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August 18, 2011

Via Federal Express

Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Ave., N.W., Rm. 3000
Washington, D.C. 20224

RE: IRM 25.2.2.12 and PTMA 2010-62 - Conflicting Guidance Has Been Issued by Chief Counsel with Respect to Whether "Collected Proceeds" Under Section 7623 Include Denied Claims for Refund, and When Whistleblower Award Determinations are Eligible to be Made.

Dear Commissioner Shulman:

We are writing to express our concerns that the Internal Revenue Service ("IRS") has issued conflicting guidance with respect to whether whistleblower awards can be paid from denied claims for refund, and as a result of this conflict, a now outdated July 2009 policy decision with respect to when whistleblower award determinations pursuant to I.R.C. section 7623 can be made is unnecessarily "freezing" award determinations and award payments in many cases. We respectfully request that the IRS review in particular the below referenced provisions of the Internal Revenue Manual ("IRM") and update the language therein to reflect the most recent published guidance of the IRS, and we further request that the IRS expedite this change because the outdated IRM provisions are causing serious economic harm to tax whistleblowers and also negatively impacting the IRS Whistleblower Program as a whole.

Several provisions of IRM 25.2.2.12 "Funding Awards," (June 18, 2010) are now outdated and in direct conflict with the more recently released PTMA 2010-62 "Payment of Refund Protection and Credit Reduction Claims" (September 1, 2010), and these outdated provisions are causing harm to the IRS Whistleblower Program and whistleblowers themselves. The recently proposed Treasury Regulations ("Proposed Regulations") at section 301.7623-1(a), which address the definition of "proceeds of amounts collected and collected proceeds" for purposes of IRC section 7623, to the extent that they are in accordance with PTMA 2010-62, would also make several parts of IRM 25.2.2.12 an obsolete vestige. The Ferraro Law Firm respectfully submits a request that this conflict be remedied on behalf of its clients who have to date made hundreds of tax whistleblower submissions to the IRS under section 7623(b).

In summary, the conflicts that have arisen between PTMA 2010-62 and IRM 25.2.2.12 relate to the following two issues:

1) whether awards can be paid on information that leads to the denial of a taxpayer's claim for refund; and
2) when an award determination is eligible to be made to a whistleblower that has made a claim pursuant to section 7623(b).

As discussed in more detail below, it is logical that a modification of the IRM necessitated by the recent change in the IRS's position with respect to "refund protection" submissions under section 7623(b) which are the subject of issue 1 above should lead to a modification of the IRM with respect to issue 2 above with respect to what periods of limitation must have expired before an award determination can be made pursuant to section 7623(b).

Specifically, the relevant parts of IRM 25.2.2.12 that are at issue are as follows.
First with respect to issue 1 above:

> 8. **Refund Protection:** Claims may not be paid under 7623 (a) or (b) which are based on information which leads to the denial of a claim for refund which otherwise would have been paid.

And second with respect to issue 2 above:

> 7. **7623(b) Claims:** The amount of assessment of taxes, penalties, interest and other amounts attributable to the Whistleblower will be computed by the Whistleblower Analyst based on all information known with respect to the taxpayer's account, including, for example, with respect to the use of offsets and net operating losses, as of the date the computation is made. The Whistleblower Analyst will monitor the case for collection of the proceeds. The award payment cannot be completed until the statutory period for filing a claim for refund expires or there is an agreement between the taxpayer and the IRS that there has been a final determination of tax for the specific period and the right to file a claim for a refund has been waived.

Issue 1) <u>To the extent that it states that awards under section 7623 may not be paid on information that leads to the denial of a claim for refund, IRM 25.2.2.12 paragraph 8 needs to be revised to be consistent with the newer guidance of the IRS found in PTMA 2010-62</u>.

PTMA 2010-62 "Payment of Refund Protection and Credit Reduction Claims" (September 1, 2010) states in relevant part:

> "[W]e have concluded that "collected proceeds" under the statute can include denied refunds and the reduction of an overpayment of a credit balance when the information provided by the whistleblower prevents the IRS from paying the refund or applying a credit balance to offset other tax liabilities."

PTMA 2010-62, pg. 1. This written guidance goes on to explain the legal justification for this conclusion, but those justifications are not important to the actions that should be taken by the IRS as a result of this decision and conclusion as a matter of law.[1] What is important is that the conclusion of PTMA 2010-62 with respect to whether information that leads to a denied claim for refunds can result in an award under section 7623 is now in direct conflict with the older in time IRM 25.2.2.12 paragraph 8 which states that no such awards can be paid in refund protection cases.

While the IRS Whistleblower Analysts could simply ignore the inaccurate IRM 25.2.2.12 paragraph 8 when drafting their award determinations under section 7623(b), clearly the better course of action is to update the IRM to accurately state how awards should be determined based on the most recent published position of the IRS.

In order to be consistent with PTMA 2010-62, paragraph 8 of IRM 25.2.2.12 should be revised as follows to remove the language that has been stricken through as seen below with respect to issue 1 above:

> 8. **Refund Protection:** Claims may ~~not~~ be paid under 7623 (a) or (b) which are based on information which leads to the denial of a claim for refund which otherwise would have been paid.

This is a simple change which could and should be made immediately and without waiting for all other changes to be made to the IRM currently under consideration with respect to the IRS Whistleblower Program.

Whistleblowers are unnecessarily harmed when there is a delay between the time their case becomes award determination eligible and when they are actually paid. This harm comes not just because of the time value of money (because awards do not earn interest between the time the taxpayer pays the tax, penalties, interest, and additions to the time the award from these collected proceeds is paid), but also because many whistleblowers have quit or have been fired from their jobs as a result of their whistleblowing. Many such whistleblowers' whole future hangs in the balance, and if the IRS unnecessarily waits to pay such persons the just award due for their sacrifice, it is shameful and it damages the credibility of the whole IRS Whistleblower Program.

If even a single award determination is currently being held up because of this outdated "Refund Protection" language in the IRM, then that whistleblower is being harmed and they should be suing the Commissioner in Tax Court pursuant to section 7623(b) because the IRS has failed to make a timely award determination. The Tax Court, pursuant to its holding in William Prentice Cooper, III v. Commissioner, 135 T.C. No. 4 (July 8, 2010), would have jurisdiction to hear the case, and would almost certainly find that the IRS was being arbitrary, capricious, and unreasonable by failing to make an award determination when one was ripe to be made and the matter met the

[1] With respect to the conclusion that information that leads to a denied claim for refunds can result in an award under section 7623, we agree with Chief Counsel's conclusion. With respect to the conclusion information that leads to a reduction in a credit balance can result in an award under section 7623, we disagree with Chief Counsel that awards are limited only to information that leads to a reduction in "overpayment" credit balances. However, that is not the subject of this letter, and we have already submitted our comments to the Treasury Department on this point as it relates to Proposed Regulation section 301.7623-1(a) and (g).

threshold requirements of section 7623(b). Such a scenario would clearly not be an effective use of IRS resources, and the Tax Court would also be burdened with making award determinations de novo.

Issue 2) The date that award determinations are eligible to be made to a whistleblower that has made a claim pursuant to section 7623(b) should be consistent with the most recent published guidance of the IRS. It should not be based on a policy decision formulated under guidance that is now outdated, particularly because that policy decision has such a drastic impact on whistleblower cases and the success of the IRS Whistleblower Program.

The Old Rule vs. the Current Rule: The IRS's current rule about when an award determination under section 7623 is eligible to be made needs to be changed to be consistent with PTMA 2010-62. We understand that in 2009 Chief Counsel changed the policy of the IRS with respect to when section 7623 award determinations were eligible to be made because at the time it was concerned that awards would be paid out to a whistleblower in a case where there was no net additional collected tax, penalties, interest, and additions to tax if the taxpayer claimed a refund after paying such amounts. However, the recent guidance in PTMA 2010-62, to the extent that it now allows for awards to be paid when a claim for refund is denied, makes that concern irrelevant because the IRS still has to pay out awards under section 7623 even if such a taxpayer later claims a refund.
The IRS should change its rule about when award determinations are eligible to be made, and shortly thereafter paid, to whistleblowers from collected proceeds because the current rule can unnecessarily add up to TWO YEARS to the payment process, and this is causing harm to both whistleblowers and the IRS Whistleblower Program as a whole. As shown above, the IRS's current position, as stated in IRM 25.2.2.12 "Funding Awards," (06-18-2010) paragraph 8, is that awards cannot be paid "under 7623 (a) or (b) which are based on information which leads to the denial of a claim for refund which otherwise would have been paid." As discussed in issue 1 above, this IRM provision will need to be revoked or amended immediately to be consistent with PTMA 2010-62, and also to be consistent with the forthcoming final Treasury Regulation under section 301.7623-1(a) if it therein requires that awards be paid from "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..." see Prop. Treas. Reg. section 301.7623-1(a)(2). Such a change logically and necessarily leads to the conclusion that IRM 25.2.2.12 paragraph 7 should also be revoked or amended where it requires that the statute of limitations on refunds under section 6511 must be closed before an award determination can be made. The reasoning will be discussed below, but first, the question arises: Why did the IRS change this rule in 2009? Before that date, the IRS paid awards under section 7623 once the period of limitations on assessments under section 6501 closed and the IRS collected the proceeds at issue in the case. So what changed in 2009, and why? If this policy was based on the old position of the IRS that awards under section 7623 could not be paid on information that leads to the denial of a claim for refund, then the decision to reverse the refund protection award policy as set forth in PTMA 2010-62 should lead to a reversal of this policy.

In the "FY 2009 Annual Report to Congress on the Use of Section 7623," (the "2009 Report") the IRS stated that it will not pay any awards on collected proceeds resulting from whistleblower information until after the period of limitations has expired on claims for refund. On page 7 the 2009 Report said:

> "After consultation with the Office of Chief Counsel, the Whistleblower Office determined that in cases where the taxpayer has not filed an appeal, the IRS should not pay the claim until the period for filing an appeal has lapsed. The general rule is

> that a taxpayer may file a claim for refund within two years of the last payment, unless he or she has waived that right. This means that until two years have passed after the last payment, the case is still subject to the possibility of appeal through the process of filing a claim for a refund. Thus, beginning in July 2009, the IRS monitors cases both for collection and then for the expiration of the period for filing a claim for refund. As a result, the IRS will not pay some claims that under prior policy it would have paid in FY 2009 until FY 2010 or FY 2011."

This decision by Chief Counsel was implemented by issuing IRM 25.2.2.12 "Funding Awards," (06-18-2010) paragraph 7, which states that: "The award payment cannot be completed until the statutory period for filing a claim for refund expires or there is an agreement between the taxpayer and the IRS that there has been a final determination of tax for the specific period and the right to file a claim for a refund has been waived." In the "Fiscal Year 2010 Report to the Congress on the Use of Section 7623," (the "2010 Report"), the IRS again repeated this position using nearly identical language as in the 2009 Report. See 2010 Report section V., *Whistleblower Awards Paid.*

Analysis of the Current Rule in Light of More Recent Guidance: Chief Counsel is on the right track with respect to keying award determination eligibility off of (closing) agreements between the IRS and the taxpayer about the determination of tax for a specific period, but the rule as stated in the IRM still isn't consistent with the recent guidance in PTMA 2010-62. As the rule is currently being followed by the Whistleblower Office, IRM 25.2.2.12 paragraph 7 only relates to Form 866 "Agreement as to Final Determination of Tax Liability" closing agreements. In many cases, however, a taxpayer resolves their issues in dispute with the IRS Examination Division on a Form 906 "Closing Agreement on Final Determination Covering Specific Matters" and pays the additional tax deficiency they owe. Alternatively, the Form 870-AD "Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment," is commonly used by the IRS Appeals Division to close out cases with a similar effect. Specifically, the effect is that the taxpayer is barred from any further administrative or judicial appeal of the issues that were settled in either of those agreements, even when the period of limitations under section 6511(a) is still open by operation of time for claims for refund on other issues.

Because PTMA 2010-62 requires that awards be paid when the IRS denies a refund based on the whistleblower's information, then an award should be paid irrespective of the status of the period of limitations under section 6511(a). Why? Because it does not matter if the taxpayer claims a refund on some other issue, the taxpayer has already irrevocably agreed to and paid an assessment on the issue raised by the whistleblower and that will ultimately lead to the government either collecting additional tax or denying claims for refund that would have otherwise been paid. Put another way, either of these agreements definitively and finally conclude the amount of an underpayment of tax or denied refund with respect to the issues raised by the Whistleblower during the respective period, so the amount of "collected proceeds" that relate to the whistleblower's information is fixed, even though the taxpayer may technically claim a refund on some other issues. See Example 4 below for proof of this concept, but by way of a simple example to illustrate why the collected proceeds remain the same, consider the following:

> After an IRS audit based on information provided by a whistleblower, a taxpayer agrees to and then pays additional tax due, and enters into a specific matters closing agreement (Form 906) with the IRS to finalize the agreement on that issue. The taxpayer later files a claim for refund on some other issue and that amount is subsequently paid to the taxpayer. The "collected proceeds" are the same whether

or not the refund on the new issue is paid. Why? Because the taxpayer executed a closing agreement and paid the assessment attributable to the issue raised by the whistleblower, so the taxpayer has irrevocably agreed to an adjustment related to that issue. In the absence of this agreement on the issue raised by the whistleblower, the taxpayer could have received a refund of taxes it previously paid with its original return. But because of the whistleblower's information, that refund is **denied** because it was paid from the additional tax collected and agreed to on the Form 906 instead of being a refund of the amounts paid with the original return. An award is still due to the whistleblower in that instance for refund protection. Even if the claim for refund in this example is denied, the whistleblower is still due the same amount of award attributable to the additional taxes paid with the closing agreement.

Normally the period of limitations on assessments under section 6501 closes on the same date a taxpayer's period of limitations on refunds under section 6511 closes. There are two relevant exceptions to that general rule here: under section 6511(c) the period of limitations on refunds is extended by six months after the close of the period of limitations on assessments if the taxpayer has extended the period of limitations on assessments by agreement on a Form 870; and under 6511(a) the period of limitations on refunds expires no sooner than two years after the date a tax is paid, but a claim for refund can only be allowed to the extent of the tax actually paid in that period. Sec. 6511(b)(2)(B). It is this second exception that regularly arises in whistleblower cases. The reason is simple – successful whistleblower cases often lead to the collection of additional taxes after an IRS examination (which were based at least in part on the whistleblower's information). In such instance, therefore, the taxpayer has paid additional amounts that result in "collected proceeds" from which an award under section 7623 can be paid. As a practical matter, it is this two year refund period after the payment of additional taxes, penalties, interest, and additions to tax that is driving this whole problem.

The premise that the IRS should not wait to make award determinations just because the refund statute is still open is based on the following logic:

The IRS can now pay awards for "Refund Protection" issues

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After the IRS successfully makes an assessment and collection of tax based on a whistleblower's information and the taxpayer agrees with finality to that issue, any amounts that a taxpayer claims a refund from necessarily are coming out of the funds that the taxpayer already paid because of the whistleblower's information

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But for the information provided by the whistleblower and the tax collection that resulted from it, the taxpayer's subsequent claim for refund would have resulted in a net refund to the taxpayer

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The whistleblower's information led to a practical disallowance of this net refund because the whistleblower's information already resulted in an assessment that completely covered this claim for refund

Even if you add "in whole or in part" or "partial" to any of the terms in that logic, the result remains the same: The IRS always ends up with more "collected proceeds" as a result of the whistleblower's information, even if the taxpayer later claims a refund on some other issue. Furthermore, as can be

seen in the examples below, once the taxpayer resolves the whistleblower's issues with the IRS and the period of limitations on assessments under 6501 closes, the amount of the "collected proceeds" remains the same even if the taxpayer later claims a full or partial refund of the additional amounts they paid. It also does not matter if the IRS allows or disallows those subsequent claims for refund – the "collected proceeds" remain the same.

Section 7623 is on its face unfortunately silent with respect to when awards shall be paid. The statute only requires under part (b) the IRS to pay an award to persons who provide information that leads to the IRS collecting proceeds from a taxpayer. Specifically, section 7623(b)(1) says:

> 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.

"Collected Proceeds" is the key term here, and more specifically, when are the collected proceeds fixed and determinable. The whistleblower must "receive as an award at least 15 percent but not more than 30 percent of the collected proceeds ... resulting from the action ... or from any settlement in response to such action." Once the amount of "collected proceeds" is fixed, an award must be paid to a whistleblower who meets the criteria of section 7623(b). Despite a lack of a specific timeline in the statute to pay the required award, the IRS cannot simply bury its head in the sand and fail to act. The Tax Court will not allow the IRS to fail to issue an award determination, because to do so would in effect be a zero dollar award determination. The Tax Court in Cooper v. Commissioner 135 T.C. No. 4 (July 8, 2010) held that an IRS letter denying whistleblower awards constitutes a final administrative determination necessary to allow the court to review the petitioner's claim, denying the IRS's motion to dismiss. In other words, by either failing to issue an award determination after the amount of collected proceeds is fixed, or by issuing an award denial letter, the IRS is subject to the jurisdiction of the Tax Court. Certainly the Tax Court will allow the IRS a reasonable amount of time to make its preliminary award determination and allow the whistleblower and the IRS time to come to an agreement (through an administrative process). However, that is not what is occurring here. In whistleblower matters where the period of limitations on refunds under section 6511 is still open, the IRS is not endeavoring to prepare an award determination and is not engaging in the administrative procedure to resolve a dispute about the award amount with the whistleblower... because of this July 2009 policy decision by Chief Counsel they are simply failing to act.

During the May 11, 2011, public hearing held with respect to Proposed Treasury Regulation section 301.7623-1(a) and (g), this issue with respect to the timing of award payment eligibility was discussed by The Ferraro Law Firm Tax Partner Scott A. Knott. This issue was also raised in the public comments on behalf of The Ferraro Law Firm's clients filed with respect to the Proposed Regulations on April 18, 2011. See comment #4 therein. In response to our written comments and discussion during the May 11 hearing, Thomas J. Kane, Senior Level Counsel, Internal Revenue Service, Office of Associate Chief Counsel - Procedure and Administration, responded to Mr. Knott's comments as follows:

> "MR. KANE: I just want to -- on your last point, just for a second, I mean, our concern is the fact that even if we deny a claim for refund, the taxpayer still has the

opportunity to go to court and challenge that and could be successful. And ultimately we're concerned, as we are in similar situations, where we may put ourselves in a difficult position of having paid out an award based upon something that we've collected, but yet may have to give it back because of some future legal action."

We understand this concern, and when the pre-PTMA 2010-62 position of the IRS was that awards under section 7623 could not be paid if the whistleblower's information to the extent that it led to the denial of a claim for refund, we even grudgingly accepted Chief Counsel's rationale for this rule (even though award payments under section 7623 had always been made without any regard to the refund period of limitations until July 2009). However, as can be seen from the analysis above and the examples below, this concern no longer puts the IRS in a "difficult position of having paid out an award based on something [the IRS] collected" because it doesn't matter if the IRS has to later pay a refund to the taxpayer, an award can still be paid now that refund protection claims are "collected proceeds."

Examples [re Timing of Award Determinations That We Would Agree With]:

1) After an examination, a taxpayer pays additional tax of $50 million on January 1, 2009, due to information provided by a whistleblower. Further assume that the section 6501 period of limitations closed on July 1, 2009, by operation of time. The section 6511 period of limitations on refunds with respect to that tax will expire on January 1, 2011.

   What are the "collected proceeds"? – $50 million – The IRS collected $50 million of additional tax as a result of the whistleblower's information.

   When should the award determination be made? – Because in absence of a closing agreement there was no finality to the issue which led to the adjustment attributable to the whistleblower's information, we understand the concern which led to the IRS policy change to require that the refund period of limitations under section 6511 be closed before an award determination can be made. However, query if the IRS has ever paid out an award under section 7623 in any case that monies were collected and then refunded to the taxpayer. We'd bet lunch in the IRS cafeteria that it has never happened. Getting back to this example though, the taxpayer would be able to claim a refund with respect to the same issue the whistleblower raised, so the amount of final "collected proceeds" wasn't determinable until the period of limitations on refunds under section 6511 was closed on January 1, 2011.

2) Same facts as example 1, but on January 1, 2010 the taxpayer then files a $10 million claim for refund with respect to the same issue as the $50 million payment and that amount is subsequently paid to the taxpayer.

   What are the "collected proceeds"? – $40 million – The IRS originally collected $50 million, but then paid a refund of $10 million with respect to the same issue the whistleblower raised. Therefore, there is a total of $40 million of "collected proceeds" attributable to a net $40 million collection of additional tax.

   When should the award determination be made? – Again, in absence of a closing agreement there was no finality to the issue which led to the initial adjustment attributable to the whistleblower's information, so the refund period of limitations under section 6511 should be closed before an award determination can be made. The taxpayer was able to successfully

claim a refund with respect to the same issue the whistleblower raised, so the amount of final "collected proceeds" wasn't determinable until the period of limitations on refunds under section 6511 was closed on January 1, 2011.

3) After an examination based on information provided by a whistleblower, on June 1, 2008, a taxpayer gets a Notice of Deficiency for $50 million. The taxpayer files a petition in Tax Court, and on December 25, 2009, the Tax Court enters its decision in favor of the IRS. The taxpayer pays the $50 million deficiency on January 1, 2010, and does not file an appeal in the applicable United States Court of Appeals.

   What are the "collected proceeds"? – $50 million – The IRS collected $50 million of additional tax as a result of the whistleblower's information.

   When should the award determination be made? – Decisions of the Tax Court become final 90 days after the decision is entered by the court. The award determination should be made immediately after the expiration of those 90 days, which is March 25, 2010.
   As can be seen in the first two examples above, in the absence of finality with respect to the issue raised by the whistleblower, the IRS understandably is delaying the award determination process until the period of limitations on refunds under section 6511 closes. The amount of collected proceeds is likely known at the time the taxpayer pays the tax, but there is no finality until the period of limitations on refunds closes. In example three, everyone would likely agree that the decision of the Tax Court is final 90 days after it is entered if no appeal is filed, so the award determination can be made in that instance irrespective of when the period of limitations under either section 6501 or section 6511 closes. The refund and assessment statutes no longer matter because finality is achieved in Tax Court. However, there are many instances where finality of issues is achieved through means other than Tax Court or the passing of time. As discussed in the examples below, it is in these areas that the current policy of the IRS shows its weakness. After the following examples we will propose IRM language which will preserve the requirement for finality illustrated by the above examples but will do so in a way that is consistent with current guidance while doing whistleblowers and the IRS Whistleblower Program no harm.

Examples [that Illustrate Why the Current Rule re Timing of Award Determinations is Outdated]:

4) After an examination, a taxpayer agrees to and then pays additional tax of $50 million on January 1, 2009, due to information provided by a whistleblower, and a Form 906 specific matters closing agreement is entered into on such date to finalize the agreement on that issue. Further assume that the section 6501 period of limitations closed on July 1, 2009, by agreement. On January 1, 2010, the taxpayer files a $10 million claim for refund (on some other issue because he has contractually agreed that the issues in the Form 906 are final) and that amount is subsequently paid to the taxpayer.

   What are the "collected proceeds"? – The taxpayer executed a Form 906 and paid the $50 million assessment attributable to the issue raised by the whistleblower, so the taxpayer has irrevocably agreed to a $50 million adjustment related to that issue. In the absence of this agreement and issue raised by the whistleblower, the taxpayer could have filed an amended return and received a $10 million refund of taxes it previously paid with its original return. But because of the whistleblower's information, that $10 million refund is denied because it

was paid from the additional tax collected and agreed to on the Form 906 instead of being a refund of the amounts paid with the original return. In other words, because of the information provided by the whistleblower, the $10 million refund the taxpayer would have received from the amount they originally paid on their return was denied, and instead the IRS also collected $40 million of additional tax attributable to the issue raised by the whistleblower. Therefore, the "collected proceeds" attributable to the whistleblower's issue was $50 million, $40 million of that was a due to additional tax paid and $10 million was a denied refund.

When should the award determination be made? – Because a Form 906 closing agreement was executed there was finality with respect to the issue which led to the initial adjustment attributable to the whistleblower's information. Therefore, when the section 6501 period of limitations expired on July 1, 2009, the IRS should have made an award determination based on the $50 million of "collected proceeds" in the form of additional taxes collected.

The taxpayer was able to claim a refund with respect to a different issue from the one the whistleblower raised, (because this later in time refund issue was obviously not listed on the Form 906[2]) but the "collected proceeds" resulting from the whistleblower's information became fixed once the taxpayer executed the closing agreement and let the section 6501 period of limitations on assessments expire, it's just how they get computed that changes. The taxpayer's later claiming of a refund of $10 million on another issue has no effect on the collected proceeds resulting from the issue raised by the whistleblower because the IRS still has $50 million it wouldn't have otherwise had ($40 million in cash and $10 refund effectively denied). If the IRS waited until the section 6511 period of limitations expired on January 1, 2011, to make the award determination the amount of "collected proceeds" would have been the same = $50 million. In effect the waiting from July 1, 2009, until January 1, 2011, was for nothing, because the award determination was the same.

5) After an examination and Appeals, a taxpayer agrees to and then pays additional taxes of $50 million on January 1, 2009, due solely to information provided by a whistleblower, and a Form 870-AD is entered into on such date to finalize the agreement on that issue. Further assume that the section 6501 period of limitations closed on July 1, 2009. On January 1, 2010, the taxpayer files a $10 million claim for refund on an unrelated issue and that amount is subsequently paid to the taxpayer.

What are the "collected proceeds"? – $50 million, due to the same explanation as example 2.

When should the award determination be made? – Because a Form 870-AD was executed there was finality with respect to the issue which led to the initial adjustment attributable to the whistleblower's information. The issues listed on a Form 870-AD are contractually agreed between the IRS and the taxpayer as irrevocably final. Neither party can claim a refund or additional assessment with respect to these issues. However, refunds or additional assessments can be made with respect to other issues until the expiration of the respective periods of limitation under sections 6511 and 6501. Courts have frequently applied the doctrine of equitable estoppel to prohibit either the IRS or the taxpayer from reneging on an

[2] The issues listed on a Form 906 are contractually agreed between the IRS and the taxpayer as irrevocably final. Neither party can claim a refund or additional assessment with respect to these issues. However, refunds or additional assessments can be made with respect to other issues until the expiration of the respective periods of limitation under sections 6511 and 6501.

agreement embodied in a Form 870-AD (see Whitney v. U.S., 826 F2d 896 (9th Cir. 1987); General Split Corp. v. U.S., 500 F2d 998 (7th Cir. 1974). Therefore, when the section 6501 period of limitations expired on July 1, 2009 the IRS should have made an award determination based on the $50 million of "collected proceeds" in the form of additional taxes collected.

The taxpayer was able to claim a refund with respect to a different issue from the one the whistleblower raised, (because this later in time refund issue was obviously not listed on the Form 870-AD) but the "collected proceeds" resulting from the whistleblower's information became fixed once the taxpayer executed the Form 870-AD and let the section 6501 period of limitations on assessments expire, it's just how they get computed that changes. The collected proceeds eventually breaks down as $40 million in cash and $10 refund effectively denied after the taxpayer subsequently files their claim for refund on another issue, but as discussed above in example 2 it does not matter – the award determination amount remains the same.

6) Before a whistleblower presented an issue to the IRS with respect to a taxpayer, that taxpayer files a claim for refund of $10 million on an amended return. A whistleblower then presents information about an unrelated issue to the IRS. After an examination, the taxpayer agrees to a $50 million adjustment attributable to the issue raised by the whistleblower, and their $10 million refund issue is wholly allowed but no refund is paid. Rather, the $10 million offsets the $50 million due from other issues. On January 1, 2009, the parties execute a Form 866 closing agreement. Further assume that the section 6501 and 6511 periods of limitation would have otherwise closed on July 1, 2009, and January 1, 2011, respectively, by operation of time.

   What are the "collected proceeds"? – If the whistleblower had not presented the $50 million issue to the IRS, then the taxpayer would have received a refund of $10 million of previously paid taxes. But because of the whistleblower's information that refund is denied to the extent of the adjustments attributable to the issue raised by the whistleblower, to which the taxpayer agreed to on Form 866 and paid an additional $40 million of tax. Again, the IRS has $50 million it would not have otherwise had ($40 million in cash and $10 refund denied). Although the whistleblower did not present the IRS any information relating to the refund issue, the whistleblower's information on the $50 million issue led to the denial of the $10 million refund due to the offset of the amounts. Lest there be any confusion, the taxpayer's claim for refund is denied. A successful claim for refund results in a refund being paid to the taxpayer. Collected proceeds are still $50 million, which shows that it does not matter which comes first, the taxpayer's refund issue or the whistleblower's submission, the award determination remains the same.

   When should the award determination be made? – Because a Form 866 closing agreement was executed on January 1, 2009, there was finality with respect to all the issues as of that date. The award determination should be made immediately after the Form 866 is executed, even though the section 6501 and 6511 periods of limitation would normally have still been open, because all assessments and refund claims are now barred pursuant to the Form 866 agreement.

It can be seen in the examples above that Mr. Kane's and Chief Counsel's concerns that awards would be paid out in a situation where the IRS has to then "give back" the collected proceeds to the taxpayer do not actually result in a decreased award when the taxpayer agrees and pays with finality

an assessment with respect to an issue raised by a whistleblower. Once the issue raised by the whistleblower is locked down by agreement, it either results in collected proceeds or it does not result in collected proceeds, and the subsequent claim for refund on another issue – which is either allowed or disallowed – doesn't change the amount of the collected proceeds. This scenario is the direct result of the IRS change in position in PTMA 2010-62 that section 7623 awards can be paid on refund protection information from a whistleblower, so the current policy of the IRS with respect to when award determinations can be made should be changed to reflect that most recent guidance. The policy change that the IRS made (about when award determinations were ripe) when it believed that it could not pay awards in refund protection cases should be revoked because upon reconsideration, Chief Counsel's position (about refund protection awards) was revoked. To fail to be consistent is to hurt whistleblowers.

Damage Caused by the Current Rule: There is evidence that this policy change has had a drastic effect on the IRS Whistleblower Program. In the 2010 Report, the IRS disclosed that it collected MORE THAN DOUBLE the amounts of proceeds than it had received as a result of the Whistleblower Program in the prior three years, yet it still paid out roughly the average amount it had been paying out in awards over that period. In other words, receipts from tax whistleblower cases have doubled, but the awards have basically stayed the same. Why? Because the current rule about when award determinations are eligible to be made is freezing out awards under section 7623(b).

In the 2009 Report the IRS explained that it was the operation of the current rule that caused a huge decrease in the number of Section 7623 awards paid by the IRS during that year. Specifically, the Report said: "One factor contributing to the lower award payments in FY 2009 was a change in the IRS definition of the point at which proceeds in a tax case are available to make an award payment." This rule was also applied to award determinations under section 7623(a), so it had an immediate impact on all whistleblower award determinations. Once this policy was put in place, the number of awards paid fell from 198 to 110 and from $22,370,756 to $5,851,608 (Fiscal 2008 vs. Fiscal 2009, respectively), even though the amounts the IRS collected from taxpayers as a result of the Whistleblower Program increased from $155,985,834 to $206,032,872 during those same years. In Fiscal 2010, the number of awards again decreased to 97, and the total amounts of awards paid again neared the average over the last few years at $18,746,327, despite the doubling of collected proceeds in FY 2010. We know firsthand that a large percentage of the collections which have been made by the IRS in FY 2010 were as a result of information provided by whistleblowers pursuant to the new provisions of section 7623(b), and yet the IRS has not paid any awards on these proceeds because of the current and outdated rule with respect to when award determinations can be made. In the meanwhile, the IRS is sitting on the collected proceeds while at the same time releasing statistics, such as those released in the 2010 Report, which make the whole program look like a failure because it continues to shortchange whistleblowers.

Proposed Action to be Taken by the IRS: The IRS needs to change IRM 25.2.2.12 "Funding Awards," (06-18-2010) paragraph 7, to allow for awards to be paid on issues that have been conclusively and finally resolved.

In order to be consistent with PTMA 2010-62 and to do no more harm to whistleblowers under section 7623, we propose that paragraph 7 of IRM 25.2.2.12 be revised as follows to remove the language that has been stricken through as seen below and by adding the italicized language with respect to issue 2 above:

7. **7623(b) Claims:** The amount of assessment of taxes, penalties, interest and other amounts attributable to the Whistleblower will be computed by the Whistleblower Analyst based on all information known with respect to the taxpayer's account, including, for example, with respect to the use of offsets and net operating losses, as of the date the computation is made. The Whistleblower Analyst will monitor the case for collection of the proceeds. The award payment cannot be completed until ~~the statutory period for filing a claim for refund expires or there is an agreement between the taxpayer and the IRS that~~ there has been a final determination of tax for the specific period ~~and the right to file a claim for a refund has been waived~~ *relating to a Whistleblower's information.*

By using the language: "until there has been a final determination of tax for the specific period relating to a Whistleblower's information" the IRS will still achieve its stated goal of not putting itself in a difficult position of having to make an award determination until the period to which the whistleblower's information relates has achieved the appropriate level of finality, while at the same time being consistent with its own recently published guidance and fair to whistleblowers. Under this proposed language, the IRS Whistleblower Office would be able to make an award determination once period of limitations on assessments under section 6501 had lapsed by closing agreement, Form 870-AD, or by a decision of a court. The IRS Whistleblower Office would not have to wait until the period of limitations on refunds under section 6511 had expired to make an award determination because the "collected proceeds" would be the same even if the taxpayer later filed a refund on another issue.

Conclusion: We believe the current provisions of the IRM cited above with respect to refunds and the time that award determinations are eligible to be made are inviting controversy and litigation with the same whistleblowers Congress had hoped to attract. A change in the IRM language with respect to refunds and award eligibility timeliness is needed to avoid those disputes and to be in line with the plain meaning and Congressional intent of section 7623 as well as the IRS's own recently published guidance.

Sincerely,

Scott A. Knott Gregory S. Lyman

cc Senator Grassley
Director Stephen Whitlock
Associate Chief Counsel Deborah Butler