

“Why Won’t They Take My Case!” Tax Court Decides That It Lacks Jurisdiction To Review The IRS’ Decision Not To Pursue Whistleblower Claims

Raymond Cohen filed a “whistleblower claim” pursuant to [26 U.S.C. Section 7623\(b\)](#) on IRS Form 211. The IRS Whistleblower Office reviewed his claim and told Mr. Cohen that he was not eligible for an award because no proceeds were collected. [Cohen v. Commissioner Of Internal Revenue](#), 139 T.C. No. 12, *4 (October 9, 2012.) Mr. Cohen asked the Whistleblower Office to reconsider their decision. The Whistleblower Office repeated their denial. Mr. Cohen then filed a Petition with the Tax Court. Mr. Cohen requested that the Tax Court order the IRS to explain the reason for the denial and reopen his claim. The IRS response was that the Tax Court can only review claims after the IRS starts a proceeding and collects proceeds.

Essentially, Mr. Cohen wanted the Tax Court to force the IRS to proceed with his claim. The IRS’ position was that the Tax Court only had authority to review a whistleblower determination after the IRS had acted upon the claim and obtained proceeds, and lacked any authority to compel it to act. The Tax Court found that it did not have jurisdiction to compel the IRS to explain its reasons for not proceeding with Mr. Cohen’s claim and that Section 7623(b) required both a judicial or administrative action by the IRS and proceeds before Tax Court review could be obtained. See, page 9.

Mr. Cohen was concerned that the IRS was denying his claim, only to later pursue it and obtain proceeds (thereby cutting him out of an award.) See, page 7. Mr. Cohen did not present any allegations (or introduce evidence) to support this theory, however, and the Tax Court labeled this as ‘frustration.’ See, page 9. [Readers should keep as a reference that following a determination, a whistleblower has thirty (30) days to petition the Tax Court pursuant to [26 U.S.C. Section 7623\(b\)\(4\)](#).]

The Tax Court’s result in *Cohen* is consistent with the text of [Section 7623\(b\)\(1\)](#) and (4), which states:

(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 collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. 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.

And,

(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).

(emphasis added) The text of Section 7623(b) supports a conclusion that a whistleblower can only appeal the determination of an administrative or judicial action that results in proceeds. (“If the Secretary proceeds...”)

The *Cohen* decision is consistent with prior jurisdictional decisions. The Tax Court has held that it has jurisdiction not only of an award but of any decision to deny an award. See, [Cooper v. Commissioner](#), 135 T.C. No. 70, 75 (2010) [“*Cooper I.*”] This jurisdiction is limited: the Tax Court cannot review the IRS’ determinations as to the underlying tax liability. See, [Cooper v. Commissioner](#), 136 T.C. No. 597, 600 (2011) [“*Cooper II.*”] Now, with *Cohen*, we know the Tax Court does not have jurisdiction to force the IRS to explain its reasons for not proceeding with a claim.

Whistleblowers and their counsel can draw a few lessons from *Cohen*. First of all, the Tax Court is only able to review a determination when the IRS has commenced an action and obtained proceeds. Absent those conditions, the Tax Court is without jurisdiction. Thus, in [Whistleblower 14106-10W v. Commissioner](#), 137 T.C. No. 15 (2011), the Tax Court granted summary judgment in favor of the IRS because an affidavit from IRS Chief Counsel established the uncontroverted facts that the IRS had not commenced an administrative or judicial action. The Tax Court held such an action was a jurisdictional prerequisite to substantive review. (at 8)

The current state of the law appears to be that pursuant to IRC Section 7623(b)(4) and *Cooper I*, a whistleblower must appeal any determination to the Tax Court within 30 days. Unless there is an administrative or judicial action and resulting proceeds, however, the IRS will prevail on a motion to dismiss (if the taxpayer does not allege the occurrence of those elements, as in *Cohen*) or summary judgment (as in *Whistleblower 14106-10W.*) The Whistleblower may learn the reason(s) the IRS is not pursuing the claim during the course of litigation, but the Tax Court will not compel the IRS to explain itself. *Cohen*, at page 8.

Second, the IRS can determine whether to pursue a matter or not, and no matter how promising the claim appears to be, a whistleblower cannot compel the IRS to act. *Cohen*. The IRS can decline to move forward on potential action for a number of reasons, all of which at this point appear to be beyond Tax Court review.

Finally, while not a direct part of the Tax Court decision in *Cohen*, Taxpayers should consider carefully whether the source(s) of their information meet the statutory guidelines for an award. Mr. Cohen relied upon, along with some personal observations by his spouse, a civil proceeding (cited by the Tax Court) and information from a state FOIA-type request.

The Tax Court noted that these latter sources were “public information.” See, page 8 footnote 4.

Whistleblower Claims are a popular subject in news reports and, increasingly, advertising by tax practitioners. Claimants and their representatives should be aware that discretion *to pursue a claim* is vested in the IRS Whistleblower Office and is not subject to judicial review. The Tax Court will not compel the IRS to “explain itself” or take a particular course of administrative or judicial action. Barring Congressional action or a change in judicial determinations, whistleblowers have no recourse when the IRS decides not to pursue their claims.

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