Scratching Our Heads Over *Cooper v. Commissioner*

By Michelle M. Kwon


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Cooper v. Commissioner is a case of first impression involving the denial of a whistleblower claim after the IRS declined to pursue the whistleblower's tip. In this article, Kwon explains why the Tax Court should not have asserted jurisdiction in *Cooper* and surmises why it persisted. The article explores the implications of the court's decision and some of the remaining questions.

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A. Introduction

Last July the Tax Court, in *Cooper*, a case of first impression, decided it has jurisdiction under section 7623(b)(4) to review the IRS's denial of a whistleblower claim even when the whistleblower's information is not used to collect underpayments of tax.[1] Some 11 months later, the Tax Court dismissed the *Cooper* cases by granting the government's summary judgment motion.[2] Those two decisions are puzzling. The court asserts jurisdiction over the denied claims and then disposes of the cases on summary judgment because the claims were denied. This article explains why the Tax Court should have refused *Cooper I* on jurisdictional grounds and surmises why it persisted. The article also explores some implications of the *Cooper* decisions and unanswered questions that remain.

B. Summary of IRS Whistleblower Program

Congress enacted section 7623(b) in 2006 to address weaknesses in the whistleblower program, which has been around for more than 100 years and continues to exist in section 7623(a).[3] Before the 2006 amendments, the IRS had virtually unchecked discretion to decide whether to pay any award at all and how much, if any, to pay.[4] Section 7623 as it existed before the 2006 amendments did not give whistleblowers the right to judicially appeal IRS award determinations.[5] Only whistleblowers who could show a contract with the IRS governing the award could file suit in the Court of Federal Claims under the Tucker Act to appeal the award determination.[6]

Under section 7623(b), the IRS no longer has discretion to decide whether to make an award. Now it generally must pay an award out of collected proceeds to a whistleblower who provides information that leads to the collection of an underpayment of tax.[7] Some whistleblowers filing claims

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[1]*Cooper v. Commissioner*, 135 T.C. 70, 75 (2010), *Doc 2010-15202*, *2010 TNT 131-3* (*Cooper I*). *See also Friedland v. Commissioner*, T.C. Memo. 2011-90, *Doc 2011-8863*, *2011 TNT 80-16* (following *Cooper I* in holding that a letter from the IRS denying a whistleblower's claim was sufficient to confer jurisdiction on the Tax Court but dismissing the case because the whistleblower did not timely file his petition).

[2]*Cooper v. Commissioner*, 136 T.C. No. 30 (2011), *Doc 2011-13460*, *2011 TNT 119-6* (*Cooper II*).

[3]Tax Relief and Health Care Act of 2006, P.L. 109-432, Div. A, Title IV, section 406. The problems with the prior program were publicized by the Treasury Inspector General for Tax Administration in a report six months before Congress enacted section 7623(b). *See* TIGTA, "The Informants' Rewards Program Needs More Centralized Management Oversight," 2006-30-092 (June 2006), *Doc 2006-11262*, *2006 TNT 112-11* (2006 TIGTA report). *See* Michelle M. Kwon, "Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions," 29 *Va. Tax Rev.* 447, 451-455 (2010), for a discussion of the weaknesses of the whistleblower program before the 2006 changes.

[4]Kwon, *supra* note 3, at 451.

[5]*Id.* at 453.

[6]*Id.* Congress made clear in the 2006 amendments that a contract with the IRS is no longer necessary to receive an award. *See* section 7623(b)(6)(A).

[7]Section 7623(b)(1) (stating that an individual "shall . . . receive as an award"). The award is paid out of collected proceeds, including penalties, interest, additions to tax, and additional amounts. *Id.* The provisions of section 7623(b) apply only to information that a whistleblower provides to the IRS on or after December 20, 2006. *Wolf v. Commissioner*, 93 T.C. Memo. 2007-133, *Doc 2007-13044*, *2007 TNT 105-11* (stating that the Tax Court lacked jurisdiction over a whistleblower claim under section 7623(b) if the information was provided to the IRS before December 20, 2006). Also, the amounts in dispute, including penalties and interest, must exceed $2 million, and if the taxpayer is an individual, the taxpayer's gross income must

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under section 7623(b) have the right to appeal their award determinations to the Tax Court, which has exclusive jurisdiction.[8] A whistleblower action is commenced by filing a petition in the Tax Court within 30 days of the award determination.[9]

C. *Cooper I*

William Prentice Cooper III filed two claims with the IRS Whistleblower Office alleging that ''certain parties had failed to pay millions of dollars in estate and generation-skipping transfer tax.''[10] The Whistleblower Office eventually sent Cooper a letter denying his submissions.[11] The letter informed Cooper that ''the information [he] provided did not identify a federal tax issue upon which the IRS will take action. Therefore, [his] claim did not result in the detection of the underpayment of taxes and as a result, an award determination cannot be made under section 7623(b).''[12]

Cooper filed two petitions in the Tax Court in response to the government's letter.[13] The government moved to dismiss the petitions. It asserted that the Tax Court lacked jurisdiction because no notice of determination within the meaning of section 7623(b)(4) was sent to Cooper, nor had the government made any determination that would confer jurisdiction upon the Tax Court.[14] The Tax Court denied the government's motion to dismiss, instead holding that the letter was a valid determination notice sufficient to confer jurisdiction on the Tax Court under section 7623(b)(4).[15]

D. *Cooper II*

After the Tax Court claimed jurisdiction over the claims in the first *Cooper* decision (*Cooper I*), it granted the government's motion for summary judgment in the second decision (*Cooper II*) because ''petitioner does not meet the threshold requirements for an award under section 7623(b).''[16] The court in *Cooper II* set forth two statutory conditions for an award: (1) the initiation of an administrative or judicial action based on the whistleblower's information, and (2) the collection of proceeds. The IRS did not take an administrative or judicial action against the taxpayer, and therefore Cooper was not entitled to a whistleblower award under section 7623(b).

E. Tax Court Jurisdiction

The Tax Court should not have asserted jurisdiction in *Cooper I*. Oddly, the reason the Tax Court granted the government's motion for summary judgment in *Cooper II* — because the statutory conditions were not satisfied — is exactly why the court lacks jurisdiction over the cases. The Tax Court's determination that it has jurisdiction in cases like *Cooper* is based on a misreading of both the statutory language and a technical explanation from the Joint Committee on Taxation.

1. Defying the statute's plain language. The Tax Court is a court of limited jurisdiction that may legitimately exercise authority only to the extent Congress expressly authorizes by statute.[17] It has no authority to enlarge its statutory grant of jurisdiction.[18] Congress granted the Tax Court the authority to adjudicate appeals of specific whistleblower claims by enacting section 7623(b)(4), which provides:

> (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).

The Tax Court seems to read the language in section 7623(b)(4) providing that ''any determination regarding an award under paragraph (1), (2), or (3)'' may be appealed to mean that any determination regarding a *claim* may be appealed. The terms ''award'' and ''claim'' are not interchangeable. Congress consistently uses the term ''award'' in section 7623(b).[19] The common meaning of the term

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exceed $200,000 for any tax year at issue. Section 7623(b)(5). If all those conditions are not met, a whistleblower's claim will be governed by section 7623(a).

[8]Section 7623(b)(4). *Dacosta v. United States*, 82 Fed. Cl. 549, 555 (Fed. Cl. 2008), *Doc 2008-15634*, *2008 TNT 138-12* (stating that the Tax Court has exclusive jurisdiction over section 7623(b) claims).

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

[10]*Cooper I*, 135 T.C. at 71.

[11]*Id.* at 72.

[12]Exhibit C to Respondent's Motion to Dismiss for Lack of Jurisdiction, *Cooper I*, 135 T.C. 70. Citations in this article to filings in the public record refer to documents obtained from the Tax Court relating to Dkt. No. 24178-09W, one of the two cases the whistleblower filed. The court eventually consolidated both cases. *William Prentice Cooper III v. Commissioner*, 135 T.C. No. 4; Nos. 24178-09W, 24179-09W, *Doc 2010-15202*, *2010 TNT 131-3*.

[13]*Cooper I*, 135 T.C. at 72.

[14]*Id.*

[15]*Id.* at 76. The court also seems to think that some provisions in the Internal Revenue Manual and Notice 2008-4, 2008-2 IRB 253, *Doc 2007-27740*, *2007 TNT 245-13*, confer jurisdiction on it even though those procedures lack the force and effect of law.

[16]*Cooper II*, 136 T.C. No. 30.

[17]Section 7442; *Cooper I*, 135 T.C. at 73; *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985).

[18]*Phillips Petroleum Co. v. Commissioner*, 92 T.C. 885, 888 (1989).

[19]The only place Congress used the term ''claim'' is in section 7623(b)(3) (''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

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"award" is "something that is conferred or bestowed upon a person."[20] The term "claim" means merely "a demand for compensation, benefits, or payment."[21] Section 7623(b)(4) does not apply, and thus jurisdiction is lacking in *Cooper I* because the whistleblower's claims failed to qualify him for an award. Award determinations, and not merely claim determinations, are what may be appealed.

2. The magic of seeing things that aren't there. Judge Diane L. Kroupa, who delivered the opinions in *Cooper*, said that section 7623(b)(4) "expressly permits an individual to seek judicial review in [the Tax Court] of the amount *or denial* of an award determination."[22] But that section says no such thing. Without analyzing the plain language of section 7623(b)(4), the Tax Court leapt to the JCT's technical explanation, which states: "The provision permits an individual to appeal the *amount or a denial of an award determination* to the United States Tax Court . . . within 30 days of such determination."[23] The technical explanation, prepared by the JCT two days before the bill was cleared for the White House, is not an official legislative document, and "standing alone, without any direct evidence of legislative intent, is not unequivocal evidence of legislative intent."[24] Further, it is a fundamental rule of statutory construction that a court should not resort to extrinsic material when a statute is unambiguous on its face.[25] Rather, a court should enforce a statute by assigning to the words of the statute their plain and ordinary meaning.[26] It is only when the statute is ambiguous or silent that a court should examine the statute's legislative history.[27] Only "unequivocal evidence of legislative purpose" can override the plain language of a statute.[28] Even if any weight can be accorded to the explanation provided by the JCT, Kroupa misinterpreted it. The phrase "denial of an award determination" in the JCT's technical explanation more likely refers to situations when the IRS denies an award despite having collected proceeds based on a whistleblower's tip as opposed to the denial of a mere whistleblower claim, as the Tax Court held in *Cooper I*.

Recall that section 7623(b)(4) provides that "any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court." Paragraph (1) of section 7623(b) requires the payment of an award of between 15 and 30 percent of amounts collected from the taxpayer "if the Secretary proceeds with any administrative or judicial action . . . based on information brought to the Secretary's attention by an individual." Section 7623(b)(1) defines an administrative or judicial action by referring to section 7623(a), which authorizes awards to individuals who provide information that leads to "detecting underpayments of tax, or detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." The amount of the award within the 15 to 30 percent statutorily mandated range depends on "the extent to which the individual substantially contributed" to the investigation. Paragraph (2) permits the Whistleblower Office to reduce the amount of an award made under paragraph (1) to no more than 10 percent of the collected proceeds if the information is from public sources unless the whistleblower was the original source of the public information. Paragraph (3) permits the Whistleblower Office to reduce an award made under paragraph (1) or (2) if the whistleblower planned and initiated the actions that led to the underpayment of tax. Paragraph (3) directs the Whistleblower Office to deny an award made under paragraph (1) or (2) to a whistleblower who is criminally convicted for planning and initiating the actions that led to the underpayment.

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underpayment of tax . . . then the Whistleblower Office may appropriately reduce such award").

[20]*Webster's Third New International Dictionary*, 152 (1971). While the term "award" may also mean a "judgment, sentence, or final decision," that interpretation would make the terms "determination" and "award" duplicative.

[21]*Id.* at 414.

[22]*Cooper I*, 135 T.C. at 75 (emphasis added).

[23]JCT, "Technical Explanation of H.R. 6408, The Tax Relief and Health Care Act of 2006 as Introduced in the House on Dec. 6, 2006," JCX-50-06 (Dec. 7, 2006), at 89, *Doc 2006-24589*, *2006 TNT 236-13* (emphasis added). *See* David F. Shores, "Textualism and Intentionalism in Tax Litigation," 61 *Tax Law*. 53 (Fall 2007) (studying cases in the Tax Court to show that it is more apt than courts of appeals to rely on congressional intent and to deviate from the plain meaning of statutes).

[24]*Zinniel v. Commissioner*, 89 T.C. 357, 367 (1987) (interpreting weight to be given to the JCT's general explanation). *See also Estate of Wallace v. Commissioner*, 965 F.2d 1038, 1050 n.15 (11th Cir. 1992) (JCT's general explanation is not "binding authority on legislative intent"); *Allen v. Commissioner*, 118 T.C. 1, 13-15 (2002), *Doc 2002-456*, *2002 TNT 4-5* (giving general explanation no persuasive value). *Compare Maniolos v. United States*, 741 F. Supp.2d 555, 563 n.8 (S.D.N.Y. 2010), *Doc 2010-21742*, *2010 TNT 193-8* (stating that "while the technical explanation is not legislative history, it is indicative of the intent behind" the Economic Stimulus Act).

[25]*See, e.g., United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010) (stating that the court interprets a statute based on its plain language absent ambiguity or a clearly expressed legislative intent to the contrary); *BP America Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1033 (10th Cir. 2010) (if a statute's language is plain and plainly satisfied, the sole function of the courts is to enforce it according to its terms).

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[26]*Summitt v. Commissioner*, 134 T.C. 248, 264 (2010), *Doc 2010-11286*, *2010 TNT 98-15*.

[27]*Id.*

[28]*Id.*

Thus, a ''determination regarding an award under paragraph (1)'' that may be appealed to the Tax Court is one in which the IRS proceeds with an administrative or judicial action based on information from a whistleblower and collects proceeds from the targeted taxpayer as a result of the action.[29] A determination as to an award under paragraph (2) incorporates the prerequisites of paragraph (1) but could also result in a reduction in the amount of an award.[30] A determination as to an award under paragraph (3) could result in a reduction or denial of an award.[31] Under that interpretation, the IRS may proceed with an administrative or judicial action based on information from the whistleblower and collect proceeds, but an award determination under paragraph (b)(3) would be denied (that is, the amount would be zero). The JCT's reference to an appeal of ''a denial of an award determination'' in its technical explanation likely refers to the denial of an award under section 7623(b)(3) or in other cases in which the government denies an award to a whistleblower despite having collected proceeds based on his information.[32]

Under the law as it existed before the 2006 amendments, the IRS had almost total discretion to decide whether to pay an award and how much to pay.[33] Consequently, courts lacked the authority to order the government to pay an award even in cases in which the whistleblower's information led to the collection of back taxes. For example, in *Krug v. United States*, the whistleblower sued the IRS for refusing to pay him any award despite using information he provided to recover millions of dollars from delinquent taxpayers.[34] The Federal Circuit said that the government's ''dealing with Mr. Krug leaves much to be desired in terms of how the Government should treat its citizens.''[35] Nonetheless, in granting summary judgment to the government, the court held that the IRS was not obligated to pay an award absent a contract, even if the whistleblower was otherwise eligible.[36]

Now, a whistleblower like Krug should be able to judicially appeal the amount or the denial of an award determination. The language of section 7623(b) makes it clear that Congress intended to remove the IRS's discretion to deny an award when the statutory conditions are satisfied (that is, the whistleblower provides information involving a violation of tax law that leads to the recovery of back taxes and the whistleblower is not convicted of planning and initiating the actions that led to the underpayment). Section 7623(b)(4) (the provision giving the Tax Court jurisdiction to hear appeals of specific whistleblower determinations) was enacted against a backdrop of court decisions that rejected the possibility of judicial review to challenge the IRS's determination even if the IRS had collected proceeds based on the whistleblower's information. If the government arbitrarily or capriciously refuses to pay an award even when the statutory conditions are satisfied, a whistleblower has the right to file suit in the Tax Court to demand the payment of an award under section 7623(b)(4). The role of the Tax Court presumably will be to determine whether the amount awarded is consistent with the statutory provisions.

3. Containing the fallout. Although the Tax Court overstepped its jurisdictional bounds in *Cooper I*, the whistleblower's Tax Court appeal was ultimately unsuccessful. The court correctly concluded in *Cooper II* that it has no role in deciding whether it was proper for the IRS to decline to initiate an administrative or judicial action against the targeted taxpayer. Cooper had asked the Tax Court to direct the government ''to undertake a complete re-evaluation of the facts in this matter, begin an investigation of this matter, open a case file, and

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

[30]*Id.*

[31]*Id.*

[32]Section 7623(b)(3) is the only place in the statute where the word ''deny'' is used. Query whether the IRS could legitimately deny an award under section 7623(b)(2). Section 7623(b)(2) provides that ''the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the collected proceeds'' if the whistleblower's information is from public sources. Under the whistleblower program that existed before 2006, courts held that similar language in contracts between the government and the whistleblower gave the government discretion to pay no award. *See, e.g., Stack v. United States*, 25 Cl. Ct. 634 (1992) (holding that contract providing a whistleblower payment of up to 5 percent of collected proceeds as insufficiently precise for the whistleblower to recover an additional award despite government's use of the whistleblower's information to recover proceeds). It seems that the IRS could not completely deny an award under section 7623(b)(1) unless section 7623(b)(2) or (b)(3) also applies.

[33]*See, e.g., Thomas v. United States*, 22 Cl. Ct. 749, 749-750 (1991) (whistleblower not entitled to an award even if the whistleblower's information resulted in collected proceeds); *Barker v. Lein*, 366 F.2d 757, 758 (1st Cir. 1966) (that the IRS recovered tax from the taxpayer based on a whistleblower's information did not provide a sufficient basis for recovery by the whistleblower).

[34]*Krug v. United States*, 41 Fed. Cl. 96, 97 (1998), *Doc 98-17480, 98 TNT 106-13, aff'd*, 168 F.3d 1307 (Fed. Cir. 1999), *Doc 1999-6633, 1999 TNT 33-9*.

[35]*Krug*, 168 F.3d at 1310.

[36]*Krug*, 41 Fed. Cl. at 99. Even whistleblowers who received awards had difficulty challenging the amount of awards the government paid. *See, e.g., Cambridge v. United States*, 558 F.3d 1331 (Fed. Cir. 2009), *Doc 2009-4903, 2009 TNT 42-9*. *Compare Merrick v. United States*, 846 F.2d 725 (Fed. Cir. 1988).

take whatever other steps may be necessary.''[37] It is clear that mandamus relief is unavailable absent a clear duty on the government's part to act; in any event, the Tax Court does not have the authority to grant mandamus relief.[38] Alternatively, Cooper argued that the Tax Court itself may adjudicate the merits of the claim and make its own determination.[39] Contrary to those assertions, the IRS's decisions not to pursue the taxpayer are committed to agency discretion and thus are not reviewable by the Tax Court.

The IRS continues to have discretion to decide whether to pursue a whistleblower's tip under the express language of section 7623(b)(1):

> 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 . . . receive as an award at least 15 percent but no more than 30 percent of the collected proceeds.

Section 7623(b)(1) requires the payment of an award of between 15 and 30 percent of the collected proceeds but only *if* the IRS collects proceeds based on the whistleblower's information. Granted, the language in section 7623(b)(1) is both permissive (the word ''if'' at the start of the section) and mandatory (later use of the word ''shall''). The statute by its terms permits the IRS to pursue an enforcement action using the whistleblower's information and mandates the payment of an award if the IRS proceeds with an action and collects proceeds.

Section 701(a)(2) of the Administrative Procedure Act insulates an agency's discretionary actions from judicial review.[40] The Supreme Court in *Heckler v. Chaney* recognized that ''an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.''[41] The presumption that agency enforcement action and non-action is immune from judicial review may be rebutted if the substantive statute contains standards by which to judge the agency's ''exercise of its enforcement powers.''[42] Judicial review is appropriate when Congress has ''indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion.''[43]

The IRS must pay a whistleblower award but only if it proceeds with an administrative or judicial action and collects proceeds. The statute sets forth no standards as to how and when the Whistleblower Office should investigate whistleblower claims, and thus there are no standards for the Tax Court to use to judge the Whistleblower Office's exercise of discretion. The IRS's decision to decline to take enforcement action by not pursuing a whistleblower claim was discretionary under the law as it existed under section 7623(a). It continues to be discretionary and hence, unreviewable under section 7623(b).

It should be up to the IRS, not the Tax Court, to decide which cases to pursue based on the agency's own cost-benefit analysis, resource limitations, strategic priorities, or other relevant factors. As the Supreme Court said in *Heckler*:

> An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.[44]

Maintaining the government's discretion over enforcement actions is consistent with the tax bar that exists in the federal False Claims Act. The act authorizes private citizens known as *qui tam* plaintiffs to file actions on behalf of the United States against persons who defraud the federal government.[45] But the False Claims Act expressly bars *qui tam* actions for tax claims to reserve ''discretion to

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[37]Respondent's Motion to Dismiss for Lack of Jurisdiction at 6, quoting Petitioner's Prayer for Relief, *Cooper I*, 135 T.C. 70.

[38]*See Davis v. Fechtel*, 150 F.3d 486, 487 (5th Cir. 1998). 28 U.S.C. section 1361 (providing that ''the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff'').

[39]Memorandum in Support of Petitioner's Objection to Respondent's Motion to Dismiss at 12, *Cooper I*, 135 T.C. 70.

[40]5 U.S.C. section 701(a)(2).

[41]*Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

[42]*Id.* at 833.

[43]*Id.* at 834.

[44]The Supreme Court in *Heckler* described some of the reasons courts are unsuited to review agency decisions to refuse enforcement. *Id.* at 831-832.

[45]31 U.S.C. sections 3729-3733.

prosecute tax violations to the IRS.''[46] Section 7623 does not permit *qui tam* actions, either.[47] Permitting the whistleblower's request for relief would have in effect amounted to an indirect *qui tam* claim because the Tax Court or the IRS would be pursuing the taxpayer at the whistleblower's direction.

F. Analysis and Unanswered Questions

In *Cooper I*, the Tax Court said it has the authority to review the IRS's decision not to pursue a whistleblower claim only to declare in *Cooper II* that the court itself cannot pursue the targeted taxpayer nor can it order the IRS to do so. Consequently, the court decided as a matter of law that the government properly denied an award to Cooper because the IRS did not pursue his claims. As a consequence of the court's decision in *Cooper I*, every whistleblower who files an application for an award potentially has the right to appeal the IRS's handling of its claim to the Tax Court. Once the case is before the Tax Court, the IRS and the court will have to deal with a potential multitude of claims, including cases like *Cooper I* in which it is clear that the IRS did not use the whistleblower's information to collect proceeds. The practical effect of the *Cooper* decisions is to create disappointment and frustration for many whistleblowers and a lot of busywork for the IRS and the Tax Court.

The court's exercise of jurisdiction when the IRS declines to pursue the whistleblower's claims seems meaningless and nonsensical. The mistake the court makes is to ignore that its jurisdiction is predicated on the IRS actually using the whistleblower's information to collect proceeds. The court recognizes that its jurisdiction under section 7623(b) depends on the determination of an award and a timely petition.[48] But it broadly defines a determination to include ''any final administrative decision'' regarding the whistleblower's claims regardless of whether the IRS pursues the targeted taxpayer or collects any proceeds.[49] That reading is not supported by the statute. Section 7623(b)(4) does not permit the court to review *any* determination made under section 7623(b). To the contrary, the statute limits the court's review to ''any determination regarding an award under paragraph (1), (2), or (3)'' of section 7623(b).[50] Those paragraphs condition payment of an award on the initiation of an administrative or judicial action based on the whistleblower's information and the collection of proceeds. The court's jurisdiction is thus predicated on those statutory conditions. The court in *Cooper I*, however, focuses on whether the denial of an award is proper regardless of whether the statutory conditions are satisfied.[51] But the denial of an award will always be proper when the statutory conditions are not met. The court's focus instead should be to decide whether the amount of an award or the denial of an award is consistent with the provisions Congress set forth in the statute when the statutory conditions are satisfied.

I surmise that the Tax Court asserted jurisdiction in *Cooper I* to cast the widest possible net over appeals of whistleblower claims. *Cooper I* was the first opportunity for the Tax Court to address its jurisdiction over whistleblower claims that are governed by section 7623(b). The court may have been anticipating future cases in which it thinks it may need jurisdiction to decide whether the government properly determined that the statutory conditions in section 7623(b) are met. If any statutory condition is not met, the Whistleblower Office presumably will notify the whistleblower in a letter like the one issued in *Cooper I* that may simply say that ''an award was not warranted'' because the whistleblower's information did not ''result in the detection of the underpayment of taxes.''[52] But there could be times when there is a dispute whether the IRS proceeded with an administrative or judicial action based on the whistleblower's information or whether it collected proceeds. For example, the parties could disagree about whether it was the whistleblower's information that caused the IRS to proceed with an administrative or judicial action. Or the IRS may acknowledge that it collected sums from the taxpayer as a result of the whistleblower's information, but the parties may disagree about what counts as ''collected proceeds'' within the meaning of the statute. The court may have feared that it would not be able to claim jurisdiction over a future case had it declined to assert jurisdiction in *Cooper I*. But there is no dispute that the statutory conditions were not met in that case. Although they

[46]*United States ex rel. Lissack v. Sakura Global Capital Markets Inc.*, 377 F.3d 145, 153 (2d Cir. 2004), *Doc 2004-15878*, *2004 TNT 150-13*. *See also* 31 U.S.C. section 3729(d); section 7401 (providing that ''no civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced''); Kwon, *supra* note 3, at 457-459 (comparing IRS whistleblower program to federal False Claims Act).

[47]Dennis J. Ventry Jr., ''Whistleblowers and *Qui Tam* for Tax,'' 61 *Tax Law*. 357, 372 (Winter 2008).

[48]*Friedland v. Commissioner*, T.C. Memo. 2011-90, *Doc 2011-8863*, *2011 TNT 80-16*.

[49]*Cooper I*, 135 T.C. at 75.

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

[51]*Compare* Tax Court Rule 340(b) (stating that the court shall have jurisdiction over whistleblower claims when the conditions of section 7623(b) are satisfied).

[52]*Cooper I*, 135 T.C. at 72.

were first, the *Cooper* cases were the wrong ones for the Tax Court to exercise its jurisdiction.

Even if my supposition is correct, I am not sure the court would need jurisdiction to decide whether the statutory conditions are met since they are predicates to the court's jurisdiction. I read section 7623(b)(4) to mean that the court has jurisdiction to review IRS determinations regarding awards, which are possible only if the statutory conditions are satisfied. Thus, the court has jurisdiction to review the amount or denial of any whistleblower awards, but only if the IRS uses the whistleblower's information to collect proceeds and refuses to pay. The court has consistently held that it has jurisdiction to determine whether it has jurisdiction.[53] Thus, in deciding whether it has jurisdiction, the Tax Court has the authority to decide whether the statutory conditions are met. If not, the court lacks jurisdiction.

Putting aside the question of jurisdiction, questions remain about the Tax Court appeal right. One question to be answered is whether the government will be required to review the whistleblower's information. A second question is whether the government has any obligation to explain the basis for declining to pursue the whistleblower's claims. As explained in *Cooper II*, subject matter experts in the relevant IRS operating division reviewed the whistleblower's information before the agency decided not to take any action against the taxpayer. Moreover, government counsel attached a memorandum from an IRS estate tax attorney as an exhibit to its answer in *Cooper I* explaining the government's legal analysis and conclusion to deny the whistleblower's claims. The Tax Court in *Cooper II* noted that ''respondent has explained why he determined that there was no estate or gift tax due on the facts petitioner presented.'' The Tax Court also noted that ''respondent properly processed petitioner's whistleblower claims.'' Although the Tax Court conveyed those facts in *Cooper II*, it is not clear whether its decision actually hinges on them.

An off-code provision states that the Whistleblower Office ''shall analyze information received from an individual described in section 7623(b) . . . and either investigate the matter itself or assign it to the appropriate Internal Revenue Service office.''[54] Before the 2006 amendments, decisions regarding whistleblower claims were handled at multiple IRS campuses.[55] The off-code provision could be read to merely centralize decision-making in the Whistleblower Office. If Congress instead intended to impose on the government an obligation to analyze the whistleblower's information, query whether the Tax Court would have the authority to verify that the Whistleblower Office actually did so.[56]

While the Tax Court perhaps has authority to verify that the Whistleblower Office actually analyzed the whistleblower's information, the government should have no obligation to explain the basis for declining to pursue the whistleblower's claims. To permit otherwise would inappropriately infringe on the IRS's enforcement discretion. The government has discretion to decide whether to initiate an administrative or judicial action within the meaning of section 7623(b)(1). Even if the whistleblower's claim is viable, the IRS would not abuse its discretion in declining to pursue it and should not have to offer any explanation for taking no action.

Beyond cases like *Cooper*, it also remains to be seen what standard and scope of review the Tax Court will apply to review the denial or amount of an award when the IRS actually uses the whistleblower's information to collect back taxes. Section 7623 is silent regarding both the standard and scope of review applicable to whistleblower claims in the Tax Court. The standard of review refers to how the court will examine the evidence and the amount of deference it will give to the IRS, and scope of review refers to the span of evidence the court will consider to reach its decision. Those issues will need to be resolved in future litigation.

G. Conclusion

It is disappointing that the Tax Court provided scant analysis to support its decision to assert jurisdiction in an important case of first impression. In my view, the Tax Court overstepped its authority by asserting jurisdiction in *Cooper I* cases by equating the denial of a claim with a determination of an award. Paragraphs (1), (2), and (3) of section 7623(b) — together with paragraph (4), the jurisdictional provision — seem instead to say that claims may be appealed to the Tax Court only if the whistleblower's information leads to the detection of an underpayment of tax and the IRS collects proceeds from which to pay an award. Paragraph (1) is

[53]*See, e.g., Pyo v. Commissioner*, 83 T.C. 626, 632 (1984).

[54]P.L. 109-432, section 406(b)(1)(B). *See also* IRM section 25.2.2.2(6) (stating that ''the law requires the Whistleblower Office to analyze 7623(b) claims'').

[55]2006 TIGTA report, *supra* note 3, at 1 n.7.

[56]Even if the off-code provision means that the government must investigate the whistleblower's information, it cannot reasonably be read to require the IRS to proceed with an administrative or judicial action. If Congress had intended to diminish the government's discretion to not take enforcement action, then it would have done so more precisely in the code itself rather than burying what would be an extraordinary change in an off-code provision.

operative only if those conditions are satisfied. Paragraphs (2) and (3) qualify amounts determined under paragraph (1). Perhaps the court claimed jurisdiction in *Cooper I* anticipating issues in future cases in deciding whether those statutory conditions are actually satisfied. But in *Cooper I*, there was no question that the IRS declined to pursue the taxpayer. Thus, the Tax Court should have dismissed the *Cooper* cases on jurisdictional grounds.

The way things stand, the Tax Court's approach may mean that the Whistleblower Office must issue a determination sufficient to give the Tax Court jurisdiction to every whistleblower who files an application for an award. But the appeal right is meaningful only for whistleblowers whose information resulted in the collection of back taxes. For other whistleblowers, the Tax Court's role should be limited to verifying that the IRS did not collect any proceeds as a result of the whistleblower's information. In future litigation, one can hope that the court will reexamine its jurisdiction when the statutory conditions in section 7623(b) are not met. And the court certainly will have future opportunities to unravel other mysteries over whistleblower claims, including whether the IRS has to show that it actually investigated the whistleblower's information and explain the basis for declining to pursue the targeted taxpayers and the scope and standard of review in the Tax Court.