A Legislative History of the Modern Tax Whistleblower Program

by Dean Zerbe

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In this report, Zerbe provides insight into the legislative history and context of section 7623(b), which he argues clearly reflect congressional intent that the Tax Court use a *de novo* standard of review for whistleblower cases.

Table of Contents

The mandatory tax whistleblower program created by section 7623(b) has proven to be one of the great legislative successes in addressing the tax gap, particularly with its focus on high-dollar tax evasion. Since its passage in 2006, the provision has encouraged knowledgeable whistleblowers to come forward and provide information, which assists the important work of IRS examiners and agents and brings in billions of dollars to the fisc.

Before memories fade further and more dust settles, I thought it would be useful to put forward a history of section 7623(b). Doing so is particularly important given that, unfortunately, the IRS and the Tax Court have stated that there is no legislative history for section 7623(b). That inaccurate conclusion came to head in *Kasper*, a case in which the whistleblower was pro se and didn't contradict the IRS on the standard of review, much less the issue of legislative history.[1] The lack of awareness surrounding the legislative history of section 7623(b) and its context has led to problematic and questionable judicial decisions.

The Supreme Court has recognized the potential value of the legislative history of previous versions of a bill, particularly when the "operative language of the original bill was substantially carried forward into the Act."[2] As detailed later, that was the case with section 7623(b) from 2004 to 2006.

[1] Opening Brief for Respondent, at 23, *Kasper v. Commissioner*, 150 T.C. 8 (T.C. Dec. 19, 2014) (No. 22242-11) ("While there is no legislative history concerning section 7623(b). . . ."); and *Kasper*, 150 T.C. 8, at 16 (2018), stating that the legislative history of section 7623(b) "sheds no light on this darkness."

[2] *United States v. Enmons*, 410 U.S. 396, 405 n.14 (1973) (finding that remarks by Rep. Sam Hobbs in introducing the bill that ultimately became the Hobbs Act were "wholly relevant" to an understanding of the act: "Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand . . . simply because the interpretation was given two years earlier."). *See also Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1347 n.1 (Fed. Cir. 2001) (finding it proper to look at the legislative history of a vetoed version of the Whistleblower Protection Act, which was reintroduced and passed in the next Congress without the release of committee reports).

A Model: The False Claims Act

Although the mandatory tax whistleblower program has been a success, the provision stands on the shoulders of the most successful anti-fraud provision on the books: the False Claims Act (*qui tam*).[3] In brief, the False Claims Act allows an individual to file suit in U.S. district court on behalf of the federal government and receive an award for disclosing fraud that resulted in a financial loss to the government. Originating in the Civil War, the False Claims Act was substantially updated and modernized in 1986, with Chuck Grassley, R-Iowa, as the lead senator for those reforms. The one exception to the federal False Claims Act is that it does not cover tax fraud.

The success of the False Claims Act rests on three pillars: (1) a mandatory payment to the whistleblower; (2) a guaranteed award of 15 to 30 percent of the collected proceeds; and (3) *de novo* judicial review of the government's actions, especially as they concern the whistleblower's eligibility.

The importance of *de novo* judicial review for a whistleblower award is particularly critical given that culturally, federal agencies are extremely reluctant to make significant awards to whistleblowers, who are often individuals who have put their jobs and careers in jeopardy to assist the government.

Courts have recognized this problem. For example, the Fifth Circuit in *SAIC* stated: "The government has not always been magnanimous to its relators at the end of the day."[4] And the district court in *General Electric* observed: "In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals [whistleblowers] as adversaries rather than allies. This is not the first case where this Court has noted the antagonism of the Justice Department to a whistleblower. The reason continues to be unknown, but the attitude is clear."[5] That court rejected the government's efforts to reduce a whistleblower award based on its argument that the informant should have come forward sooner.

The modern False Claims Act has brought in more than $62 billion to the U.S. fisc, including over $3 billion last year alone.[6] The even greater benefit of whistleblower award programs like the False Claims Act is their indirect effect on behavior — encouraging greater voluntary compliance.[7]

Context for Reform

When Grassley became chair of the Senate Finance Committee after the 2000 elections, it was natural, given his lengthy involvement and leadership in whistleblower matters, for the committee to conduct oversight on the one missing piece of the False Claims Act — the IRS whistleblower program.

The IRS program has a long history, dating back to 1867, when it was used to pay informants.[8] At the time, the federal government had a host of different whistleblower award programs, most of which shared key attributes: They were discretionary, did not require minimum payments, and did not include a structure for awards. Those award programs are largely forgotten relics, little used by the relevant agencies, although the IRS program was comparatively active.

In conducting oversight of federal agencies for years, I've found that bringing light to a corner of the government produces a grab bag of good, bad, and ugly. For example, the IRS Art Advisory Panel was, at our review, brilliantly led by a dynamic individual and a wonder of efficiency.[9] Unfortunately, those are not the words that would come to mind about the IRS whistleblower program when the Finance Committee reviewed it in the early 2000s.

Essentially, the whistleblower program was a lost soul at the IRS. Although the former senior

[3] 31 U.S.C. sections 3729-3733.

[4] *United States v. Science Applications International Corporation (SAIC)*, 207 F.3d 769, 773 (5th Cir. 2000).

[5] *United States v. General Electric*, 808 F. Supp. 580, 584 S.D. Ohio (1992).

[6] Finance Committee release, "Grassley: Feds Recover $3 Billion From Fraudsters in 2019 Thanks to Grassley Law" (Jan. 9, 2020).

[7] Jetson Leder-Luis, "Whistleblowers, Private Enforcement, and Medicare Fraud," MIT Economics (July 1, 2020).

[8] IRS, "History of the Whistleblower/Informant Program" (last visited Sept. 17, 2020).

[9] Andrey Velimirović, "Behind the Scenes at the IRS Art Advisory Panel," *Widewalls*, Dec. 30, 2020.

manager was well-meaning, it was clear that the program was a long-term resident on the island of misfit toys. It was eye-blinking when an IRS manager commented that the agency received a strong number of informant letters from prisoners. In the Finance Committee staff's review, the program clearly fell short in terms of basic management and relevant guidelines. This included a failure to cultivate and collect good whistleblower information in the field about tax evasion, and a failure to ensure that whistleblowers are treated fairly and given awards properly. Moreover, with the exception of the Criminal Investigation division, the prevailing culture at the IRS made it clear that whistleblowers were neither encouraged nor welcome.

The Finance Committee's oversight work on the IRS whistleblower program included discussions with practitioners, particularly attorneys who represented informants (primarily under the False Claims Act). This brought more bad news. The practitioners scorned the IRS whistleblower program, viewing it as a complete waste of their clients' time and their own. At the time, the IRS had complete discretion in determining whether to pay an award and how much to pay. With its limited and uncertain award payments, the program was at best a disaster.

Adding insult to injury for informants, the sole avenue for judicial review — the Court of Federal Claims — was a graveyard for tax whistleblower claims. This was partly because its jurisdiction to review an award determination was premised on the Tucker Act, which required that there be a contract between the IRS and the whistleblower.

The state of play as of early 2000 was reflected in a detailed article by professor Terri Gutierrez, who analyzed the IRS whistleblower program, its incentives, and the case law.[10] Particularly concerning was her finding that the IRS did not seem to follow its own whistleblower award guidelines and that it was thus difficult for informants to make a case. Importantly, Gutierrez's survey of judicial reviews revealed that the IRS won all 19 award appeals brought by whistleblowers from 1941 to 1998, the claims court in each instance concluding that the agency had not abused its discretion.

"While the decisions seem egregious on the issue of fairness, the wording of the statute gives the commissioner such complete discretion in determining whether and how much reward will be paid, that the courts are wont to rule otherwise," Gutierrez observed. She noted that "courts are reluctant to override administrative authority where Congress has given duties to department heads that require them to exercise judgment and discretion unless there is evidence that the decisions are clearly wrong."

Dennis Ventry Jr., now a professor of law at the University of California, Davis, offered a similarly bleak analysis of the IRS whistleblower program before the 2006 amendments.[11] He found that "with paltry bounties, stingy administrators, inadequate protection for whistleblowers, and unreceptive courts," the program failed to provide an incentive for whistleblowers to endanger their careers and reputations.

The Finance Committee also heard directly from whistleblowers, such as "Mr. ABC," who testified anonymously about his experience in trying to blow the whistle on Enron:

> In providing all this information, my experience with the IRS has been extremely frustrating and discouraging. What I have encountered is an agency that is resistant to and suspicious of confidential informants . . . that is, private citizens who are trying to do the right thing by coming forward and blowing the whistle on significant tax fraud. I have also encountered an agency that is disorganized, and that is generally not equipped to deal with complex and sophisticated tax shelters in an effective fashion.[12]

Mr. ABC went on to detail the basic problems he faced in the IRS's processing of his Form 211, "Application for Award for Original Information." He testified that the agency treated

[10] Gutierrez, "IRS Informants Reward Program: Is It Fair?" *Tax Notes*, Aug. 23, 1999.

[11] Ventry, "Whistleblowers and *Qui Tam* for Tax," 61 *Tax Law.* 357, 363-364 (2007).

[12] Testimony of Mr. ABC (July 21, 2004).

him with suspicion and generally resisted taking "outside information from knowledgeable insiders" seriously.

While the Finance Committee was reviewing the IRS whistleblower program, it was also undertaking its own bipartisan review of corporate tax shelters (particularly Enron's) and individual tax evasion. For committee staff, the importance of whistleblowers in helping uncover complicated tax evasion — structures designed specifically to avoid detection — became readily apparent. They were essential to help peel back the onion. This was especially true for the type of tax evasion in which Enron participated, which involved a host of offshore entities and transactions. This made clear to us, on a bipartisan basis, that there was a need to encourage whistleblowers to come forward and act as Sherpas for the IRS.

From its discussions with practitioners and whistleblowers and its review of available materials and analyses, the Finance Committee concluded that the IRS whistleblower program suffered because it was discretionary and because there were no set award amounts, no *de novo* judicial review, and no dedicated senior management. Grassley had heard firsthand testimony about the program's problems, raised questions with senior Treasury officials,[13] and sought further information from IRS officials.[14] It was in the context of addressing these problems that Grassley directed the committee staff to begin drafting a modernizing amendment to the IRS whistleblower program: proposed section 7623(b).

2004: Reform Passes Senate

The legislative history of section 7623(b) starts not in September 2006, as suggested by the IRS, but in May 2004, when Grassley introduced section 488 of the Jumpstart Our Business Strength (JOBS) Act, S. 1637, which effectively created section 7623(b).[15] The provision proposed by Grassley was included in a manager's amendment that was passed by the Senate. Drawing from the three pillars of the False Claims Act, it provided for a mandatory award, an award range of between 15 and 30 percent of the collected proceeds, and Tax Court review of IRS award determinations (transferring jurisdiction from the claims court). It should be noted that at the time of the amendment's introduction, the Tax Court itself had recognized that the court was understood to have a deep tradition and practice of *de novo* review.[16] Further, to address management concerns (and increase the profile of the program), the provision called for the creation of a whistleblower office within the IRS that would report directly to the commissioner.

In short, in all its key elements, the 2004 amendment creating section 7623(b) was the same as what was ultimately signed into law in 2006.[17] As discussed below, it was presumed that the Tax Court would conduct trials *de novo* (unlike the claims court, which reviewed whistleblower cases under an arbitrary and capricious standard).

The Finance Committee, in its summary of all the Senate-passed amendments to the JOBS Act, described the section 7623(b) proposal as providing "greater certainty and independent review for whistleblowers who are seeking a cash award for providing assistance to the IRS."[18] This echoed a statement released by Grassley:

[13] *See* S. Hrg. 109-219, "Nominations of Robert M. Kimmitt, Randal Quarles, Sandra L. Pack and Kevin I. Fromer" (July 20, 2005) (question to Kimmitt about IRS whistleblower program and comparing it with the success of the False Claims Act: "The Finance Committee has heard testimony, and my office has received complaints from many individuals, that the whistleblower reward program at the IRS is not effective.").

[14] *See, e.g.*, Grassley release, "Grassley Seeks Details of Instrument Donation, Highlights Need for IRS Whistleblower Incentives" (May 3, 2004).

[15] Grassley amendment No. 3133 passed the Senate May 11, 2004. Although there was some behind-the-scenes maneuvering a little before that date, this is the first date that the provision saw the light of day.

[16] *Jones v. Commissioner*, 97 T.C. 7, 18 (1991).

[17] Commentators have incorrectly viewed a 2006 Treasury Inspector General for Tax Administration report as the sole impetus for the section 7623(b) amendments. *See* TIGTA, "The Informants' Rewards Program Needs More Centralized Management Oversight," No. 2006-30-092 (June 2006). Although the TIGTA report, done at Grassley's request, was helpful and important, the Finance Committee staff had been conducting a review of the IRS whistleblower program even before the 2004 amendment. The staff review made clear the host of problems at the time — the IRS's administration of the program, as well as the limitations of judicial review by the claims court. Those issues, particularly the maladministration of the program, were later amplified and confirmed by the TIGTA report.

[18] Finance Committee, "Summary of Amendments to the Senate-Passed JOBS Act" (May 13, 2004) (the 2004 Grassley amendment creating section 7623(b) was well known in the tax community); *see* Allen Kenney, "Critics Question Whistleblower Proposal in Senate ETI Bill," *Tax Notes*, July 12, 2004, p. 111 (it should be noted that Grassley's proposed amendment did not go unnoticed, with critics questioning the proposal heavily).

> Right now, the IRS is allowed to pay rewards to whistleblowers, but there's no guarantee of a reward and, therefore, less incentive for whistleblowers. This provision models an IRS rewards program on the False Claims Act. It provides greater certainty and independent review for whistleblowers who are seeking a cash award for providing assistance to the IRS.[19]

The courts, and particularly the Tax Court, have long understood and interpreted "independent review" to mean *de novo* review.[20] Just as important, the Tax Court has long understood and interpreted "arbitrary and capricious" to *not* mean independent review.[21] Further, "greater certainty" can be fairly read as speaking to *de novo* review, given that whistleblowers were already subject to the arbitrary and capricious review standard in the claims court.

Reinforcing this concept is a little-discussed provision of the 2004 amendment that was included in all versions of the bill and ultimately signed into law as section 7623(b)(6)(A). It states: "No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection."[22] As noted earlier, the existence of a contract is a core element of the Tucker Act. Thus, the "no contract" provision of section 7623(b)(6)(A) is not surplusage; it was included to ensure that the Tax Court would not view itself as bound by the Tucker Act and its arbitrary and capricious standard of review. This would help the stated goal of an independent review. Congress wanted to make certain that judicial review no longer was a graveyard for tax whistleblower cases.

Further, the overall language in section 7623(b) reflected a diligent attempt to avoid the problems and pitfalls faced by whistleblowers under the False Claims Act (that is, agencies reluctant to make awards). The provision used the word "any" repeatedly, including in the grant of court review, as well as the terms "including" and "proceeds" and other language, to guard against narrow readings that would deny whistleblowers awards or their right to a *de novo* judicial review. In a 2016 landmark decision for whistleblowers, the Tax Court recognized that section 7623(b) used "broad and sweeping" words to create an "expansive rewards program."[23]

2005: Reform Again Passes Senate

The 2004 amendment creating section 7623(b) passed the Senate but was later dropped in the House-Senate conference.[24] However, Grassley revived the amendment in 2005, introducing it as section 5508 of H.R. 3, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. The language used in the 2005 amendment was essentially the same as the language in the 2004 amendment, with only minor changes.[25] The Finance Committee released a public memorandum summarizing the provisions, again describing the whistleblower provision as providing "greater certainty and independent review for whistleblowers who are

[19] Finance Committee release, "Grassley Praises Senate Passage of IRS Whistleblower Help, Civil Rights Tax Reform, Charitable Giving Reform, Ban on Deduction of Government Fines, 'Son of Boss' Item" (May 12, 2004). Courts have frequently cited release statements as useful context for legislative interpretation. *See, e.g.*, *Blak Investments v. Commissioner*, 133 T.C. 431, 442 (2009); *In re DeVries*, No. 19-00181, at 4 (Bankr. N.D. Iowa 2020); *United States v. Hamilton Securities Group Inc.*, 332 F. Supp. 2d 10 (D.D.C. 2003); *Tinsley v. Commissioner*, T.C. Memo. 1992-195; and *United States v. Smithkline Beecham Corp.*, 205 F.3d 97, 106 (3d Cir. 2000).

[20] *See Estate of Lassiter v. Commissioner*, T.C. Memo. 2000-324, at 8 (2000) ("As we have previously established, a trial before the Tax Court is a proceeding de novo. . . . In carrying out this mandate here, we cannot substitute selected conclusions made by respondent in administrative papers for our own. We instead must engage in an independent review of the facts and application of law thereto.").

[21] *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005) ("We do not conduct an independent review of what would be an acceptable offer in compromise.*Fowler v. Commissioner*, T.C. Memo. 2004-163. The extent of our review is to determine whether the Appeals officer's decision to reject the offer in compromise actually submitted by the taxpayer was arbitrary, capricious, or without sound basis in fact or law.") (Citations omitted.).

[22] Section 7623(b)(6)(A).

[23] *Whistleblower 21276-13W v. Commissioner*, 147 T.C. 121, 129 (2016).

[24] JOBS Act, section 488; "Grassley Amendment No. 3133 Passes Senate," *supra* note 15.

[25] The 2005 amendment would have added section 7623(b)(3), an antiabuse provision allowing the IRS Whistleblower Office to reduce awards when the whistleblower planned and initiated the tax evasion action, and directing the office to deny an award if the whistleblower was convicted of criminal conduct arising from the role of planning and initiating. The 2005 provision also made clear that it was in the sole discretion of the whistleblower office to ask for additional assistance from the whistleblower or the whistleblower's lawyer.

seeking a cash award for providing assistance to the IRS."[26] Again, the amendment passed the Senate but was dropped in conference.

Important for the long-term chances of the provision becoming law, the Joint Committee on Taxation scored the proposed whistleblower reform as generating $407 million over 10 years.[27] That turned out to be an underestimate. We had been working on the provision with the very capable tax professionals at JCT for a long time, and it was extremely good news to have this score. Although the revenue raised wasn't going to close the tax gap, the score made the provision instantly more viable, given Congress's strong appetite for revenue raisers to serve as offsets. We were confident that the provision would eventually become law. We just needed to get it on another legislative train that was in motion.

Sen. Carl Levin proposed legislation later in 2005 that followed the language in Grassley's section 7623(b) in most ways, except in one key respect: Levin's bill specifically gave the IRS full discretion in administering awards to whistleblowers.[28] It stated that the determination of any whistleblower award was to "be determined at the sole discretion of the Whistleblower Office." In introducing the legislation, Levin noted this important difference from the provision developed by the Finance Committee:

> We would continue to give the IRS the discretion to determine the amount of money paid to an individual whistleblower; our bill would not enable whistleblowers to appeal to a court to obtain additional sums. The fact-specific analysis that goes into evaluating a whistleblower's assistance and calculating a reward makes court review inadvisable. The existence of an appeal also invites litigation and necessitates the expenditure of taxpayer dollars — not for tax enforcement but for a court dispute.[29]

Based on those comments, it appears that Levin interpreted Grassley's section 7623(b) language as providing for *de novo* review, because he complains about "the fact-specific analysis" and resulting extensive time and expense. It seems unlikely Levin would have used this description if he viewed the Tax Court review as involving comparatively simple, quick, pro forma, rubber-stamp review under an arbitrary and capricious standard. His statement, fairly read, assumes that any review of whistleblower determinations would be under a *de novo* standard of review.

Further, knowledgeable commentators argued at the time that the judicial review of whistleblower awards should be conducted by federal district courts, given their experience with *qui tam* actions — experience that the Tax Court did not possess.[30] *Qui tam* litigation is subject to a *de novo* standard of review in the district courts. If these commentators (one of whom had served as IRS chief counsel, assistant Treasury secretary for tax policy, and chair of the American Bar Association Section of Taxation) believed there would be an arbitrary and capricious review standard at the Tax Court, they undoubtedly would have raised that point.[31] Presumably, they didn't because it was widely understood that Grassley's proposed section 7623(b) called for a *de novo* standard of review.

2006: TIGTA Report and Champagne

In addition to the Finance Committee's oversight of the IRS whistleblower program, Grassley had asked the Treasury Inspector General for Tax Administration to conduct an independent review of the program. The TIGTA report, released June 9, 2006,[32] was titled "The

[26] Finance Committee staff, "Memorandum for Tax LAs" (May 10, 2005).

[27] JCT, "Estimated Budget Effects of the Tax Provisions Contained in H.R. 3, as Passed by the Senate, Fiscal Years 2005-2015," JCX-42-05 (June 13, 2005).

[28] Tax Shelter and Tax Haven Reform Act of 2005, S. 1565, 109th Cong. section 206 (2005).

[29] 151 *Cong. Rec.* S9472, S9484 (July 29, 2005).

[30] *See, e.g.*, letter of Kenneth W. Gideon, as chair of the American Bar Association Section of Taxation (June 13, 2005).

[31] *Id.*; *see also Church of Scientology of California v. IRS*, 484 U.S. 9 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.").

[32] *See* TIGTA report, *supra* note 17.

Informants' Rewards Program Needs More Centralized Management Oversight." The findings of this thorough, first-rate report amounted to a devastating indictment of the IRS whistleblower program. Commenting on the release, Grassley said:

> TIGTA's report makes clear that the IRS and Treasury still are far short in having a professional, effective office to benefit from whistleblowers. For example, in 76 percent of the claims rejected, TIGTA was unable to determine the rationale for the reviewer's decision to reject the claim. This has to stop.[33]

The TIGTA report made it clear that the chances of an erroneous decision on a whistleblower award were extremely high. It stated:

> In 32 percent of the paid claims, we were unable to determine the justification for the percentage granted. In most of these cases, the reviews simply entered the percentage on the Form 11369 and did not provide any explanation for the decision.
>
> For a rejected claim, the reason for rejection is of major significance. In 76 percent of the rejected informant claims included in our review, we were unable to determine the rationale for the reviewer's decision to reject the claim, based on information in the case file.[34]

TIGTA also found that approximately 14 percent of the files reviewed lacked important information, such as copies of crucial forms and correspondence with informants. Other claims could not be found by the whistleblower office altogether.[35]

Just as important, TIGTA brought to light findings of a buried 1999 Treasury report on the program,[36] which showed that the "examinations initiated based on informant information had a higher dollar yield per hour and a lower no-change rate, when compared to returns selected using the IRS' primary method of selecting returns, the Discrimination Index Function."[37] In sum, the earlier Treasury findings as reported by TIGTA made clear that a strong whistleblower program could be taxpayer-friendly, conserve limited IRS resources by targeting bad actors, and reduce agency time spent examining honest taxpayers, all while returning dollars to the fisc. The TIGTA report, combined with the JCT score, identified a path to enactment for Grassley's proposal, first introduced in 2004.

The TIGTA report also underscored a path Congress chose to not take in modernizing the IRS whistleblower program: an administrative review process. This sort of internal review is mandated for cases under other code provisions, such as collection due process cases brought under section 6330, which the Tax Court reviews under the arbitrary and capricious standard, as was made clear in congressional report language.[38] These cases require a detailed review by an independent IRS Appeals officer.[39] Whistleblower award determinations had traditionally never been subject to IRS Appeals. Because the IRS whistleblower program had been problematic for years, many lawmakers in 2006 lacked confidence that the IRS would successfully manage the modernized program. Moreover, it was widely known that many at the IRS were hostile to the enactment of section 7623(b).[40] For Congress, the natural answer was to have the necessary independent review process performed outside

[33] Finance Committee release, "Grassley: Report Shows IRS Could Better Use Whistleblowers to Catch Tax Cheats" (June 9, 2006).

[34] *See* TIGTA report, *supra* note 17, at 2 and 7 (noting that the pre-2006 IRS whistleblower program lacked "standardized procedures," was plagued by "limited management oversight," and that up to 45 percent of claims filed had "basic control issues," including missing forms); *see also* S. Rep. No. 110-1, at 66 (2007).

[35] *See* TIGTA report, *supra* note 17, at 7.

[36] IRS, "The Informants' Project: A Study of the Present Law Reward Program" (Sept. 1999).

[37] *See* TIGTA report, *supra* note 17, at 4-5.

[38] *See* section 6330(a)(1); *See also* H.R. Rep. No. 105-599, at 266 (1998) (Conf. Rep.); and *Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006).

[39] Section 6330(b) and (c).

[40] *See, e.g.*, Jeremiah Coder, "Conversations: Donald Korb," *Tax Notes*, Jan. 18, 2010, p. 310 (quoting then-IRS Chief Counsel Donald Korb as stating: "The new whistleblower provisions Congress enacted a couple of years ago have the potential to be a real disaster for the tax system. I believe that it is unseemly in this country to encourage people to turn in their neighbors and employers to the IRS as contemplated by this particular program. The IRS didn't ask for these rules; they were forced on it by the Congress.").

the IRS, by the Tax Court. That decision was also informed by Grassley's long experience in working on whistleblower issues with recalcitrant and reluctant agencies in False Claims Act cases. An agency's culture toward whistleblowers doesn't become sunshine and roses just because the law has changed; it can take years for an agency to embrace whistleblowers.

The summer of 2006 again saw the whistleblower reform legislation included as a revenue raiser by the Finance Committee. It was first seen on June 28, 2006, in the chair's modification of S. 1321, the Telephone Excise Tax Repeal Act of 2005.[41] Essentially, the whistleblower provision had become a go-to revenue raiser for the Finance Committee.

The 2006 provision, which was ultimately enacted, reflected one notable change: Awards would be available for whistleblowers only if the tax evasion — the "amount in dispute," including penalties and additions to tax — exceeded $2 million (the original threshold was $20,000). The 2006 amendment also clarified and strengthened judicial review by ensuring that whistleblowers could appeal a Tax Court decision to the D.C. Circuit. The provision creating a mandatory tax whistleblower award with independent review by the Tax Court finally became law in December 2006, when it was enacted as a revenue raiser in the Tax Relief and Health Care Act of 2006. However, the legislative history wasn't yet complete.

2007: A Clarification Surfaces

Weeks after the enactment of section 7623(b), Grassley sought some minor changes, which mostly reflected earlier drafts of the legislation.[42] These included reducing the claim floor for mandatory awards from $2 million to $20,000 and providing for reimbursement for whistleblowers' attorneys who assisted the IRS. The proposals were in the Senate version of an emergency supplemental funding bill that passed Congress but was later vetoed.[43]

Important for purposes of the legislative history, the proposals included the following provision, which would have created section 7623(b)(4)(B) to address the publicity of appeals:

> Notwithstanding sections 7458 and 7461, the Tax Court may, in order to preserve the anonymity, privacy or confidentiality of any person under this subsection, provide by rules adopted under section 7453 that portions of filings, *hearings, testimony, evidence and reports* in connection with proceedings under this subsection may be closed to the public or to inspection by the public. [Emphasis added.]

The "hearings, testimony, evidence and reports" language is fairly read as referring to *de novo* review proceedings. However, the Tax Court has been reviewing whistleblower cases under an arbitrary and capricious standard, with a limited scope of review. Those proceedings do not include the expansive hearings, testimony, evidence, and reports encompassed by this provision.

Notably, section 7623(b)(4)(B), unlike the other 2007 proposed amendments to section 7623(b), was to take effect "as if included in the amendments made by section 406 of the Tax Relief and Health Care Act of 2006." This signaled that Congress intended it to be viewed as part of the original legislation. This was an effort to ensure the protection of confidential information that was anticipated to be provided in Tax Court *de novo* review under the newly enacted statute.

The Supreme Court has been guarded about post-enactment legislative history, observing that it "should be relevant to the extent it is persuasive."[44] The legislative history at issue here is an amendment that was written by the author of

[41] *See* JCT, "Description of the Chairman's Modification to the Provisions of S. 1321, the 'Telephone Excise Tax Repeal Act of 2005' and S. 832, the 'Taxpayer Protection and Assistance Act of 2005,'" JCX-28-06, at 19 (June 28, 2006).

[42] *See* S. 349, the Small Business and Work Opportunity Act of 2007, section 213 (as approved by the Finance Committee Jan. 17, 2007); and JCT, "Description of the Chairman's Modification of the Provisions of the 'Small Business and Work Opportunity Act of 2007,'" JCX-5-07, at 40 (Jan. 17, 2007).

[43] H.R. 1591, section 543.

[44] *United States v. Woods*, 571 U.S. 31, 48 (2013) (finding that a JCT blue book is a "post-enactment explanation," with the Supreme Court stating in its opinion, "Of course the Blue Book, like a law review article, may be relevant to the extent it is persuasive."); by comparison, the 2007 provision is not a "post-enactment explanation," but instead legislation passed by Congress that was written by the author of the previous language that was signed into law just a few weeks earlier.

section 7623(b) and passed by Congress only weeks after it enacted the original legislation. These are unique circumstances, and this piece of the legislative history is indeed persuasive. Although section 7623(b)(4)(B) did not become law (because lawmakers couldn't overcome the presidential veto), the provision clearly reflects Congress's understanding that section 7623(b), as passed in 2006, provides for *de novo* of whistleblower cases.[45]

Conclusion

The path of this legislation is not atypical for small provisions. Commonly, they get over the barricades after two or three attempts, if not more, before finally finding a bigger vehicle that is moving through the legislative process. Thus, it is not unusual that enactment can take two years, as was the case here, or much longer.[46] The legislative history of section 7623(b) sheds light on the thinking of its author, Grassley, as well as Congress — particularly regarding the creation of an independent review by the Tax Court. ■

[45]The Tax Court noted the provision when it passed new Tax Court Rule 345, "Privacy Protections for Filings in Whistleblower Provisions"; *see* U.S.T.C. R. Prac. & Proc. Rule 345 n.1.

[46]Section 7623(b)(4).