



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

DEPUTY COMMISSIONER

November 26, 2010

The Honorable Charles Grassley
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Senator Grassley:

I am responding to your letter of June 21, 2010, to Secretary Geithner in which you raised a number of concerns about the IRS Whistleblower Program and recent Internal Revenue Manual revisions relating to that program. I assure you that we regard the Whistleblower Program as a critical part of the IRS strategy to uncover tax cheats and to vigorously and appropriately administer our nation's tax laws. The IRS has committed significant resources to the Whistleblower Office since its formation in 2007, and I am pleased with the progress we have made to date in this important area. Senior IRS staff met with your staff on August 3, 2010, to discuss the concerns raised in your letter. At that time, IRS staff explained the legal and policy considerations underlying a number of the issues you raised. We stand ready to discuss these matters further with your staff.

In your letter, you wrote about our then current definition of "collected proceeds." As to this issue, we conducted a comprehensive review of the current regulations, IRM, statutory construction principles, public policy, and congressional intent on the collected proceeds issue. We have completed that review and soon will be issuing for public comment a proposed regulation to clarify that the term "collected proceeds" includes refund denials and overpayment credit offsets both for sections 7623(a) and 7623(b) claims. In addition, we have suspended those portions of the IRM that excluded refund denials and the reduction or elimination of overpayment credits from collected proceeds and will be replacing them as part of our work to implement the new collected proceeds guidance.

You also asked about the confidentiality provision required in section 25.2.2.8 of the new IRM. This provision was adopted to provide the whistleblower an opportunity to review taxpayer information relevant to the whistleblower's particular award determination while protecting the confidentiality of taxpayer information in the award determination proceeding.

Section 7623(b)(4) provides that any determination regarding an award under paragraph (1), (2) or (3) of section 7623(b) may be appealed to the United States Tax Court, and the Tax Court shall have jurisdiction with respect to such matter. As the IRS was developing procedures to implement the 2006 amendments to the

whistleblower statute, the IRS determined that it was important to develop an award determination administrative proceeding that was as transparent as possible to the individual claimant and that the United States Tax Court would respect and uphold as an administrative process in those cases involving appeals to that Court. As the Whistleblower Office worked with IRS Chief Counsel and the operating divisions to develop this administrative proceeding, it became clear that many of these proceedings could require the disclosure of substantial amounts of taxpayer information to the whistleblower for the individual to fully understand how the award was determined and to facilitate the whistleblower's participation in the award determination process.

The confidentiality process ultimately adopted, and set forth in IRM 25.2.2.8, requires the Whistleblower Office to present a preliminary award recommendation package to the whistleblower with an opportunity for the whistleblower to obtain and review relevant taxpayer information if the whistleblower agrees to execute a confidentiality agreement in advance of the IRS disclosing the taxpayer information to the whistleblower. The legal authority for disclosing the taxpayer information to the whistleblower was premised on the purpose of the disclosure—that it is necessary for the award determination administrative proceeding. The Whistleblower Office and others within the IRS were concerned about potential misuse of the taxpayer information by the whistleblower, however, and believed that protections were needed to restrict the whistleblower's use of the information to the purpose of the disclosure and comport with Code Section 6103. The IRS also wanted to provide reasonable assurances to taxpayers that their confidential information was not being released in an unrestricted manner to whistleblowers who have interests adverse to those of the taxpayer. The IRS felt that use of the information by the whistleblower for some other purpose would undermine the rationale for the use of the disclosure authority and could compromise the whistleblower program in the eyes of taxpayers. The confidentiality agreement required to be executed by a whistleblower before obtaining taxpayer information was designed to strike the appropriate balance between protecting confidentiality of taxpayer information and providing transparency to the whistleblower regarding the determination of award amounts.

There have not yet been any instances where a whistleblower was asked to execute a confidentiality agreement as part of the preliminary award recommendation package to obtain and review taxpayer information regarding a section 7623(b) claim made under the 2006 law. Further, under the confidentiality agreement procedures in IRM 25.2.2.8, the whistleblower is not required to execute a confidentiality agreement if he or she chooses to accept the preliminary award recommendation (either by taking no action or by notifying the Whistleblower Office of his or her acceptance of the preliminary award recommendation without requesting to obtain and review taxpayer information), in which case the Whistleblower Office will make the final award determination based on the preliminary recommendation without disclosing taxpayer information to the whistleblower.

IRM 25.2.2.8 requires a whistleblower to execute the confidentiality agreement and keep the taxpayer information confidential as a condition to obtaining and reviewing taxpayer information as part of the administrative proceeding. Under the IRM, the terms of the confidentiality agreement to be executed by those whistleblowers who request to obtain and review taxpayer information as part of the administrative proceeding are the terms set forth in Exhibit 25.2.2-10 of the IRM.

You asked about disclosure of information to the Congress. A confidentiality agreement entered into under the IRM provision would not preclude a whistleblower from providing certain information about the preliminary award package to the Congress, but would preclude the whistleblower from providing information disclosed to the whistleblower after execution of the confidentiality agreement and during the administrative proceeding involving the claim and award determination. However, section 6103 provides a framework for appropriate congressional access to taxpayer information and may be used in cases where a whistleblower wishes to bring an award claim to the attention of the Congress.

By executing the confidentiality agreement and commencing the administrative proceeding, the whistleblower is agreeing that use of any information disclosed as part of the administrative proceeding other than for the purpose of preparing comments on the award recommendation to the Director of the Whistleblower Office, or in appealing the Director's determination by petitioning the United States Tax Court, "may be considered" a negative factor in determining the award payable. Whether a particular disclosure of information to the Congress in violation of the confidentiality agreement would be considered a negative factor would depend on the facts and circumstances of the particular case.

You inquired about the process the IRS uses to review a request made by a particular informant (referred to as "XYZ" in your letter) for the IRS to increase the maximum award amount payable to that informant. This case involved a special agreement reached between the IRS and the informant in 2001, which capped the informant's award at a specified amount. The informant has received the maximum amount allowed for under the special agreement. The informant requested renegotiation of that agreement to increase the award cap beyond the specified maximum amount. The Whistleblower Executive Board, chaired by the Director of the Whistleblower Office, ultimately determined that the contract would not be renegotiated to increase the agreement's cap. The Whistleblower Executive Board determined by consensus that Mr. XYZ had been adequately compensated for his contributions, that the IRS had no legal obligation to compensate him further and that the special agreement should not be renegotiated.

You asked about the role the office of the Deputy Commissioner of Services and Enforcement played in this determination. The then Deputy Commissioner was present at the meeting at which the Board's final determination was made. However, as stated

above, this determination was a consensus determination made by the full board, which included the Director of the Whistleblower Office.

The Whistleblower Executive Board was created in July 2008 and meets periodically to address matters pertinent to administration of the Whistleblower Program within the IRS. The Board has not yet reviewed an award claim recommendation or determination.

You also asked whether the statute of limitations is a factor in many whistleblower claim submissions. In some cases, the applicable limitations periods have expired before the information is submitted and the IRS is unable to act. Generally, in cases where statute of limitations dates are imminent, the IRS has little practical opportunity to act; however, some actions may be possible on an expedited basis. In some cases, the IRS may take an issue raised by the whistleblower regarding a closed year and consider it for a year that is still open. The IRS has taken steps to reduce the time required for administrative processing of section 7623 submissions, and continues to explore additional ways to reduce this time.

If you have any questions, please contact me, or a member of your staff may contact Ron Schultz, Senior Advisor, at (202) 622-5992.

Sincerely,



Steven T. Miller