
No. 21-1133

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

PATRICK KENNEDY,
PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE

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

**REBRIEF BY AMICUS CURIAE THE ANTI-FRAUD COALITION
(FORMERLY 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 respondent-appellee the Commissioner of Internal Revenue. No amici or intervenors appeared before the Tax Court. On March 24, 2022, The Anti-Fraud Coalition (“TAF Coalition”) (at that time known as Taxpayers Against Fraud Education Fund) filed a motion to appear as amicus curiae and lodged an amicus brief, which was accepted and filed on June 1, 2022. Following full briefing in this case by the parties and TAF Coalition, the Court issued an order on September 27, 2023, directing the parties and TAF Coalition to rebrief the case, with specific reference to the Court’s rulings in *Lissack v. Commissioner of Internal Revenue*, 68 F.4th 1312 (D.C. Cir. 2023) (*Lissack*) and *Villa-Arce v. Commissioner of Internal Revenue*, 68 F.4th 1328 (D.C. Cir. 2023).

B. Ruling Under Review. An accurate reference to the ruling at issue appears in petitioner-appellant’s opening brief.

C. Related Cases. The jurisdictional issue before the Court in this case was substantively addressed in *Lissack*. The docket in this case also designates the *pro se* appeal in *Roy Meidinger v. Commissioner*, D.C. Cir. Case No. 22-1239, as a “related” case. Otherwise, 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, TAF Coalition 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. TAF Coalition represents no parties in this matter and has no pecuniary interest in its outcome. However, TAF Coalition 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

Code	Internal Revenue Code (26 U.S.C.)
Commissioner	Commissioner of Internal Revenue, respondent-appellee
IRM	Internal Revenue Manual
IRS or the Service	Internal Revenue Service
Kennedy	Patrick Kennedy, petitioner-appellant
TAF Coalition	The Anti-Fraud Coalition (formerly Taxpayers Against Fraud Education Fund)
Treas. Reg.	Treasury Regulations (26 C.F.R.)
WBO	IRS Whistleblower Office

STATUTES AND REGULATIONS

Relevant excerpts from 26 U.S.C. § 7623, Treas. Reg. § 301.7623-1, Treas. Reg. § 301.7623-2, and Treas. Reg. § 301.7623-3 are included in the addendum attached hereto.

INTEREST OF AMICUS CURIAE

TAF Coalition is a non-profit public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAF Coalition 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. TAF Coalition regularly participates in litigation as amicus curiae. TAF Coalition is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAF Coalition is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAF Coalition has an interest in ensuring that 26 U.S.C. § 7623(b) is interpreted in the manner Congress intended. TAF Coalition 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 action.

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.

SUMMARY OF ARGUMENT

Internal Revenue Code Section 7623(b)(4) broadly grants the Tax Court jurisdiction over “[a]ny determination regarding an award” by the IRS Whistleblower Office (WBO). As this Court recognized in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022), it would be pointless for the Tax Court to review threshold rejections of facially deficient whistleblower submissions that the WBO does not forward on for further action. In such situations, no award to the whistleblower is possible. But once the WBO forwards a claim to the appropriate IRS operating division, the whistleblower’s information is combined with the taxpayer’s information, and it becomes possible that the whistleblower’s information will be used by the IRS in an administrative action against the taxpayer and will contribute to the IRS’s collection of proceeds.

After a claim is forwarded on to the operating division, it can be denied for a wide variety of reasons. For jurisdictional purposes, it is of no moment whether a denial centers on whether the IRS collected proceeds or whether the IRS took action against a taxpayer based on the whistleblower’s information. In either scenario, it is necessary for the WBO to make a substantive determination as to what use, if any, the operating division made of the whistleblower’s information. Indeed, this is why the governing regulations have long distinguished between a “rejection” and a “denial.” *See* Treas. Reg. § 301.7623-3(c)(7) (defining a

rejection as “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)(8) (stating that a denial “relates to or implicates taxpayer information”).

The reasoning of this Court in *Lissack* – that jurisdiction should not be conflated with the merits absent an “unusually high degree of clarity” in the governing statute – compels adoption of this same distinction between rejections and denials for jurisdictional purposes. Proving that the IRS took action “based on” a whistleblower’s information is a statutory prerequisite to recovery on the merits and should not be converted into a jurisdictional question. Consistent with this reasoning, the Court in *Pinnavaia v. IRS*, 2022 WL 566475 at *1 (D.C. Cir. Feb. 23, 2022) (unpublished), cited with approval the Tax Court’s decision in *Whistleblower 11332-13W v. Commissioner*, 142 T.C. 396, 401-02 (June 4, 2014) - - a decision that accepted jurisdiction over a whistleblower’s contested claim that the IRS had taken action based on his claim against the referenced taxpayer. *Id.*

The legislative history of section 7623, which confirms Congress’s intent to incentivize tax whistleblowers by giving them an avenue for Tax Court review of denials, likewise supports this interpretation of the Tax Court’s jurisdiction. *See* 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). It would also disserve the interests of judicial economy for the Tax Court to deal with unnecessary fights over jurisdiction before whistleblowers gain access to the administrative record and voluntarily dismiss claims on their own. The Court should thus follow the reasoning of *Lissack* and decline the Government's invitation to extend the holding in *Li* beyond the narrow situation that gave rise to it, *viz.*, the threshold "rejection" of a whistleblower's claim by the WBO prior to the matter being forwarded to an IRS operating division.

I. BACKGROUND

A. Procedural History

Petitioner-appellant Kennedy filed a whistleblower claim in April 2012 regarding three related taxpayers alleging underpayment of excise taxes. Joint Appendix (JA) at 15-16. He was initially assigned one claim number and the claim was assigned to the IRS's Large Businesses & International (LB&I) operating division. *Id.* Two additional claim numbers were later assigned, and those claims were assigned to operating divisions as well. JA 16-19. Nearly five years later, all three claims were denied in a single-page Final Determination Letter. JA 7. Kennedy timely challenged the denials *pro se* before the Tax Court below and then also on appeal before this Court.

This Court granted leave for TAF Coalition to file an amicus brief on the jurisdictional issue the Commissioner raised in his answering brief – whether the Tax Court lacks jurisdiction to review denials of whistleblower awards unless the whistleblower has first established the claim was meritorious. The Commissioner filed a supplemental brief in response on June 30, 2022. TAF Coalition sought leave to file a reply, which was accepted. In the same October 27, 2022 Order granting TAF Coalition leave to file its reply, the Court, on its own motion, ordered this case held in abeyance pending its decisions in *Lissack v. Commissioner of Internal Revenue*, 68 F.4th 1312 (D.C. Cir. 2023) and *Villa-Arce v. Commissioner of Internal Revenue*, 68 F.4th 1328 (D.C. Cir. 2023) and directed the parties to file motions to govern future proceedings within 30 days after resolution of those cases. *Id.*

On May 26, 2023, this Court held in *Lissack* that 26 U.S.C. § 7623 “does not require a whistleblower to establish a meritorious claim to an award before the Tax Court may exercise jurisdiction to review the IRS’s determination on that claim.” 68 F.4th at 1321.¹ On June 22, 2023, the Commissioner moved under Circuit Rule

¹ The Court’s decision in *Villa-Arce* referred to its ruling in *Lissack* on the jurisdictional question and noted as follows regarding the case before it: “[T]he Whistleblower Office referred the submission to the IRS, the IRS initiated an examination, and the IRS ultimately made the tax adjustment that is the object of the parties’ dispute on the merits. We are thus satisfied that the Tax Court had jurisdiction over Villa-Arce’s appeal.” *Villa-Arce v. Commissioner of Internal Revenue*, 68 F.4th at 1332.

34(j) for the Court to take this case under submission without oral argument, hold that the Tax Court lacked jurisdiction over two of petitioner-appellant's claims, and affirm dismissal of the third claim. IRS Motion for Submission of the Case (Motion) at 6. The Court granted leave for amicus TAF Coalition to file a response, which was accepted, and which contested the Commissioner's argument that the Tax Court lacks jurisdiction over claims 1 and 2 in this case. The Court subsequently ordered on September 7, 2023 that this case be rebriefed and calendared for presentation to a merits panel.

B. 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* Act of March 2, 1867, 39 Cong. Ch. 169, 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").

This 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, 120 Stat. 2922, 2958-60 (2006) (2006 Act) that were modeled, in part, after the successful False Claims Act whistleblower program, 31 U.S.C. §§ 3729, *et seq.*² 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 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

² As statistics reported by DOJ show, the United States has recovered over \$37 billion in whistleblower cases under the False Claims Act since 2007 (and over \$50 billion since the statute was amended in 1986). *See* DOJ Civil Division, Press Release No. 23-149 (February 7, 2023), available at <https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022> (including cumulative FCA Statistics), available at https://www.justice.gov/media/1273591/dl?inline_ (accessed November 22, 2023). Since 2007, the IRS tax whistleblower program has led to the collection of \$6.6 billion from non-compliant taxpayers. IRS Whistleblower Office 2022 Annual Report to Congress, (Rev. 6-2023), Publication 5241, Catalog Number 68435Z, Department of the Treasury (IRS Whistleblower Office 2022 Report) at 5, available at <https://www.irs.gov/pub/irs-pdf/p5241> (accessed November 22, 2023).

new Internal Revenue Code subsection -- 26 U.S.C. § 7623(c) -- expanding the definition of “proceeds” for whistleblower awards.

In 2019, Congress amended the tax whistleblower program again, by ensuring that tax whistleblowers had more information about the handling of their tips and by providing 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, the IRS still faced challenges with implementation, including challenges with its handling of rejections and denials of claims. Reports of the Treasury Inspector General for Tax Administration (TIGTA) and by the General Accountability Office (GAO) illustrate some of the issues that can result in unsupported denials.³

³ *See, e.g.,* TIGTA, *The Whistleblower Program Helps Identify Tax Noncompliance; However, Improvements Are Needed to Ensure That Claims Are Processed Appropriately and Expeditiously*, Ref. No. 2016-30-059 (August 30, 2016), available at <https://static1.squarespace.com/static/54b02e1de4b075f5535088d5/t/580e74b0197aeac3131b6c97/1477342386272/Aug+2016+TIGTA+Report.pdf> (accessed March 20, 2022) (noting “processing inconsistencies that increase the risk of unsupported rejection/denial decisions” and that “supporting documentation” . . . did “not always match the closure reason recorded” . . . “or did not clearly substantiate the reason for the decision”); GAO Report to the U.S. Senate Committee on Finance, *Whistleblower Program - IRS Needs to Improve Data Controls for Some Award Determinations*, Ref. No. GAO-18-698, at 25-27 (September 2018), available at <https://static1.squarespace.com/static/54b02e1de4b075f5535088d5/t/5bd77cc1f4e1fc93692c6f91/1540848836476/Sept+2018+GAO+report.pdf> (accessed March 20,

The WBO has a limited number of employees to handle a large number of claims. According to the IRS Whistleblower Office's 2022 Annual Report to Congress, the WBO had 47 full time employees and received 5,084 submissions comprising 12,597 claims in 2022. *See* IRS Whistleblower Office Report at 4 & 13, available at <https://www.irs.gov/compliance/whistleblower-office-annual-reports>. In the same period, the WBO closed 11,605 claims, *id.* at 28, and it paid rewards in 132 cases. *Id.* at 4. Of the 28,027 claims that remained open as of the date of the report, only 32 were Section 7623(b) cases in litigation. *Id.* at 31.

C. 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).

26 U.S.C. § 7623(b)(1).

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.

2022) (noting “insufficient or incomplete data for reporting and decision making . . ., including amounts of whistleblower awards” in connection with FBARs).

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. *See* 26 U.S.C. §§ 7623(b)(2) & (b)(3).

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).

D. The Operation of the IRS Whistleblower Program

The IRS adopted regulations governing the submission of claims to the WBO office and award determinations. *See* Treas. Regs. §§ 301.7623-1, 301.7623-2, 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 v. Commissioner*, 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); *see also* Treas. Reg. § 301.7623-3(c)(7) ("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."). *See also* Internal Revenue Manual 25.2.1.2 (04-29-2019), Initial Form 211 Processing.

If the claim makes it past the WBO's threshold screening process and is forwarded to the relevant IRS operating division, where it is combined with taxpayer information, the WBO will subsequently issue either an award or a "denial." If the WBO determines that the IRS has proceeded with an administrative or judicial action based on the whistleblower's information that results in collected proceeds, then the WBO may issue an award. 26 U.S.C. § 7623(b)(1). But if the WBO determines that the IRS did not proceed with an action based on the whistleblower's information, or if the IRS proceeded but did not collect proceeds as a result, the WBO may issue a "denial" letter to the whistleblower. *See* Treas. Reg. § 301.7623-3(c)(8). The WBO may also issue a denial if it determines that the whistleblower has been 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) Grants the Tax Court Jurisdiction Over Denials of Awards.

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). As this Court observed in *Lissack*, Congress “made generous provision for judicial review of Whistleblower Office award decisions” by giving the Tax Court jurisdiction over “[a]ny determination regarding an award.” 68 F.4th at 1320 (quoting 26 U.S.C. § 7623(b)(4)) (emphasis added by Court).

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.*⁵

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 whistleblower’s 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.” 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. *Cf. 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 the purview of the Tax Court).

⁵ The Commissioner stated in his opening brief that for appellant 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 (quoting *Scott v. Commissioner*, No. 19-1022, 2020 WL 986942, at *1 (D.C. Cir. Jan. 31, 2020)). It is not, in fact, necessary for the IRS to *initiate* an action for a whistleblower to qualify for an award; expanding or continuing to pursue an action may also provide the basis for an award. Treas. Reg. § 301.7623-2(b)(1).

Once a whistleblower's information has been forwarded to an operating division, however, Tax Court review is appropriate. At that juncture, the operating division has access to both the whistleblower's information and the taxpayer's information. The possibility then exists that the whistleblower's information may be used or contribute to enforcement efforts, and it therefore becomes necessary for the WBO to make a substantive determination as to whether an award should be made or the claim should be denied; numerous factual issues may arise.

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 initiated the same action against the taxpayer even in the absence 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, thus creating a factual issue as to whether the whistleblower substantially contributed to the IRS's recovery on the issue.

Factual issues may also arise regarding whether a whistleblower's information contributed to the IRS's recovery on "related" claims against taxpayers not directly named in the Form 211. Treas. Reg. § 301.7623-2I (defining

what actions qualify as “related actions,” *i.e.*, actions against persons not specifically identified in the information provided).⁶

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).

B. Under *Li* and *Lissack* the Tax Court had Jurisdiction over Petitioner-Appellant’s Claims.

The Commissioner’s original answering brief in this case relied on *Li* to contend broadly that the Tax Court did not have jurisdiction over whistleblower

⁶ Regarding the question of whether the IRS has collected proceeds, the issues are similarly factually driven. This Court already held in *Lissack* that the Tax Court has jurisdiction over such disputes.

appeals 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.” Ans. Br. at 21. In *Lis* “ack, however, this Court rejected this argument. 68 F.4th at 1321 (“[A]s the IRS reads it, our decision in *Li* renders the jurisdictional grant coextensive with the merits of a whistleblower appeal. We disagree.”).

In *Lissack*, it was undisputed that the IRS had initiated an exam of the taxpayer on the issue identified by the whistleblower, and therefore the Court stated that “[w]e need not delineate the precise line between an unreviewable threshold rejection [as in *Li*] and a reviewable determination to conclude that the decision here was a ‘determination regarding an award’ under subsection (b)(4).” *Id.*

The Commissioner argues that based on *Lis* “ack this Court should hold that the Tax Court lacks jurisdiction over petitioner-appellant’s first and second claims, because “no action was taken as to Kennedy’s first and second claims (claims 1 and 2),” *i.e.*, “there was no determination [by the (WBO)] regarding an award with respect to those claims.” Motion at 3. But the Commissioner’s arguments do not follow from this Court’s rulings in *Li* or *Lissack*.

As the Court noted in *Li*, “a threshold rejection of a Form 211 by nature means the IRS is not *proceeding* with an action against the target taxpayer.” 22

F.4th at 1017 (emphasis original; citation omitted). Once the WBO forwards a claim to the appropriate operating division, however, then the WBO must make a substantive determination regarding, *inter alia*, whether action was taken on the claim. The Tax Court has explicit statutory jurisdiction to review such a determination.

The Commissioner now concedes that the IRS *did* take action on claim 3, so there is no dispute that the Tax Court had jurisdiction over that claim. Motion at 5. But Claims 1 and 2 also proceeded beyond a threshold rejection, and the Tax Court's decision helps illustrate why it properly exercised jurisdiction over those claims as well. All the claims were referred to the IRS's Large Businesses & International (LB&I) division to be considered for examination, then later to the IRS's Tax Exempt and Government Entities division, Exempt Organizations subdivision (TEGE-EO), but TEGE-EO ultimately did not proceed with an examination on claims 1 and 2. JA 16-19. "While we note that it is unclear whether taxpayer 1 was independently evaluated by an operating division, it is clear that taxpayers 1, 2, and 3 are all related. TEGE-EO thoroughly evaluated taxpayers 2 and 3 and, in fact, completed a two-year examination of taxpayer 3's return that resulted in no change (and likewise, no collected proceeds)." JA 31. Petitioner-appellant also asserted as to claim 1 that the IRS had recovered funds

from taxpayer 1 in connection with bankruptcy court proceedings. JA 29-30; *see also* November 20, 2023 Brief for Appellant at 4-10.

The WBO thus had to evaluate the foregoing facts and make a substantive determination as to whether the IRS had taken action and/or recovered proceeds based on the whistleblower's information.

The denial letter in this case also did not simply say no action had been taken against the taxpayer. It said that no action had been taken "based on" the whistleblower's information, and it was unclear on the precise reason for denial on Claims 1 and 2, stating, in relevant part:

The following claims has (sic) been recommended for denial because the IRS took no action based on the information that you provided. Common reasons for declining to act on information include statute of limitations issues, limited resources, or a conclusion that there are no material issues:

- 2012-004308
- 2013-001106

JA 7, Final Determination Letter.

Unlike the scenario in *Li*, after a claim clears the initial rejection threshold, it is possible a whistleblower's information will be used by the IRS once it reaches an operating division, and it is not uncommon for the IRS to contend that it did not take action based on a whistleblower's information while simultaneously taking action against the same taxpayer. The parties may simply disagree on whether the IRS's action was "based on" the whistleblower's information as defined by statute.

Under these circumstances, the Tax Court correctly took jurisdiction to review this determination. JA 22 (noting that the WBO’s stated reason for denial of claims 1 and 2 was that “the IRS took no action based on the information that you provided”).

C. The Substantive Requirements of the IRS Whistleblower Rewards Statute Should not be Converted into Jurisdictional Requirements.

As this Court observed in *Lisack*, “[a]n ‘unusually high degree of clarity’ is required to treat statutory requirements as jurisdictional.” *Id.* at 1321 (quoting *Myers v. Commissioner*, 928 F.3d 1025, 1035 (D.C. Cir. 2019)).⁸ Consistent with this standard, this Court has approvingly cited a Tax Court decision, which stated that a “whistleblower satisfie[s] 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” *Whistleblower*

⁸ Prior to the Court’s ruling in *Lissack*, the Commissioner cited *Brownback v. King*, 141 S. Ct. 740 (2021) as justification for conflating the analysis of jurisdiction and the merits of denials in Tax Court cases, Appellee Supp. Br. at 11, but as the Court observed in *Brownback*, the “unique context of the [Federal Tort Claims Act]” creates a situation where “all elements of a meritorious claim are also jurisdictional,” because the jurisdictional provision at issue, which waives sovereign immunity, specifically lists the elements of liability as preconditions to jurisdiction. *Brownback*, 141 S. Ct. at 749. By contrast, the jurisdictional provision at issue here simply says the Tax Court shall have jurisdiction over “[a]ny determination regarding an award” 26 U.S.C. § 7623(b)(4). Accordingly, there is no statutory basis for requiring whistleblowers in Tax Court to prove the merits of their claim as a prerequisite to Tax Court jurisdiction.

11332-13W v. Commissioner, 142 T.C. at 402, cited with approval in *Pinnavaia v. IRS*, 2022 WL 566475 at *1 (D.C. Cir. Feb. 23, 2022) (unpublished). “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 Commissioner argues that “Amicus’s reliance on this Court’s citation to *Whistleblower 11332-13W* is unavailing” because “this Court’s citation to that case in *Pinnavaia* simply referred to the Tax Court’s description of the WBO’s procedures for processing whistleblower claims and making award determinations” Appellee Supp. Br. at 10. But the Court in *Pinnavaia* was discussing a jurisdictional question and cited pages 401-402 of *Whistleblower 11332-13W*, which addressed the jurisdictional question presented here.

This Court’s favorable citation of *Whistleblower 11332-13W* is also in accord with other 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.” *Feldman v. Fed. Deposit Ins. Corp.*, 879 F.3d 347, 351 (D.C. Cir. 2018) (internal citations omitted). “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.” *Id.*⁹

Following this well-established approach to determining jurisdiction also avoids the problem the Tax Court identified in *Whistleblower 972-17W v. Commissioner*, 159 T.C. No. 1, 26 (July 13, 2022) -- that the Tax Court generally “review[s] whistleblower determinations for abuse of discretion based on the administrative record,” the contents of which have not yet been determined at the pleadings stage. As the Tax Court noted, “any proceeding to establish whether an action was ‘based on’ the whistleblower’s information for jurisdictional purposes

⁹ The Commissioner cites *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) for the proposition that, “[i]f a decision about [subject matter jurisdiction] requires resolution of factual disputes, the court will have to resolve those disputes, but it should do so as near to the outset of the case as is reasonably possible.” *See* Appellee Supp. Br. at 12. But this quote omits the Court’s explanation for why the jurisdictional issue had to be resolved promptly in that case – *viz.*, the need to resolve jurisdictional issues involving foreign sovereigns as promptly as possible. *Id.* at 1317. Such concerns plainly are not applicable here.

would [therefore] raise complicated questions regarding the scope and standard of [Tax Court] review.” *Id.*¹⁰

D. The Legislative History of the IRS Whistleblower Program Supports Review of Denials of Awards.

The legislative history of the whistleblower statute 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 any requirement that a whistleblower first prove that action was taken by the IRS based on the whistleblower’s information to

¹⁰ Moreover, it would be contrary to judicial economy for the Tax Court to address jurisdictional issues before the IRS discloses the administrative record, as petitioners are able to voluntarily dismiss their claims upon receipt of the administrative record if it reveals their claims are without merit.

establish jurisdiction. 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. *Id.*

The Commissioner contends that this legislative history was meant to refer only to the extremely rare event of a denial under 26 U.S.C. § 7623(b)(3) (last sentence), based on the whistleblower being criminally convicted in connection with the underlying tax noncompliance. Appellee Supp. Br. at 13-14.¹¹ The challenge the Commissioner faces with this argument is that the legislative history contains no such limiting language, and the Commissioner has provided no authority to support its claim.

E. 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:

¹¹ Counsel's research has not revealed any case in the history of the Tax Court involving a denial under § 7623(b)(3) based on the whistleblower being criminally convicted for involvement with the conduct alleged in the claim.

(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 the Tax Court. *See* 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 observes that the Court is obliged to inquire into its own jurisdiction, but the point remains that the IRS has long interpreted the whistleblower statute in a manner consistent with the plain meaning of the jurisdictional language in section 7623(b)(4). It is the Commissioner’s recent effort 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.

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.

The Commissioner attempts to minimize the significance of these regulations, noting that the same regulations also allowed for appeals of rejections until abrogated by *Li*. But the IRS’s regulatory framework provides qualitatively different recourse for rejections and denials. The right to appeal a denial is a whistleblower’s only means to remedy a substantive error in a denial, while a whistleblower can always simply “perfect and resubmit” a claim when it is rejected. Treas. Reg. § 301.7623-1(c)(4). The regulatory framework itself thus provides a separate and independent reason why jurisdiction is appropriate over denials and unnecessary over rejections.¹³

¹³ The Commissioner’s citation (in its Motion for Submission at 4, fn. 2) to the discussion in *Shands v. Commissioner*, 160 T.C. No. 5, 2023 WL 2399912, at *2-*3 (2023) relative to the impact of rejections versus denials on jurisdiction is inapposite here, as the whistleblower’s unique claim in that case - relating to the creation of the 2011 Offshore Voluntary Disclosure Initiative and the public’s participation in it - was never forwarded to an operating division.

III. CONCLUSION

Consistent with *Lissack*, 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.¹⁴

Respectfully submitted,

Date: November 27, 2023

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¹⁴ Amicus TAF Coalition takes no position on the non-jurisdictional issues in the case.

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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 November 27, 2023.

I further certify that on this 27th day of November, 2023, 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 U.S. Code § 7623

(a) IN GENERAL The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—

(1) detecting underpayments of tax, or

(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,

in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the **proceeds** of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

(b) AWARDS TO WHISTLEBLOWERS

(1) IN GENERAL

If 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). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) AWARD IN CASE OF LESS SUBSTANTIAL CONTRIBUTION

(A) In general

In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 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), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) Nonapplication of paragraph where individual is original source of information

Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

(3) REDUCTION IN OR DENIAL OF AWARD

If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

(4) APPEAL OF AWARD DETERMINATION

Any determination regarding an award under paragraph (1), (2), or (3) 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 CFR § 301.7623-1 General rules, submitting information on underpayments of tax or violations of the internal revenue laws, and filing claims for award.

(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.

(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.

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).

(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.