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**No. 21-1133**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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PATRICK KENNEDY,  
PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,  
RESPONDENT-APPELLEE

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ON APPEAL FROM THE ORDER AND DECISION OF THE  
UNITED STATES TAX COURT

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**BRIEF OF AMICUS CURIAE  
TAXPAYERS AGAINST FRAUD EDUCATION FUND  
IN SUPPORT OF PETITIONER-APPELLANT**

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## **CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES**

**A. Parties and Amici.** The parties appearing in the United States Tax Court and in this Court are petitioner-appellant Patrick Kennedy and the respondent-appellee the Commissioner of Internal Revenue. No amici or intervenors appeared before the Tax Court. Amicus Curiae Taxpayers Against Fraud Education Fund seeks to appear in this appeal.

**B. Ruling Under Review.** An accurate reference to the ruling at issue appears in Petitioner-Appellant's opening brief.

**C. Related Cases.** This case was not previously before this Court or any other appellate court to counsel's knowledge. Counsel is not aware of any related cases currently pending in this Court or in any other court, as provided in Cir. R. 28(a)(1)(C).

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund (“TAFEF”) states that it is a corporation organized under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the statutes and regulations governing the Internal Revenue Service’s tax whistleblower program.

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**GLOSSARY**

<b>Code</b>	<b>Internal Revenue Code (26 U.S.C.)</b>
<b>Commissioner</b>	<b>Commissioner of Internal Revenue, respondent-appellee</b>
<b>I.R.C.</b>	<b>Internal Revenue Code (26 U.S.C.)</b>
<b>IRM</b>	<b>Internal Revenue Manual</b>
<b>IRS or the Service</b>	<b>Internal Revenue Service</b>
<b>Kennedy</b>	<b>Patrick Kennedy, petitioner-appellant</b>
<b>Treas. Reg.</b>	<b>Treasury Regulations (26 C.F.R.)</b>
<b>WBO</b>	<b>IRS Whistleblower Office</b>



## **STATUTES AND REGULATIONS**

Relevant excerpts of the applicable statute are contained in the Brief for Appellee. Excerpts from Treas. Reg. § 301.7623-1 and more complete excerpts of Treas. Reg. § 301.7623-2 and Treas. Reg. § 301.7623-3 are included in the addendum attached hereto.

## INTEREST OF AMICUS CURIAE<sup>1</sup>

TAFEF is a non-profit public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to educate the public and the legal community about various whistleblower laws, including the IRS whistleblower provisions in 26 U.S.C. § 7623(b) at issue in this case. TAFEF regularly participates in litigation as amicus curiae. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAFEF has an interest in ensuring that 26 U.S.C. § 7623(b) is interpreted in the manner Congress intended. TAFEF takes no position on the particular facts of this appeal but contends that Congress intended that IRS whistleblowers have the right to Tax Court review of WBO denials that are predicated on the assertion the IRS either did not take an administrative or judicial action based on the whistleblower's information or did not collect proceeds as a result of such an action.

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<sup>1</sup> No party's counsel authored this brief in whole or in part, and no person other than the amicus curiae, its members, and its counsel contributed money intended to fund preparing or submitting this brief.

Both Appellant and Appellee have consented to the filing of this brief.

Appellee has consented on the condition that Appellee be given an opportunity to respond to this brief.

## SUMMARY OF ARGUMENT

The Commissioner argues that the “Tax Court lacked jurisdiction to review the WBO’s denial of Kennedy’s whistleblower claim because the WBO did not make a reviewable award determination.” Appellee’s Br. 28. The Commissioner bases this argument on this Court’s holding in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022), where the Court held that “[a] threshold rejection of a whistleblower’s Form 211 for vague and speculative information is not a negative award determination, as there is no determination as to an award under subsections (b)(1)-(3) whatsoever.” *Id.* at 1017.

The Commissioner now seeks to extend this Court’s holding to very different circumstances – not a “threshold rejection” by the WBO as in *Li*, but rather where a whistleblower’s information is deemed substantial enough to be forwarded to the relevant operating division of the IRS and where “the operating division ends its consideration of the claim either by declining to proceed with any action against the target taxpayer, or (where an action is taken) by not collecting any proceeds.” Appellee Br. 21. The Commissioner reasons that the Tax Court should not have jurisdiction in such circumstances, because the IRS whistleblower statute provides for an award only “when the IRS has both proceeded with an administrative or judicial action against a taxpayer based on the whistleblower’s

information and collected proceeds as a result of that action.” *Id.* at 29. The plain text of the statute, however, does not support the Commissioner’s argument.

Section 7623(b)(4), which grants the Tax Court jurisdiction to review whistleblower award decisions, broadly covers “[a]ny determination regarding an award.” As the Court recognized in *Li*, it would be pointless for the Tax Court to review threshold rejections of whistleblower submissions that never even reach an operating division. But once the IRS shares whistleblower information with the operating division, the information is combined with taxpayer information and it is possible the whistleblower information will then be used by the IRS in an administrative or judicial action against the referenced taxpayer and will result in the IRS’ collection of proceeds. Determinations regarding these key events, which are prerequisite to a whistleblower award, can present factual disputes that are appropriately subject to review by the Tax Court under section 7623(b)(4).

Consistent with this reasoning, and subsequent to its ruling in *Li*, this Court approvingly cited a Tax Court holding that it had jurisdiction over denials where the whistleblower’s information was shared with enforcement personnel, irrespective of whether it was established that enforcement personnel had taken action against the taxpayer based on the information. *Pinnavaia v. IRS*, 2022 WL 566475 at \*1 (D.C. Cir. Feb. 23, 2022), citing *Whistleblower 11332-13W v. Comm’r*, 142 T.C. 396, 401-02 (2014). The legislative history of section 7623,

which confirms Congress’s intent to incentivize and encourage tax whistleblowers, is consonant with this interpretation. Joint Committee on Taxation, Technical Explanation of H.R. 6408, The “Tax Relief and Health Care Act of 2006,” as Introduced in the House on December 7, 2006 (JCX-50-06) 89 (Dec. 7, 2006). Indeed, the IRS itself has embraced the same understanding in its governing regulations for years. The Court should thus decline the Government’s invitation to extend the holding in *Li* beyond the situation that gave rise to it, *viz.*, the WBO’s threshold “rejection” of a whistleblower’s claim.

## **I. BACKGROUND**

### **A. History of the IRS Whistleblower Program**

Section 7623(a) has long authorized the IRS, in its discretion, to reward tax whistleblowers by paying “such sums as deemed necessary for: (1) detecting underpayments of tax; and (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same.” 26 U.S.C. § 7623(a); *see also* UNITED STATES STATUTES AT LARGE, 39 Cong. Ch. 169, March 2, 1867, 14 Stat. 471, 473 (original statute authorizing the Commissioner “to pay such sums . . . as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same . . .”).

The discretionary award program, though, had significant limitations, including “arbitrary and inconsistent” issuance of awards, which could not be contested by whistleblowers. *Whistleblower 11332-13W*, 142 T.C. at 400. To remedy this and other perceived drawbacks of the discretionary system, Congress amended the IRS whistleblower program by including provisions in the Tax Relief and Health Care Act of 2006, Pub. L. 109—432, div. A., sec. 406, tit. IV, 120 Stat. 2922, 2958-60 (2006) (“the 2006 Act”) that were modeled, in part, after the successful False Claims Act whistleblower program.<sup>2</sup> The 2006 amendments reformed the whistleblower program to make the payment of awards to tax whistleblowers mandatory under specified circumstances. The 2006 Act also provided for the creation of the WBO to administer the program and granted

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<sup>2</sup> Department of Justice statistics report over \$48 billion collected in whistleblower cases under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, since it was amended in 1986, including over \$35 billion recovered since 2007. DOJ Civil Division, Press Release No. 22-83 (February 1, 2022) (including cumulative FCA Statistics), available at <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year> (accessed March 20, 2022); <https://www.justice.gov/opa/press-release/file/1467811/download> (accessed March 20, 2022). Since 2007, the tax whistleblower program “has led to the successful collection of \$6.14 billion from noncompliant taxpayers.” IRS Whistleblower Office - Annual Report to Congress (2020), Publication 5241 (Rev. 12-2020) Catalog Number 68435Z Department of the Treasury, available at <https://www.irs.gov/compliance/whistleblower-office-annual-reports> (accessed March 20, 2022).

whistleblowers the right to Tax Court review of the WBO's award determinations.

*Id.* at sec. 406(b)(1) & (4), 120 Stat. at 2960.

The Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 41108, 132 Stat. 64, 158-159 (2018), further reformed the tax whistleblower program by adding a new Internal Revenue Code subsection – 26 U.S.C. § 7623(c) - expanding the definition of “proceeds” for whistleblower awards.

In 2019, Congress amended the IRS Whistleblower program again to increase transparency and ensure that whistleblowers had more information about the handling of their tips and to provide tax whistleblowers a cause of action for retaliation. *See* Taxpayer First Act, Pub. L. No. 116-25, § 1405, 133 Stat. 981, 998-99 (2019).

Despite Congressional efforts to bolster the tax whistleblower program, though, the IRS still faced challenges with its implementation, including challenges with its handling of rejections and denials of claims. Reports of the Treasury Inspector General for Tax Administration and by the General Accounting Office describe some of the issues that can result in unsupported denials.<sup>3</sup>

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<sup>3</sup> *See, e.g.,* TIGTA, Ref. No. 2016-30-059, *The Whistleblower Program Helps Identify Tax Noncompliance; However, Improvements Are Needed to Ensure That Claims Are Processed Appropriately and Expeditiously* (August 30, 2016), available at <https://static1.squarespace.com/static/54b02e1de4b075f5535088d5/t/580e74b0197aeac3131b6c97/1477342386272/Aug+2016+TIGTA+Report.pdf> (accessed March



According to the WBO's most recent annual report to Congress, the WBO had 43 full time employees and received 9,077 claims in 2020. *Id.* at 17. In the same period, the WBO closed 11,135 cases. *Id.* at 20. Over half of the WBO's cases were "rejected" as a threshold matter based on the allegations being speculative or not specific or credible. *Id.* at 28. About 16% were denied based on the assertion that the examination result was "no change" or the result of the exam of the whistleblower issue was "no change." *Id.* Smaller percentages of cases were denied for other reasons, including, but not limited to, information being already known to the IRS (under 1%) or no collected proceeds (under 1%). *Id.* Of the 23,943 cases that remained active as of the date of the report, only 118 were section 7623(b) cases in litigation. *Id.* at 25.

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20, 2022) (“[W]e found 60 closures with processing inconsistencies that increase the risk of unsupported rejection/denial decisions, some of which are included under more than one category. We did not determine whether the claims were improperly closed as rejections/denials. However, the supporting documentation was not always provided, did not always match the closure reason recorded in E-TRAK, or did not clearly substantiate the reason for the decision”); GAO Report to the U.S. Senate Committee on Finance, Ref. No. GAO-18-698, *Whistleblower Program - IRS Needs to Improve Data Controls for Some Award Determinations*, 25-27 (September 2018), available at <https://static1.squarespace.com/static/54b02e1de4b075f5535088d5/t/5bd77cc1f4e1fc93692c6f91/1540848836476/Sept+2018+GAO+report.pdf> (accessed March 20, 2022) (“Because the FBAR data lack some reliability controls, IRS may rely on insufficient or incomplete data for reporting and decision making [e.g., blank date fields resulting in records not being pulled of FBAR penalty assessments], including amounts of whistleblower awards.”).

## **B. The Statutory Scheme**

Section 7623(b)(1) sets forth the general criteria under which the payment of an award to a whistleblower is mandatory. Pursuant to section 7623(b)(1),

[i]f the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary).

Sections 7623(b)(2) and (3) concern discrete circumstances under which an award otherwise owing under Section 7623(b)(1) may be reduced or denied.

Section 7623(b)(2) permits the Secretary to reduce the award in specified circumstances where the whistleblower's submission was based on public information, and section 7623(b)(3) permits the Secretary to reduce or deny the award if the whistleblower was involved in planning or initiating the subject tax violation.

Section 7623(b)(4) sets forth the Tax Court's broad jurisdiction to review any determinations by the IRS regarding an award under the foregoing three paragraphs:

Any determination regarding an award under paragraph (1), (2), or (3) [of Section 7623(b)] may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

26 U.S.C. § 7623(b)(4).<sup>4</sup>

### C. The Operation of the IRS Whistleblower Program

The IRS adopted regulations governing submissions of claims to the WBO office and award determinations. *See* Treas. Regs. §§ 301.7623-1, 301.7623-2,

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<sup>4</sup> While describing the statutory scheme, the Commissioner states that, to qualify for an award, “the IRS must have both initiated an administrative or judicial action and collected tax proceeds based on the appellant’s tip.” Appellee Br. at 17 (internal citations omitted). While this comment does not directly relate to jurisdiction, it quotes language from an unpublished decision by this Court in *Scott v. Commissioner*, No. 19-1022, 2020 WL 986942, at \*1 (D.C. Cir. Jan. 31, 2020), so it is worth noting that the summary is incorrect in two respects.

Section 7623(b)(1) requires only that the Secretary “proceeds with” an administrative or judicial action based on the whistleblower’s information; it does not require that the Secretary “initiate” an entirely new action. Indeed, it is for this reason that Treasury Regulations defining the term “collected proceeds” specifically provide for whistleblower awards in cases where a whistleblower’s information aids an ongoing audit as opposed to causing the initiation of an audit. Treas. Reg. § 301.7623-2(b) (“[T]he IRS proceeds based on the information provided when the IRS initiates a new action, *expands the scope of an ongoing action, or continues to pursue an ongoing action*, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided.”) (emphasis added).

Section 7623(b)(1) also does not specifically require that the IRS “collect[] tax proceeds *based* on the appellant’s tip.” Appellee Br. 17 (emphasis added). While the Secretary must have proceeded with an action “based on” the whistleblower’s information, once the Secretary has done so, the whistleblower is entitled to a percentage of the “proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary).” 26 U.S.C. § 7623(b)(2). That is, it is only necessary that the collected proceeds result from the action; the statute does not expressly require the whistleblower to then prove again that the funds collected in the action were collected based on the whistleblower’s information.

301.7623-3. A tax whistleblower claim is initiated by the filing of IRS Form 211. “When a whistleblower makes a Form 211 filing, the WBO follows several steps. First, it reviews the Form, and any related information, to determine whether the provided information may lead to the discovery of a tax violation. If the information is too vague or speculative, the WBO issues a rejection.” *Li*, 22 F.4th at 1016. “[A] rejection is appropriate when a whistleblower’s claim fails to comply with the threshold requirements as to who may submit a claim or what information the claim must include.” *Id.* (internal quotation omitted); Treas. Reg. § 301.7623-3(c)(7) (defining “rejection”).

If the claim makes it past the WBO’s threshold screening process and is forwarded to the relevant operating division, the IRS will subsequently issue either an award or a “denial.” If the IRS proceeds with an administrative or judicial action that results in collected proceeds, then the IRS may issue an award. 26 U.S.C. § 7623(b)(1). But if the IRS does not proceed with an action based on the whistleblower’s information, or if it proceeds but does not recover collected proceeds as a result, the WBO may issue a “denial” letter to the whistleblower. Treas. Reg. § 301.7623-3(c)(8) (defining “denial”). The WBO may also issue a denial if the whistleblower is criminally convicted based on their role in planning and initiating the actions that led to underpayment of tax. 26 U.S.C. § 7623(b)(3).

## II. ARGUMENT

### A. Section 7623(b)(4) Authorizes Tax Court Review of “Denials.”

Subject matter jurisdiction is resolved in the first instance by reference to the relevant statutory language. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Klein v. Commissioner*, 149 T.C. 341, 351 (2017).

Here, the relevant jurisdictional language provides for judicial review of “[a]ny determination regarding an award . . . .” 26 U.S.C. § 7623(b)(4) (emphasis added). “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster’s Third New International Dictionary 97 (1976)). The term “regarding” is also expansive and means “[i]n reference to; with respect to; concerning.” The American Heritage Dictionary of the English Language (5<sup>th</sup> ed. 2022), available at <https://www.ahdictionary.com/word/search.html?q=regarding>

The plain language of section 7623(b)(4) is thus very broad and covers determinations “of whatever kind” by the Service “with respect to” an award under paragraphs (1), (2), or (3) of section 7623(b).

In order for the IRS to make its first determination – *i.e.*, whether “an administrative or judicial action was taken” by the IRS based on information provided by a whistleblower – it must determine whether “the information provided substantially contribute[d] to an action against a person identified by the

whistleblower.” Treas. Reg. § 301.7623-2(b)(1). “For example, the IRS proceeds based on the information provided when the IRS initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided.” *Id.*

When a claim is “rejected” by the WBO at the outset and the whistleblower’s information does not even reach the operating division for further action, the IRS has not proceeded with any action and therefore the information could not have “substantially contribute[d] to an action,” *id.*, and there is no need for an award determination. Thus, as this Court noted in *Li*, “A threshold rejection of a whistleblower’s Form 211 for vague and speculative information is not a negative award determination, as there is no determination as to an award under subsections (b)(1)-(3) whatsoever.” *Li*, 22 F.4th at 1017. The whistleblower is simply “ineligible for an award.” *Id.* at 1015. “A threshold rejection of a Form 211 by nature means the IRS is not *proceeding* with an action against the target taxpayer,” *id.* at 1017, leaving nothing for the Tax Court to decide. *See Cohen v. Commissioner*, 139 T.C. 299, 301-302 (2012), *aff’d*, 550 F. App’x 10 (D.C. Cir. 2014) (propriety of non-enforcement decisions beyond purview of the Tax Court).

Once a whistleblower’s information has been forwarded to the operating division, though, Tax Court review of denials of awards is appropriate. At that

juncture, personnel in the operating division will have had an opportunity to read and consider the whistleblower's allegations, so the possibility exists that the whistleblower's information may have "substantially contributed" to enforcement efforts, and it therefore becomes necessary for the IRS to make a substantive determination as to whether a claim should be denied.

For example, if the IRS initiates an audit after a whistleblower's information is forwarded to the responsible operating division, the IRS might attribute that audit to the whistleblower, or it might contend that it would have still initiated the same action against the taxpayer without the benefit of the whistleblower's information.

Alternatively, in the case of an audit already existing or pending at the time the whistleblower information is received, the IRS may contend that, even if the whistleblower's information were beneficial, the IRS would have continued to pursue its audit or expanded it to the same extent, even without the benefit of the whistleblower's information.

In either scenario, if the IRS parses between which personnel were formally given the whistleblower's information in the operating division, still a substantive factual issue may remain as whether any of the whistleblower's information was nonetheless shared with others in the division including the exam team.

Regarding the question of collected proceeds, similar factual issues arise. When the IRS acknowledges that it has taken an action with respect to a taxpayer based on a whistleblower's information, it may contend that it did not collect proceeds from the taxpayer based on the whistleblower's information. There may also be disputes about whether, *inter alia*, the IRS correctly calculated the collection of proceeds, whether the IRS included the denial of a refund claim by the taxpayer as collected proceeds, or whether the taxpayer amended a past return due to the information provided by the whistleblower. *See* Treas. Reg. § 301.7623-2(d) (listing different forms of "collected proceeds"); *see also* Treas. Reg. § 301.7623-2(c) (defining what actions qualify as "related actions," i.e., actions against persons not identified in the information provided).

In all the above circumstances, there is ample room for factual disputes, yet the IRS is unilaterally making substantive determinations that implicate the government's financial interest vis-a-vis the whistleblower's interests, determinations that also reflect on the efficacy of the Service's independent auditing efforts versus those aided by information from whistleblowers. Denials predicated on such substantive decisions by the IRS are appropriate for review and easily fall within the plain statement in the statute that "any determination regarding an award" is subject to review. 26 U.S.C. § 7623(b)(4); *see also* *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6



(2000) (“[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.”) (internal quotation marks omitted).

Indeed, even beyond the above-described potential for disputes about past events, the IRS’s proposed two-step jurisdictional test – requiring proof of an action based on the whistleblowers information and proof of collected proceeds – is also flawed in that it does not take into account future events. For example, the IRS could potentially issue a denial in connection with an action, before it was even known whether the action in question might result in collected proceeds. Access to review at that stage would be necessary, because the possibility would remain that proceeds may be collected at some future date. Otherwise, as the time limit for filing an appeal of a denial is 30 days, 26 U.S.C. 7623(b)(4), requiring proof of collected proceeds as a prerequisite to subject matter jurisdiction could lead to denials being entirely unreviewable.

**B. The Government’s Reliance on *Li* is Misplaced.**

This Court has previously distinguished between the situation at issue in *Li*, where the IRS rejected the whistleblower submission at the outset, and situations where the IRS has forwarded the whistleblower’s information to the operating division but then later issued a denial. In *Li* itself, this Court expressly noted “we need not and do not decide whether the Tax Court would have jurisdiction to hear a

whistleblower's claim in a case in which the IRS wrongly denied a Form 211 application but nevertheless proceeded against a target taxpayer based on the provided information." *Li*, 22 F.4th at 1017. Subsequent to *Li*, this Court, while dealing with a separate jurisdictional issue, cited with approval a Tax Court opinion that answered the question left open in *Li* in the affirmative. *See Pinnavaia v. IRS*, 2022 WL 566475 at \*1 (D.C. Cir. Feb. 23, 2022), citing with approval, *Whistleblower 11332-13W v. Comm'r*, 142 T.C. 396, 401-02 (2014).

In *Whistleblower 11332-13W*, the whistleblower challenged a denial by the WBO, alleging he had aided the IRS in an ongoing investigation after the passage of the Tax Relief and Health Care Act of 2006. The Commissioner filed a motion to dismiss based on lack of jurisdiction, but the Tax Court denied the motion, holding that "the whistleblower satisfied the whistleblower's pleading burden by alleging facts that respondent proceeded with an action against the targets using information brought to respondent's attention by the whistleblower . . . ." 142 T.C. at 402. "Whether respondent used this information to proceed against the targets is not a question for the present motion. The whistleblower has alleged sufficient jurisdictional facts to avail the whistleblower of section 7623(b)(1) for jurisdictional purposes and to overcome a motion to dismiss for lack of jurisdiction." *Id.* at 404. "Where jurisdiction turns on contested facts, allegations in the petition are generally taken as true for purposes of deciding a motion to

dismiss for lack of jurisdiction. . . . The issue is whether the claimant is entitled to offer evidence to support the claims, not whether the claimant will ultimately prevail on the merits.” *Id.* at 400.

The Tax Court’s holding on these points is consistent with well-established authority in this Circuit. In considering a motion to dismiss for lack of subject matter jurisdiction, the “court may properly consider allegations in the complaint and evidentiary material in the record . . . but is obligated, at this threshold stage, prior to any discovery, to accord [plaintiff] the benefit of all reasonable inferences. . . . Absent evidentiary offering here, weighing the plausibility of [plaintiff’s] allegations was for a later stage of the proceedings . . . , as was assessing the credibility of [plaintiff’s] allegations.” *Feldman v. Fed. Deposit Ins. Corp.*, 879 F.3d 347, 351 (D.C. Cir. 2018) (internal citations omitted).

The Tax Court thus correctly concluded in *Whistleblower 11332-13W* that when there are contested facts, including whether the IRS proceeded with an action and/or whether it collected proceeds, the Tax Court has jurisdiction over the petition to review denial of a claim.

### **C. The Legislative History Supports Review of “Denials.”**

The legislative history of the whistleblower statute regarding its jurisdictional provision supports the conclusion that the Tax Court has jurisdiction to review denials of awards where there are factual disputes as to whether the IRS

proceeded with an action or collected proceeds. While no House or Senate Reports were prepared for the Tax Relief and Health Care Act (H.R. 6111, 6406, and 6408), the Joint Committee on Taxation published a report on the 2006 Act, explaining that a whistleblower may “appeal the amount or a denial of an award determination.” Joint Committee on Taxation, Technical Explanation of H.R. 6408, The “Tax Relief and Health Care Act of 2006,” as Introduced in the House on December 7, 2006 (JCX-50-06) 89 (Dec. 7, 2006); *see* Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 109th Congress (JCS-1-07) 745-46 (Jan. 17, 2007) (same).

The Joint Report makes no mention of the two-step hurdle to jurisdiction – proof of an action and collected proceeds – proposed by the Commissioner. To the contrary, the Report describes the Tax Court’s jurisdiction expansively to include appeals of either “the amount” of an award *or* “the denial” of an award.

**D. The IRS’s Own Regulations Embrace Review of “Denials.”**

The IRS’s own regulations explicitly state the IRS’s heretofore undisputed understanding that determinations regarding whether an operating division took action or whether the action resulted in collected proceeds are independently subject to review by the Tax Court.

Treasury Regulation § 301.7623-3(c)(8) explains that denials of awards for either reason are “determinations” regarding a claim for an award:

**(8) Denials.** A denial is a determination that relates to or implicates taxpayer information. If, *with respect to a claim for award* under section 7623(b), the IRS *either* did not proceed based on the information provided by the whistleblower, as defined in § 301.7623-2(b), *or* did not collect proceeds, as defined in § 301.7623-2(d), then the Whistleblower Office will . . . send to the whistleblower a preliminary denial letter that states the basis for the denial of the claim.”

Treas. Reg. § 301.7623-3(c)(8) (emphasis added).

The following paragraph in the regulation then states that any such determination [i.e., “denial”] may be appealed to Tax Court. Treas. Reg. § 301.7623-3(d) (“Any determination regarding an award under section 7623(b)(1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court.”).

The Commissioner correctly points out that the Court is obliged to inquire into its own jurisdiction, but the point remains that the IRS has long interpreted the statute in a manner consistent with the plain meaning of the jurisdictional language in section 7623(b)(4). It is the Commissioner’s recent efforts to impose new requirements for subject matter jurisdiction – proof of both an action based on the whistleblower’s information and proceeds collected as a result — that is at odds with the plain meaning of the statute.

Notably, in the same regulations, the IRS also recognized that “rejections” and “denials” are qualitatively different. While a rejection “is a determination that relates solely to the whistleblower and the information on the face of the claim that

pertains to the whistleblower.” Treas. Reg. § 301.7623-3(c)(7), a denial “relates to or implicates taxpayer information.” Treas. Reg. § 301.7623-3(c)(8). In the latter circumstances, where whistleblower information is combined with the IRS’s taxpayer information, as happens when the information is forwarded to the operating division, the possibility of substantive error exists, and the need for judicial review arises as provided by statute. By contrast, when a claim is “rejected,” “the whistleblower may perfect and resubmit the claim.” Treas. Reg. § 301.7623-1(c)(4).

**E. Public Policy Supports Tax Court Jurisdiction Over “Denials.”**

According to the Government, “[t]he conclusion that the Tax Court lacks jurisdiction both when there has been no action taken and also when no proceeds have been collected will not prevent the Tax Court from testing any allegations raised by whistleblowers that those requirements have not been met.” Appellee Br. at 26. But this is akin to saying that the Tax Court can only take jurisdiction over a whistleblower case involving a “denial” under section 7623(b)(1) once the whistleblower has already prevailed on the entirety of the merits in the case. In practice, this would mean once jurisdiction had been established, nothing would remain for the Tax Court to decide in most instances.<sup>5</sup> The Government suggests

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<sup>5</sup> The rare issue of whether a whistleblower’s claim should be denied based on the whistleblower being criminally convicted for planning and initiating the tax violation might remain in limited situations. *See* 26 U.S.C. § 7623(b)(3).

that “if a whistleblower were to allege there had been both an action and collection of proceeds, the Tax Court could then determine if those allegations were true in order to determine whether the WBO had made an award determination that it could review.” *Id.* But when the WBO issues a denial under section 7623(b)(1), there has *a fortiori* been no decision as to an award amount, so it would not be available for review.

Indeed, to reverse a mistaken denial, the Tax Court does not even necessarily need to conclude that an action was taken based on the whistleblower’s information or that proceeds were collected as a result. It could simply be that the denial was issued without an adequate basis. All that generally remains in such circumstances is for the case to be remanded back to the WBO for further consideration. *See e.g., Whistleblower 769-16W v. Comm’r*, 152 T.C. No. 10, 13-15 (2019) (case remanded to WBO after showing that WBO failed to take potentially relevant evidence into consideration). The Government’s constricted interpretation is thus not only at odds with Congress’s continuing policy of incentivizing whistleblowers and increasing accountability; it also disserves judicial economy.<sup>6</sup>

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<sup>6</sup> When the Tax Court has jurisdiction over challenges to WBO denials, petitioners are entitled to receive a copy of the administrative record, which helps shed light on the basis for the denials. *See Van Bemmelen v. Comm’r*, 155 T.C. 4, 15-16 (2020) (describing requirements for designating administrative record in tax

### III. CONCLUSION

This Court should decline the Commissioner's invitation to extend *Li* beyond the specific and limited circumstance it was meant to address – threshold rejections of claims where the whistleblower's information had not been forwarded by the WBO and there was therefore no possibility “whatsoever” of an award.

Respectfully submitted,

Date: March 24, 2022

By: /s/ Paul D. Scott

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whistleblower cases); Tax Court Rule 70(a)(1) (petitioner's entitlement to discovery); *Branerton Corporation v. Commissioner*, 61 T.C. 691 (1974) (describing informal discovery procedure applicable to Tax Court). Upon receipt of that information, if their cases are without merit, whistleblowers can dismiss their petitions, without the Tax Court having to rule on the merits. Accordingly, if a jurisdictional battle were necessary before the IRS disclosed the administrative record, the motion practice around that issue would create an additional unnecessary burden on the Tax Court in cases that otherwise might simply be dismissed.



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Dated: March 24, 2022

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I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on March 24th, 2022.

I further certify that on this 24th day of March, 2022, I electronically mailed a copy of this brief, to the appellant and the appellee, to the following email addresses:

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I further certify that appellant and appellee agreed to this manner of electronic service in writing in accordance with Fed. R. App. P. 25(c)(2)(B).

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**ADDENDUM  
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## **26 CFR § 301.7623-1 General rules, submitting information on underpayments of **tax** or violations of the internal revenue laws, and filing claims for award.**

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**(c)(4) Perfecting claim for award.** If a whistleblower files a claim for award that does not include information described under [paragraph \(c\)\(2\)](#) of this section, does not contain specific and credible information as described in [paragraph \(c\)\(1\)](#) of this section, or is based on information that was not submitted under [penalty](#) of perjury as required by [paragraph \(c\)\(3\)](#) of this section, the Whistleblower Office may reject the claim or notify the whistleblower of the deficiencies and provide the whistleblower an opportunity to perfect the claim for award. If a whistleblower does not perfect the claim for award within the time period specified by the Whistleblower Office, then the Whistleblower Office may reject the claim. If the Whistleblower Office rejects a claim, then the Whistleblower Office will provide [notice](#) of the rejection to the whistleblower pursuant to the rules of § 301.7623-3(b)(3) or (c)(7). If the Whistleblower Office rejects a claim for the reasons described in this paragraph, then the whistleblower may perfect and resubmit the claim.

## § 301.7623-2 Definitions.

### (a) *Action.*

**(1) *In general.*** For purposes of section 7623(b) and §§ 301.7623-1 through 301.7623-4, the term *action* means an administrative or judicial action.

**(2) *Administrative action.*** For purposes of section 7623(b) and §§ 301.7623-1 through 301.7623-4, the term *administrative action* means all or a portion of an Internal Revenue Service (IRS) civil or criminal proceeding against any person that may result in collected proceeds, as defined in paragraph (d) of this section, including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation.

**(3) *Judicial action.*** For purposes of section 7623(b) and §§ 301.7623-1 through 301.7623-4, the term *judicial action* means all or a portion of a proceeding against any person in any court that may result in collected proceeds, as defined in paragraph (d) of this section.

### (b) *Proceeds based on.*

**(1) *In general.*** For purposes of section 7623(b) and §§ 301.7623-1 through 301.7623-4, the IRS *proceeds based on* information provided by a whistleblower when the information provided substantially contributes to an action against a person identified by the whistleblower. For example, the IRS *proceeds based on* the information provided when the IRS initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided. The IRS does not proceed based on information when the IRS analyzes the information provided or investigates a matter raised by the information provided.

**(2) *Examples.*** The provisions of paragraph (b)(1) of this section may be illustrated by the following examples:

#### **EXAMPLE 1.**

Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623-1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's foreign sales in Country A, and, based on those facts, alleges that the taxpayer was not entitled to a foreign tax credit relating to its foreign sales in Country A. The IRS receives the information after having already initiated an examination of the taxpayer. The IRS's audit plan includes foreign tax credit issues but focuses on taxpayer's foreign sales in Country B and does not specifically address the taxpayer's foreign sales in Country A. Based on the information provided, the IRS expands the

examination of the foreign tax credit issue to include consideration of the amount of foreign tax credit relating to the taxpayer's foreign sales in Country A. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the portion of the IRS's examination of the taxpayer relating to the foreign tax credit issue with respect to Country A is an administrative action with which the IRS proceeds based on the information provided by the whistleblower because the information provided substantially contributed to the action by causing the expansion of the IRS's examination.

**EXAMPLE 2.**

Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623-1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes in Year 1. The IRS proceeds with an examination of the taxpayer for Year 1 based on the information provided by the whistleblower. The IRS discovers that the taxpayer engaged in the same activities in Year 2 and expands the examination to Year 2. In the course of the examination, the IRS obtains, through the issuance of Information Document Requests (IDRs) and summonses, additional facts that are unrelated to the activities described in the information provided by the whistleblower. Based on these additional facts, the IRS expands the scope of the examination of the taxpayer for both Year 1 and Year 2. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the portion of the IRS's examination relating to the activities described and documented in the information provided is an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided substantially contributed to the action by causing the expansion of the IRS's examination of Year 1 and Year 2. The portions of the IRS's examination of the taxpayer in both Year 1 and Year 2 relating to the additional facts obtained through the issuance of IDRs and summonses are not actions with which the IRS proceeds based on the information provided by the whistleblower because the information provided did not substantially contribute to the action.

**EXAMPLE 3.**

Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623-1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes in Year 1. The IRS receives the information after having already initiated an examination of the taxpayer for Year 1. During the examination, the information is provided to the Exam team and the Exam team uses the information provided to confirm the correctness of adjustments made based on other information. Although the whistleblower's information confirms the correctness of the IRS's adjustments, the IRS does not rely on the whistleblower's information when it makes the adjustments, nor does the information cause the IRS to expand

the scope of its examination. The whistleblower's information merely supports information independently obtained by the IRS. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the IRS's examination is not an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided did not substantially contribute to the action.

**EXAMPLE 4.**

Same facts as *Example 3*. During the examination, however, the Exam team identifies inconsistencies between the information provided by the whistleblower and other information already in the Exam team's possession. The Exam team uses the information provided by the whistleblower to make additional adjustments that it would not have made based solely on the other information. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the portion of the IRS's examination relating to the additional adjustments is an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided substantially contributed to the action.

**(c) Related action.**

**(1) In general.** For purposes of section 7623(b) and §§ 301.7623-1 through 301.7623-4, the term *related action* means an action against a person other than the person(s) identified in the information provided and subject to the original action(s), when -

**(i)** The facts relating to the underpayment of tax or violations of the internal revenue laws by the other person are substantially the same as the facts described and documented in the information provided (with respect to the person(s) subject to the original action);

**(ii)** The IRS proceeds with the action against the other person based on the specific facts described and documented in the information provided; and

**(iii)** The other, unidentified person is related to the person identified in the information provided. For purposes of this paragraph, an unidentified person is related to the person identified in the information provided if the IRS can identify the unidentified person using the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information).

**(2) Examples.** The provisions of paragraph (c)(1) of this section may be illustrated by the following examples:

**EXAMPLE 1.**



Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623-1, identifies a taxpayer (Taxpayer 1), describes and documents specific facts relating to Taxpayer 1's activities, and, based on those facts, alleges tax underpayments by Taxpayer 1. The information provided also identifies an accountant (CPA 1) and describes and documents specific facts relating to CPA 1's contribution to the activities of Taxpayer 1 that the whistleblower alleges resulted in tax underpayments. The IRS proceeds with an examination of Taxpayer 1 based on the information provided by the whistleblower. Using the information provided, the IRS obtains CPA 1's client list and identifies two taxpayer/clients of CPA 1 (Taxpayer 2 and Taxpayer 3) that appear to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 2 and finds that Taxpayer 2 engaged in the same activities as those described in the information provided with respect to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 3 and finds that Taxpayer 3 engaged in different activities from those described in the information provided with respect to Taxpayer 1. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the examination of Taxpayer 2 is a related action because it satisfies the conditions of paragraph (c)(1) of this section. The examination of Taxpayer 3 is not a related action because the relevant facts are not substantially the same as the facts relevant to the examination of Taxpayer 1.

**EXAMPLE 2.**

Same facts as *Example 1*. Using the information provided by the whistleblower, the IRS identifies a co-promoter of CPA 1 (CPA 2) that appears to have engaged in activities similar to CPA 1. CPA 2 is not a member of CPA 1's firm. The IRS subsequently obtains the client list of CPA 2 and identifies a taxpayer/client of CPA 2 (Taxpayer 4) that appears to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 4 and finds that Taxpayer 4 engaged in the same activities as those described in the information provided with respect to Taxpayer 1, and that CPA 2 contributed to the activities in the same way as described in the information provided with respect to CPA 1. The IRS proceeds with an examination of CPA 2's liability for promoter penalties under section 6700 in connection with the activities described in the information provided with respect to Taxpayer 1 and CPA 1. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the examination of CPA 2 is a related action because it satisfies the conditions of paragraph (c)(1) of this section. The examination of Taxpayer 4 is not a related action because Taxpayer 4 was not related to a person identified in the information provided. CPA 2 was not identified in the information provided and the IRS first had to identify CPA 2 before identifying Taxpayer 4 and proceeding with the examination of Taxpayer 4.

**EXAMPLE 3.**

Same facts as *Example 1*. An accountant (CPA 3) is a member of CPA 1's firm. Using the information provided by the whistleblower, the IRS obtains the client list of CPA 3 and identifies a taxpayer/client of CPA 3 (Taxpayer 5) that appears to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 5 and finds that Taxpayer 5 engaged in the same activities as those described in the information provided with respect to Taxpayer 1, and that CPA 3 contributed to the activities in the same way as described in the information provided with respect to CPA 1. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the examination of Taxpayer 5 is a related action because Taxpayer 5 is related to CPA 3, a person considered to be identified in the information provided under § 301.7623-1(c)(1), and the facts relating to Taxpayer 5 are substantially the same as the facts described and documented in the information provided. An IRS examination of CPA 3's liability for promoter penalties under section 6700, based on the facts described and documented in the information provided with respect to Taxpayer 1 and CPA 1, is an administrative action based on the information provided.

**EXAMPLE 4.**

Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623-1, identifies a taxpayer (Taxpayer 1), describes and documents specific facts relating to Taxpayer 1's activities, and, in particular, Taxpayer 1's participation in a transaction. Based on those facts, the whistleblower alleges that Taxpayer 1 owed additional taxes. The IRS proceeds with an examination of Taxpayer 1 based on the information provided by the whistleblower. The IRS identifies the other parties to the transaction described in the information provided (Taxpayer 2 and Taxpayer 3). The IRS proceeds with examinations of Taxpayer 2 and Taxpayer 3 relating to their participation in the transaction described in the information provided. For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the IRS's examinations of Taxpayer 2 and Taxpayer 3 relating to the activities described and documented in the information provided are related actions because they satisfy the conditions of paragraph (c)(1) of this section.

**(d) Collected proceeds.**

**(1) In general.** For purposes of section 7623 and §§ 301.7623-1 through 301.7623-4, the terms *proceeds of amounts collected* and *collected proceeds* (collectively, *collected proceeds*) include: Tax, penalties, interest, additions to tax, and additional amounts collected because of the information provided; amounts collected prior to receipt of the information if the information provided results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information

provided. **Collected proceeds** are limited to amounts collected under the provisions of title 26, United States Code.

**(2) Refund netting.**

**(i) In general.** If any portion of a claim for refund that is substantively unrelated to the information provided is -

**(A)** Allowed, and

**(B)** Used to satisfy a **tax** liability attributable to the information provided instead of refunded to the **taxpayer**, then the allowed but non-refunded amount constitutes **collected proceeds**.

**(ii) Example.** The provisions of **paragraph (d)(2)(i)** of this section may be illustrated by the following example:

**EXAMPLE.**

Information provided to the IRS by a whistleblower, under section 7623 and **§ 301.7623-1**, identifies a corporate taxpayer (Corporation), describes and documents specific facts relating to Corporation's activities, and, based on those facts, alleges that Corporation owed additional taxes. Based on the information provided by the whistleblower, the IRS proceeds with an examination of Corporation and determines adjustments that would result in an unpaid tax liability of \$500,000. During the examination, Corporation informally claims a refund of \$400,000 based on adjustments to items of income and expense that are wholly unrelated to the information provided by the whistleblower. The IRS agrees to the unrelated adjustments. The IRS nets the adjustments and determines a tax deficiency of \$100,000. Thereafter, Corporation makes full payment of the \$100,000 deficiency. For purposes of section 7623 and **§§ 301.7623-1** through 301.7623-4, the collected proceeds include the \$400,000 informally claimed as a refund and netted against the adjustments attributable to the information provided, as well as the \$100,000 paid by Corporation.

**(3) Amended returns.** Amounts collected based on **amended returns** constitute **collected proceeds** if -

**(i)** The IRS **proceeds based on** the information provided;

**(ii)** As a **result**, the **person** subject to the action(s) with which the IRS proceeds files **amended returns**; and

**(iii)** The amounts collected based on the **amended returns** relate to the activities or facts described in the information provided.

**(4) Criminal fines.** **Criminal fines** deposited into the Crime Victims Fund are not **collected proceeds** and cannot be used for **payment** of awards.

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**(5) Computation of collected proceeds.**

**(i) In general.** Pursuant to § 301.7623-4(d)(1), the IRS cannot make an award payment until there has been a final determination of tax. For purposes of determining the amount of an award under section 7623 and §§ 301.7623-1 through 301.7623-4, after there has been a final determination of tax as defined in § 301.7623-4(d)(2), the IRS will compute the amount of collected proceeds based on all information known with respect to the taxpayer's account, including with respect to all tax attributes, as of the date the computation is made.

**(ii) Post-determination proceeds.** If, based on all information known with respect to the taxpayer's account as of the date of the computation described in paragraph (d)(5)(i) of this section, there is a possibility that the IRS may collect additional proceeds, then the Whistleblower Office will continue to monitor the case. If the Whistleblower Office identifies additional collected proceeds, then the IRS will compute and pay accordingly.

**(iii) Partial collection.** If the IRS does not collect the full amount of taxes, penalties, interest, additions to tax, and additional amounts assessed against the taxpayer, then any amounts that the IRS does collect will constitute collected proceeds in the same proportion that the adjustments attributable to the information provided bear to the total adjustments.

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## **26 C.F.R. § 301.7623-3 Whistleblower administrative proceedings and appeals of award determinations.**

**(a) In general.** The Whistleblower Office will pay awards under section 7623(a) and determine and pay awards under section 7623(b) in whistleblower administrative proceedings pursuant to the rules of this section. The whistleblower administrative proceedings described in this section are administrative proceedings pertaining to [tax](#) administration for [purposes](#) of section 6103(h)(4). See [§ 301.6103\(h\)\(4\)-1](#) for [additional rules](#) regarding disclosures of return information in whistleblower administrative proceedings. The Whistleblower Office may determine awards for claims involving multiple [actions](#) in a single whistleblower administrative proceeding. For [purposes](#) of the whistleblower administrative proceedings for [rejections and denials](#), described in paragraphs (b)(3), (c)(7), and (c)(8) of this section, the Internal Revenue Service (IRS) may rely on the whistleblower's description of the amount owed by the taxpayer(s). The IRS may, however, rely on other information as necessary (for [example](#), when the alleged [amount in dispute](#) is below the \$2 million threshold of section 7623(b)(5)(B), but the actual [amount in dispute](#) is above the threshold).

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### **(c) Awards under section 7623(b).**

**(1) Preliminary award recommendation.** For claims under section 7623(b) other than those described in paragraphs (c)(7) and (c)(8) of this section (rejections and denials), the Whistleblower Office will prepare a [preliminary award recommendation](#) based on the Whistleblower Office's review of the [administrative claim file](#) and the application of the rules of section 7623 and [§§ 301.7623-1](#) through 301.7623-4 to the facts of the case. See [paragraph \(e\)\(2\)](#) of this section for a description of the [administrative claim file](#). The whistleblower administrative proceeding described in paragraphs (c)(1) through (6) of this section begins on the date the Whistleblower Office sends the [preliminary award recommendation](#) letter. The [preliminary award recommendation](#) is not a [determination letter](#) within the meaning of [paragraph \(c\)\(6\)](#) of this section and cannot be appealed to [Tax](#) Court under section 7623(b)(4) and [paragraph \(d\)](#) of this section. The [preliminary award recommendation](#) will notify the whistleblower that the IRS cannot determine or pay any award until there is a final [determination](#) of [tax](#), as defined in [§ 301.7623-4\(d\)\(2\)](#).

**(2) Contents of preliminary award recommendation.** The Whistleblower Office will communicate the [preliminary award recommendation](#) under section 7623(b) to the whistleblower by sending -

- (i) A [preliminary award recommendation](#) letter that describes the whistleblower's options for responding to the [preliminary award recommendation](#);
- (ii) A summary report that [states](#) a preliminary computation of the amount of [collected proceeds](#), the recommended award percentage, the recommended award amount (even in cases when the application of section 7623(b)(2) or section 7623(b)(3) [results](#) in a reduction of the recommended award amount to zero), and a list of the factors that contributed to the recommended award percentage;
- (iii) An award consent form; and
- (iv) A confidentiality agreement.

**(3) Opportunity to respond to preliminary award**

**recommendation.** The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the [preliminary award recommendation](#) letter to respond to the [preliminary award recommendation](#) in one of the following ways -

- (i) If the whistleblower takes no [action](#), then the Whistleblower Office will make an award [determination](#), pursuant to [paragraph \(c\)\(6\)](#) of this section;
- (ii) If the whistleblower signs, dates, and returns the award consent form agreeing to the [preliminary award recommendation](#) and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award [determination](#), pursuant to [paragraph \(c\)\(6\)](#) of this section;
- (iii) If the whistleblower signs, dates, and returns the confidentiality agreement, then the Whistleblower Office will provide the whistleblower with a detailed award report, and an opportunity to review documents supporting the report pursuant to paragraphs (c)(4) and (5) of this section, and any comments submitted by the whistleblower will be added to the [administrative claim file](#); or
- (iv) If the whistleblower submits comments on the [preliminary award recommendation](#) to the Whistleblower Office, but does not sign, date, and return the confidentiality agreement, then the comments will be added to the [administrative claim file](#) and reviewed by the Whistleblower Office in making an award [determination](#), pursuant to [paragraph \(c\)\(6\)](#) of this section.

**(4) Detailed report.**



**(i) Contents of detailed report.** If the whistleblower signs, dates, and returns the confidentiality agreement accompanying the [preliminary award recommendation](#) under section 7623(b), pursuant to [paragraph \(c\)\(3\)](#) of this section, then the Whistleblower Office will send the whistleblower -

**(A)** A [detailed report](#) that [states](#) a preliminary computation of the amount of [collected proceeds](#), the recommended award percentage, and the recommended award amount, and provides a full explanation of the factors that contributed to the recommended award percentage;

**(B)** Instructions for scheduling an appointment for the whistleblower (and the whistleblower's legal representative, if any) to review information in the [administrative claim file](#) that is not protected by one or more common law or statutory privileges; and

**(C)** An award consent form.

**(ii) Opportunity to respond to detailed report.** The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the [detailed report](#) to respond in one of the following ways -

**(A)** If the whistleblower takes no [action](#), then the Whistleblower Office will make an award [determination](#), pursuant to [paragraph \(c\)\(6\)](#) of this section;

**(B)** If the whistleblower [requests](#) an appointment to review information from the [administrative claim file](#) that is not protected from disclosure by one or more common law or statutory privileges, then a meeting will be arranged pursuant to [paragraph \(c\)\(5\)](#) of this section;

**(C)** If the whistleblower does not [request](#) an appointment but does submit comments on the [detailed report](#) to the Whistleblower Office, then the comments will be added to the [administrative claim file](#) and reviewed by the Whistleblower Office in making an award [determination](#) pursuant to [paragraph \(c\)\(6\)](#) of this section; or

**(D)** If the whistleblower signs, dates, and returns the award consent form agreeing to the [preliminary award recommendation](#) and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award [determination](#), pursuant to [paragraph \(c\)\(6\)](#) of this section.

**(iii) Additional rules.** The [detailed report](#) is not a [determination letter](#) within the meaning of [paragraph \(c\)\(6\)](#) of this section and cannot be appealed to [Tax](#) Court under section 7623(b)(4) and [paragraph \(d\)](#) of

this section. The [detailed report](#) will notify the whistleblower that the IRS cannot determine or pay any award until there is a final [determination](#) of [tax](#), as defined in § 301.7623-4(d)(2).

**(5) Opportunity to review documents supporting award report recommendations.** Appointments for the whistleblower (and the whistleblower's legal representative, if any) to review information from the [administrative claim file](#) that is not protected from disclosure by one or more common law or statutory privileges will be held at the Whistleblower Office in Washington, DC, unless the Whistleblower Office, in its sole discretion, decides to hold the meeting at another location. At the appointment, the Whistleblower Office will provide for viewing the information from the [administrative claim file](#). The Whistleblower Office will supervise the whistleblower's review of the information and the whistleblower will not be permitted to make [copies](#) of any documents or other information. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date of the appointment to submit comments on the [detailed report](#) and the documents reviewed at the appointment to the Whistleblower Office. All comments will be added to the [administrative claim file](#) and reviewed by the Whistleblower Office in making an award [determination](#), pursuant to [paragraph \(c\)\(6\)](#) of this section.

**(6) Determination letter.** After the whistleblower's participation in the whistleblower administrative proceeding, pursuant to [paragraph \(c\)](#) of this section, has concluded, and there is a final [determination](#) of [tax](#), as defined in § 301.7623-4(d)(2), a Whistleblower Office official will determine the amount of the award under section 7623(b)(1), (2), or (3), and §§ 301.7623-1 through 301.7623-4, based on the official's review of the [administrative claim file](#). The Whistleblower Office will communicate the award to the whistleblower in a [determination letter](#), stating the amount of the award. If, however, the whistleblower has executed an award consent form agreeing to the amount of the award and waiving the whistleblower's right to appeal the award [determination](#), pursuant to section 7623(b)(4) and [paragraph \(d\)](#) of this section, then the Whistleblower Office will not send the whistleblower a [determination letter](#) and will make [payment](#) of the award as promptly as circumstances permit.

**(7) Rejections.** A rejection is a [determination](#) that relates solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower. If the Whistleblower Office rejects a claim for award under section 7623(b), pursuant to [§ 301.7623-1\(b\)](#) or (c), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower



a preliminary rejection letter that [states](#) the basis for the rejection of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary rejection letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary rejection letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either provide written [notice](#) to the whistleblower of the rejection of the claim, including the basis for the rejection, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

**(8) *Denials.*** A denial is a [determination](#) that relates to or implicates [taxpayer](#) information. If, with respect to a claim for award under section 7623(b), the IRS either did not proceed based on the information provided by the whistleblower, as defined in [§ 301.7623-2\(b\)](#), or did not collect proceeds, as defined in [§ 301.7623-2\(d\)](#), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary denial letter that [states](#) the basis for the denial of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary denial letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary denial letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either provide written [notice](#) to the whistleblower of the denial of any award, including the basis for the denial, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

**(d) *Appeal of award determination.*** Any [determination](#) regarding an award under section 7623(b)(1), (2), or (3) may, within 30 days of such [determination](#), be appealed to the [Tax](#) Court.