. 62(a)(21)].

### Award Determinations

The Whistleblower Office will make the final determination whether an award will be paid and the amount of the award. Awards will be paid in proportion to the value of information furnished with respect to the proceeds collected, including penalties, interest, additions to tax and additional amounts. The information provided by the whistleblower must "substantially" contribute to the IRS's recovery of the tax. If the claimant planned and initiated the actions that led to the underpayment of tax, or to the violation of the internal revenue law, the Whistleblower Office may reduce the award. If the claimant is convicted of criminal conduct arising from his or her role in planning and initiating the action, the claim will be denied.

The IRS explains in Notice 2008-4 that if an action is based principally on allegations resulting from judicial or administrative proceedings, government reports, hearing, audit or investigation, or the media, the award may not exceed 10 percent of the collected proceeds, including penalties, interest, additions to tax and additional amounts

resulting from the action. This rule will not apply, however, if the IRS finds that the claimant was the initial source of the information that resulted in the judicial or administrative proceedings, government reports, hearing, audit or investigation, or the media's report on the allegations.

### Ineligible Claimants

The IRS will not process whistleblower claims submitted by Treasury employees, employees of any federal, state or local government acting within the scope of their duties as such, individuals who obtained the information while acting in an official capacity as a member of a state body or commission, individuals claiming anonymity or using an alias, or corporations, partnerships and other non-natural persons.

### Appeals

When the Whistleblower Office has made a final determination regarding a claim, the claimant will receive correspondence regarding its final award determination. Final determinations may be appealed to the Tax Court within 30 days of the determination [Code Sec. 7623(b)(4)]. The Tax Court's jurisdiction only extends to the review of award determinations pertaining to information provided by a whistleblower on or after December 26, 2006.

### Confidentiality

Notice 2008-4 provides that the IRS will protect the identity of the claimant unless the claimant is needed as a witness in the judicial proceeding. In this situation, it may be impossible to pursue the investigation or examination without revealing the identity of the claimant. ■