

No.

In The
Supreme Court of the United States

DONALD W. MACPHERSON
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

DONALD W. MACPHERSON
The MacPherson Group, P.C.
3039 W. Peoria Ave., #102-620
Phoenix, AZ 85029
Ph: 623-209-2003, Fax: -2008
Email: mac@beatirs.com
Pro Se

QUESTIONS PRESENTED

An attorney and board-certified specialist in tax law raised before the Tax Court and the Ninth Circuit issues regarding the evidence of delegation of authority to assess tax, whether a Treasury regulation contravenes the statute it implements, and whether that regulation was promulgated outside of the Administrative Procedure Act's 30-day notice and comment period. Ignoring apposite decisions of this Court, the Eighth and Eleventh Circuits, and its own jurisprudence, the Ninth Circuit sanctioned the attorney for raising nothing but "frivolous arguments." The questions presented are:

1. Does a \$27,000 sanction against an attorney for raising non-frivolous issues concerning delegated tax assessment authority and an invalid regulation violate taxpayers' First Amendment right to petition for redress of grievances?

2. Are taxpayers entitled to see the delegation order which the IRS claims authorized an official to assess tax at a hearing under 26 U.S.C. § 6330, pursuant to the Fifth Amendment's due process clause and this Court's delegated authority cases?

3. Is 26 C.F.R. § 301.6203-1 invalid in that it contradicts the unambiguous statute and was promulgated in violation of the Administrative Procedures Act's thirty-day "notice and comment" period?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald W. MacPherson respectfully submits this petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming Tax Court sanctions against petitioner for raising issues which have been raised and considered in petitioner's favor in other Circuits.

OPINIONS BELOW

The Ninth Circuit's opinion is unpublished and reported at *MacPherson, et al. v. Commissioner of Internal Revenue*, 702 Fed. Appx. 621 (9th Cir. 2017). (App. 1). The Ninth Circuit's order denying the petition for rehearing and rehearing *en banc* is unreported and dated February 28, 2018. (App. 4). The opinion of the Tax Court in *Best v. Comm'r of Internal Revenue* is reported at T.C. Memo. 2016-32. (App. 6). The opinion of the Tax Court in *May v. Comm'r of Internal Revenue* is reported at T.C. Memo. 2016-43. (App. 31).

JURISDICTION

The Ninth Circuit Court of Appeals' opinion was filed November 16, 2017. The Ninth Circuit denied petitioner's timely petition for rehearing and rehearing *en banc* on February 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

**CONSTITUTIONAL, STATUTORY,
AND REGULATORY PROVISIONS INVOLVED**

The relevant provisions of the *United States Constitution* (First and Fifth Amendments), the *Administrative Procedures Act* (5 U.S.C. § 553), the *Internal Revenue Code* (26 U.S.C. §6203, §6330, §6502, and §6673), and the implementing *Treasury Regulation* (26 C.F.R. §301.6203-1) are set forth in Appendix D, App. 47-60. The original version of the relevant provision of the *Administrative Procedures Act* (5 U.S.C. § 1003 (1946)) is set forth at Appendix E, pp. 65-66.

STATEMENT OF THE CASE

I. *Underlying cases before this Court.*

Petitioner MacPherson, an attorney and a board-certified specialist in tax law, represented taxpayers Bests and Mays before the IRS in Tax Court and before the Ninth Circuit. The taxpayers were sanctioned by the Tax Court, and it ordered MacPherson to show cause why he should not be sanctioned for raising nothing but frivolous arguments solely for delay. MacPherson showed cause by demonstrating that the issues he raised on his clients' behalf were supported by case law, yet the Tax Court sanctioned him \$27,000. MacPherson appealed to the Ninth Circuit, where the sanctions involved in the *Best* and *May* cases were set as *MacPherson, et al. v. Commissioner* and assigned to

the same circuit panel. Recently *Best, et al*¹ filed their petition for *certiorari* presenting this single question:

Whether the final regulation promulgated by the Department of Treasury is invalid or entitled to judicial deference, where the regulation states that a taxpayer is to receive, not the record of assessment, but only “pertinent parts” of the record which do not include the essential components of the Assessment Officer’s signature, and the date signed.

II. *Background to issues raised below.*²

Under 26 U.S.C. §6203 and 26 C.F.R. §301.6203-1,³ a federal tax is assessed by the signature of an “Assessment Officer” who is delegated specific authority to assess, and who signs and dates the “summary record of assessment” (“SRA”). Without a valid assessment, no tax liability arises which the IRS can lawfully collect. *Hibbs v. Winn*, 542 U.S. 88, 100 (2004). Essential components of the assessment include the signature of the officer and the date the officer signed the SRA. The assessment date is crucial because it determines the statutory collection expiration date ten years later. §6502. Assessment section 6203, enacted in 1954, is two sentences long:

¹ The Tax Court cases of *Best* and *Mays* were consolidated in the Ninth Circuit, and will be referred to as *Best, et al.*

² Much of this background is reiterated in the *Best, et al.* petition for *certiorari* docketed May 22, 2018, No. 17-1577.

³ All section (§) references are to the Internal Revenue Code unless stated otherwise.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary [of Treasury] in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

Initially, the IRS utilized Form 23C as the SRA. With the advent of computerized record-keeping, the IRS developed the RACS 006 (“RACS”)⁴ as the SRA. The RACS records assessments for thousands of taxpayers at a time, in one document signed and dated by the Assessment Officer. Although voluminous, the RACS identifies individual taxpayers by listing their names and social security numbers. By reviewing pertinent RACS pages, a taxpayer can determine the validity of the assessment. For example, an assessment is invalid if no Assessment Officer’s signature appears on the SRA, see *Brafman v. United States*, 384 F.2d 863 (5th Cir. 1967).

The RACS is the primary assessment source used by the IRS to create hearsay “account transcripts.” The SRA is the *sine qua non* for verification of compliance with the statute.

⁴ “Until its transition to computerized record keeping, the [IRS] generally used Form 23C for the summary record of assessment, but it now uses, except in unusual circumstances, a computer-generated summary record of assessment known as the RACS Report 2006. Both forms have been recognized as summary records of assessment within the meaning of section 6203.” Rev. Rul. 2007-21, p. 3.

The IRS maintains computer account transcripts of a taxpayer’s case history, including assessment dates. These transcripts are prepared from other records, but do not specifically reference the SRA, and sources of information are not shown on such transcripts. The IRS also prepares “under seal” and “certified” “Certificate of Assessments and Payments,” Form 4340. An IRS official with delegated authority⁵ as shown on the Form 4340 signs it, certifying that it is “correct.” However, the certification does not identify any records purportedly examined to justify “under seal” certification.

Because the transcripts are hearsay documents subject to “keystroke errors,” they sometimes misrepresent the SRA. In *Best*, the transcript incorrectly reflected assessment by audit, despite actual assessment by stipulated Tax Court order. In *May*, the transcript falsely asserted that Mrs. May was assessed along with her husband. Her husband had filed a separate income tax return.⁶ Only the SRA is the primary “source document.” Transcripts — certified or not — are hearsay.

⁵ See, e.g., *Botany Worsted Mills v. U.S.*, 278 U.S. 282 (1929) in which this Court held a federal tax compromise agreement invalid because the revenue official lacked delegated authority.

⁶ In *May v. Comm’r*, T.C. Memo, 2014-194, at *14, the Tax Court found that the transcript which erroneously showed an assessment against Mrs. May “may reflect no more than a computer keystroke error,” missing the obvious — the need for the SRA. The IRS admitted Mrs. May had not been assessed as appeared erroneously on the transcript. To avoid error, the SRA is required.

The certified transcript does not mention the SRA, referring only to the “official records of IRS.” Reported cases from the Fifth and Ninth Circuits, *e.g.*, *Brafman v. United States*, 384 F.2d 863 (5th Cir. 1967) and *Huff v. United States*, 10 F.3d 1440 (9th Cir. 1993), impose consequences for IRS failures to satisfy §6203.

To guarantee due process to taxpayers facing IRS collection, Congress enacted the *Internal Revenue Service Restructuring and Reform Act*, also known as the “*Taxpayers’ Bill of Rights III*,” Pub. L. 105-206, 112 Stat. 685 (July 22, 1998), imposing as a prerequisite to enforced collection that the IRS verify that “the requirements of any applicable law or administrative procedure have been met.” §6330 (c)(1). Taxpayers are entitled to a Collection Due Process Hearing (“CDPH”), at which the IRS must provide such verification. If the taxpayer is not satisfied with the evidence of verification, further relief can be sought by petitioning the Tax Court. §6330(d)(1).

In the CDPH case of *Nestor v. Commissioner*, 118 T.C. 10 (2002), the Tax Court held that the taxpayer who, like these taxpayers, did not receive the Form 4340 until after he petitioned the Tax Court, was not entitled to a remand to contest the efficacy of the Form. Two judges dissented, stating that *Nestor* was entitled to due process by §6330. *Id.* at 30.

III. *IRS proceedings.*

MacPherson’s clients requested CDPHs, the SRAs, and the delegation order authorizing any

Assessment Officers to sign the SRAs to challenge whether the assessments in their cases were lawful. The IRS refused their requests and provided only account transcripts. Taxpayers timely exercised their right to petition the Tax Court.

IV. *The Tax Court proceedings.*

MacPherson presented evidence of transcript irregularities and challenged the validity of 26 C.F.R. §301.6203-1 in purportedly authorizing the IRS to refuse to produce the SRA. The Tax Court invoked §6673 to impose sanctions for raising “frivolous arguments” for the sole purpose of delay.

In his clients’ petitions, MacPherson cited relevant cases, presented the logical interplay between §6203 and the regulation at 26 C.F.R. §301.6203-1, and pinpointed the *Brafman* case and delegated authority cases to show his clients were entitled to the SRA and the delegation order for the SRA signatory.

After the Bests’ Tax Court petition was filed, IRS counsel provided a Form 4340 that bore a stamped signature. IRS counsel threatened sanctions against MacPherson’s clients, citing Rev. Rul. 2007-21, IRS Notice 2010-33, and *Nestor v. Commissioner*, 118 T.C. 162 (2002). MacPherson responded with the two judge dissent in *Nestor*.

In *Nestor*, taxpayer requested the SRA at the CDPH but received only Account Transcripts. As in *Best et al*, *Nestor* received Form 4340 after petitioning Tax Court, where he claimed entitlement

to the form at or before the hearing and sought remand to afford him due process. The majority held that because he was provided with the form prior to trial, there would no interest served by a remand. The dissent stated that the interest served would be compliance with due process demanded by §6330.

In sanctioning MacPherson, the Tax Court ignored *Brafman* and its progeny, the delegation order issue, and the infirmities of the regulation, citing *Koff v. United States*, 3 F.3d 1297, 1298 (9th Cir. 1993), in which *pro se* taxpayers challenged the Form 4340 without attempting to demonstrate irregularities. *Koff* also eschewed *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) analysis, holding that the regulation is “a permissible interpretation of [26 U.S.C. §] 6203, and we are bound to give it deference.” *Id.*, at 1298. The Tax Court did not address arguments concerning the due process right and legal need for the taxpayers to have the SRA, issues critical to the decisions in *Brafman* (Form 23C invalid for lack of a signature) and *United States v. Genov*, 490 Fed. Appx. 853 (9th Cir. 2012) (Form 4340 irregularities).

The Tax Court ignored MacPherson’s request for the order delegating authority to the Officer signing the SRA in the *Best* and *May* cases. But just days before those decisions were entered (March 8th and 11th of 2016), the Eighth Circuit on March 2, 2016 reversed the Tax Court on the issue of determining properly delegated authority in *Muncy v. Commissioner*, 637 Fed. Appx. 276 (8th Cir. 2016) (unpublished).

The Tax Court also ignored MacPherson’s challenge to the regulation for failure of the Secretary of Internal Revenue to promulgate the regulation in accordance with the Administrative Procedures Act (“APA”), 5 U.S.C. §1003 (1946), where the Secretary provided only a 15-day “notice and comment” period rather than the required 30 days.

V. *The Ninth Circuit decision.*

MacPherson’s clients appealed to the Ninth Circuit, which affirmed the Tax Court decisions.⁷ In an unpublished opinion, the court found that the IRS Appeals Office did not err in producing only transcripts as verification of assessment, holding in effect that, under the regulation, the taxpayer is entitled to only parts of the SRA, which parts do not include the Assessment Officer’s signature and date.

Rather than address the seminal issue — is the regulation void as contrary to the language of the statute? — and without any *Chevron* analysis, the Ninth Circuit merely adhered to the language of its *Koff* holding twenty-five years ago: “This regulation is ‘a permissible interpretation of [26 U.S.C. §] 6203, and we are therefore bound to give it deference’ ... When taxpayers received their account transcripts, they received ‘the pertinent parts of the assessment.’” *Best, et al. v. Comm’r of Internal Revenue*, 702 Fed. Appx. 615 (9th Cir. 2017). The court failed to mention that the “pertinent parts” itemized in the regulation do not include the essential statutory assessment components: signature and date entered

⁷ *Leonard Best, et al v. Commissioner*, 702 Fed. Appx. 615 (9th Cir. 2017) (unpublished).

by the Assessment Officer, much less that the *Chevron* “first step” is consideration of what Congress declared, from the face of the statute and the legislative history. The court found that “Form 4340 is sufficient to show that the assessments were proper,” again failing to acknowledge lack of the two necessary assessment components (date and signature). *Id.*

The Ninth Circuit ignored cases and issues MacPherson raised, including the irregularities present in the Form 4340. It ignored *Brafman* and its progeny; it ignored the Ninth Circuit cases which follow *Huff*, decided after *Koff*. *Huff* and its progeny — *Jones v. U.S.*, 60 F.3d 548 (9th Cir. 1995); *U.S. v. Genov*, 490 Fed. Appx. 853 (9th Cir. 2012); *In re Mulvania*, 214 B.R. 1 (B.A.P. 9th Cir. 1997) — held that, due to irregularities, Form 4340 documents, and even a Form 23C, did not constitute sufficient evidence of lawful assessment.

Finally, referencing Rev. Rul. 2007-21 and IRS Notice 2010-33, the court held that “IRS has reasonably classified these positions as frivolous.” *Best, et al.* The court denied MacPherson’s petitions for rehearing and rehearing *en banc*.

The Ninth Circuit failed to address MacPherson’s arguments regarding the 2016 Eighth Circuit decision in *Muncy*, *Brafman* and *Huff et al.*, the *Nestor* dissent, the APA issue, or the several scholarly articles MacPherson relied on for the non-frivolous assessment and delegation challenges. Instead, parroting the Tax Court’s error, the Ninth Circuit took out of context MacPherson’s comment

that securing the Form 23C by court order had been relegated to the status of a “dead letter” notwithstanding no Ninth Circuit case on point, making it an issue of first impression.⁸

As the IRS indicates at Rev. Rul. 2007-21, p. 3, IRS uses the RACS “except in unusual circumstances,” meaning that the 23C is still sometimes used.⁹ MacPherson never insisted on the Form 23C; in fact, he requested the Form 4340 as an alternative to the Form 23C or RACS. Rather than acknowledge the non-frivolous issues raised by MacPherson, the Ninth Circuit concluded that “On behalf of his clients, [MacPherson] advanced a position contrary to established law and unsupported by fact. In a signed declaration, he represented that he knew his [Form 23C] position would be unsuccessful” (App. 2), a statement MacPherson never made.

REASONS FOR GRANTING THE WRIT

I. *The Ninth Circuit’s sanction decision intimidates*

⁸ “[MacPherson] states that he ‘concluded many years ago that the ‘23C issue’ was a ‘dead letter.’” *Best v. Commissioner*, T.C. Memo 2016-32, at *12. MacPherson made clear that he meant there were no reported cases by which IRS was required to produce the Form 23C, but that the issue was a novel one for the Ninth Circuit. Also, as cases like *Jones* (defective 23C and 4340), *Mulvania* (defective 4340), and *Brewer v. U.S.*, 764 F. Supp 309 (SD NY 1991)(defective 23C) show, it has not been unusual for IRS to produce the Form 23C, despite its claim that it need not produce the form. To be clear: MacPherson never insisted upon receipt of the Form 23C in lieu of the RACS.

⁹ In *Jones v. U.S.*, 60 F.3d 584 (9th Cir. 1995), the IRS produced a Form 23C which was defective.

all taxpayers and their attorneys in exercising their First Amendment right to petition for redress of grievances.

The \$27,000 sanction against MacPherson chills vigorous advocacy; it chills taxpayers' and their attorneys' enthusiasm and creativity in pursuing legal theories, including arguments for extensions of the law. This chilling effect violates the First Amendment "right of the people ... to petition for redress of grievances."

Worse than the monetary sanction imposed is a subsequent IRS' Office of Professional Responsibility (OPR) "order to show cause" by which, as a result of the Tax Court sanctions, MacPherson must show cause why OPR should not expedite his suspension from practice before IRS — the death knell for his legal career.¹⁰ But the First Amendment implications do not end there; 31 C.F.R. §10.24(a) prohibits all practitioners from accepting assistance from or assisting one who is suspended "if the assistance relates to a matter or matters constituting practice before the Internal Revenue Service." Thus, as to the right of association, MacPherson and his two sons, licensed attorneys practicing before IRS, may well be prohibited from collaborating or conferring on cases before the IRS. Likewise, MacPherson may be prohibited from conferring with members of tax professional associations and bar associations.

This Court holds the right to petition for redress of grievances "among the most precious of the liberties safeguarded by the bill of rights." *See United*

¹⁰ See 31 U.S.C §330, 31 C.F.R. §10.82.

Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). The right to petition occupies a “preferred place” in our system of government, enjoys a “sanctity and a sanction not permitting dubious intrusions, and “[i]t was not by accident or coincidence that the rights to freedom of speech and press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition for redress of grievances.” *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Further, this Court holds that the right to petition protects the individual’s right to file an action with a “reasonable basis.” *Bill Johnson’s Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 743 (1983).

As Justice Stevens emphasized in 1985, the “strongest presumption” in favor of a litigant’s right to petition weighs heavily against the imposition of sanctions:

Freedom of access of the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise rise to attempts at self-help. *There is, and should be, the strongest presumption of open access to all levels of the judicial system.* Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant’s claim is unmeritorious *could only deter the legitimate*

exercise of the right to seek a peaceful redress of grievances through judicial means. ... [T]he strong presumption is against the imposition of sanctions for invoking the processes of the law.

Talamini v. All-State Insurance Co., 470 U.S. 1067, 1070–1072 (1985) (Emphasis added.)

This is a case of first impression for this Court regarding the imposition of §6673 sanctions in relation to the First Amendment right to petition. However, both this Court and the Ninth Circuit have established frameworks for analysis in analogous situations.

This Court’s interpretations of the Petition Clause have sought to strike a balance between vague and overly broad policies chilling petition rights and reasonable limitations that serve legitimate state interests, such as deterring sham litigators. The principal “litmus test” has been the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). *Noerr-Pennington*’s progeny granted immunity unless conditions for the “sham” litigation exception were satisfied. The “sham” test begins with an objective component, baselessness, and, if objective baselessness can be shown, the test continues to a subjective component, motivation in violation of anti-trust principles. *Prof’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58-61 (1993). The Ninth Circuit has applied this Court’s objective-then-subjective test to civil litigation

contexts beyond anti-trust violations. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006).

The Ninth Circuit's sanctions jurisprudence has similarly sought proper balance between "the desire to avoid abusive use of the judicial process and to avoid chilling zealous advocacy ... [the court noting that] sanctions should not be used to chill the attorney's enthusiasm or creativity in pursuing factual or legal theories." *Hudson v. Moore Bus. Forms, Inc.*, 836 F.2d 1156, 1159–60 (9th Cir. 1987). *Noerr-Pennington* and Fed. R. Civ. P. 11 require objective analysis. "The reasonable inquiry test is meant to assist courts in discovering whether an attorney, after conducting an objectively reasonable inquiry into the facts and law, would have found the complaint to be well-founded." *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005).

The Ninth Circuit quoted Justice Stevens' "strongest presumption" paragraph in *Talamini*, concluding that:

... judges must not, by imposing sanctions unnecessarily, discourage the filing of good faith actions. It is essential that free access to the judicial system be maintained; Rule 11 was not intended to impede such access. Rule 11 must not be construed so as to conflict with the primary duty of an attorney to represent his or her client zealously. Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way.

Operating Engineers Pension Tr. v. A-C Co.,
859 F.2d 1336, 1344 (9th Cir. 1988).

The Ninth Circuit's decision in this case has placed a board-certified tax specialist with four decades of litigating in Tax Court, in district and circuit courts, and this Court, on a footing with *pro se* litigants routinely sanctioned under §6673 for raising frivolous issues. MacPherson's arguments are not objectively baseless and are akin to arguments accepted in other Circuits; the Ninth Circuit simply ignored their substance. To briefly highlight just three examples of "reasonable inquiry," *cf. Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005): (1) MacPherson argued the contradictions between §6203 and its corresponding Treasury regulation, (2) identified Ninth Circuit precedents as well as inter-Circuit conflict with respect to delegation authority, and (3) relied upon opinions of two dissenting Tax Court judges to show that taxpayers are entitled to due process.

Only MacPherson has actually been sanctioned *instanter*, but many other taxpayers and counselors will feel the "chilling effect." As this Court has noted, "The threat of sanctions may deter [these freedoms] exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963) (internal citations omitted). The Ninth Circuit failed to evaluate both the objective and subjective components of

sanctionability, and failed to apply these tests narrowly to MacPherson.

The Eighth Circuit has held that “The mere filing of a frivolous petition, absent a finding that the taxpayer had knowledge that the petition was frivolous or that it was filed primarily to delay payment of taxes, is a legally insufficient ground upon which to justify the imposition of §6673 damages.” *May v. C.I.R.*, 752 F.2d 1301, 1308 (8th Cir. 1985). The Ninth Circuit held otherwise here.

MacPherson’s career has been punctuated by numerous innovative and successful legal strategies. The Fifth Circuit exonerated one of his clients — who filed charges against IRS agents for trespassing upon her property — for her “exercise of the right to petition for a redress of grievances in its pristine form.” *United States v. Hylton*, 710 F.2d 1106, 1107–08 (5th Cir. 1983) *aff’g* 558 F. Supp. 872 (S.D. Tex. 1982).

II. *Where the Tax Court can portray vigorous representation relying on established precedence as sanctionable, its authority under §6673 is arbitrary and oppressive, and direction is needed in order to define the constitutional limits of that authority.*

Section 6673(a)(2) allows the Tax Court to impose “excess costs, expenses, and attorneys’ fees reasonably incurred” when an attorney has “multiplied the proceedings in any case unreasonably and vexatiously.” In order to fall afoul of this provision, then, the IRS must demonstrate that the

tax issues raised by an attorney were unreasonable *and* rest on insufficient grounds to prevail, *i.e.*, are “frivolous.”

Here, the record establishes MacPherson conducted not only a “reasonable inquiry” into the tax issues raised in *Best* and *May*, but performed exhaustive research and, relying on sufficient grounds as represented by reported case decisions and scholarly legal articles, presented several non-frivolous legal arguments. The Tax Court reached its decision on sanctions not by addressing any of the arguments raised, but by mischaracterizing MacPherson’s issues. Most of the issues raised were *not* addressed by the Tax Court, and none were addressed by the Ninth Circuit.

MacPherson followed strategies promoted in numerous legal journals. The Tax Court refused to recognize his reliance on federal cases and scholarly articles. Moreover, despite the Tax Court’s recognition of the Ninth Circuit “subjective bad faith” sanctions criterion, the Tax Court ignored MacPherson’s thirty-eight year (unblemished) legal practice history: *e.g.*, long-time Criminal Justice Act (“CJA”) counsel for trials and Ninth Circuit appeals; being granted a petition for certiorari in a criminal tax case remanded to the Seventh Circuit which reversed the convictions, *U.S. v. Dunkel*, 900 F.2d 105 (7th Cir. 1990), 498 U.S. 1043 (1991), 927 F.2d 955 (7th Cir. 1991); numerous criminal conviction reversals in the Ninth and other circuit courts, including two acquittals in tax cases, *U.S. v. Skelton*, 168 F.3d 503 (9th Cir. 1999) and *U.S. v. Varbel*, 780 F.2d 758 (9th Cir. 1986).

As a board certified specialist in tax and criminal law, MacPherson has tried over fifty-five criminal tax cases in twenty-five states. His clients have included two state governors, three state senators, and a major U.S. airline. He graduated from West Point, and served as an Airborne, Ranger, Infantry, Jump Master, and Special Forces officer, volunteering twice for Vietnam combat and serving there for eighteen months as an infantry platoon leader and company commander with the 173rd Airborne Brigade (Separate).

As counsel, MacPherson has raised many novel arguments successfully. Under federal criminal tax law, for example, in addition to the cases listed above, MacPherson represented the following: *U.S. v. Nordbrock*, 828 F.2d 1401 (9th Cir. 1987) (good faith reliance on counsel a defense to \$75,000 tax penalty; summary judgment reversed); *U.S. v. Skelton*, 168 F.3d 503 (9th Cir. 1999) (conspiracy and tax acquittal on appeal); *U.S. v. Varbel*, 780 F.2d 758 (9th Cir. 1986) (conspiracy, tax, and currency transaction acquittal on appeal); *U.S. v. Kimball*, 925 F.2d 356 (9th Cir. 1991) (*en banc*) *rev'g* 896 F.2d 1218 (9th Cir. 1990)(tax acquittal on appeal based on "Fifth amendment tax return" by panel, but court *en banc* reversed); *Holt v. Floyd*, 215 F.3d 1333 (9th Cir. 2000) (CJA; state and federal *habeas*; remand resulted in freedom for client due to inadequacy of prison library); *U.S. v. Harris*, 726 F.2d 558 (9th Cir. 1984) (tax conviction reversed; waiver of right to counsel colloquy not sufficient); *U.S. v. Rendahl*, 746 F.2d 553 (9th Cir. 1984), reversing 567 F.Supp. 515 (D. Mt. 1983) (IRS summons enforcement, contempt

for asserting Fifth Amendment reversed; MacPherson represented clients in district court, reversal based on issues he raised); *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983) (tax acquittal based on First and Fifth Amendment issues MacPherson raised at trial; offshore triple trust); *U.S. v. Pazsint*, 728 F.2d 411 (9th Cir. 1984) (tax conviction reversed; assault on IRS revenue officer; constructive amendment to indictment). *U.S. v. Hylton*, 710 F.2d 1106 (5th Cir. 1983) *aff'g* 558 F.Supp. 872 (S.D. Tx. 1982) (First Amendment right to petition “in its pristine form;” post-verdict acquittal; intimidation and impeding IRS special agents by filing criminal trespass complaint with county).

With respect to federal civil tax issues, MacPherson was advisory counsel in *United States v. 87 Skyline Terrace*, 26 F3d 923 (9th Cir. 1994) (millions of dollars recovered for DOJ’s failure to obtain §7401 authorization prior to suit).

Finally, MacPherson represented Arizona Governor Mechem in *Mechem v. Gordon*, 782 P.2d 1160 (Az. 1989) (impeachment affirmed) and *Ingram v. Shumway*, 794 P.2d 7 (Az. 1990) (Mechem could run again for governor despite impeachment).

It is clear, from this recitation of accomplishments, that MacPherson is a seasoned attorney who knows how to research precedential cases, apply relevant law, identify appropriate issues to raise, and bring vigorous representation to his clients. Accordingly, MacPherson raised at least six viable issues:

1. Section 6330 requires the IRS verify that it has complied with the law, and the Forms 4340 provided by IRS were irregular and thus insufficient to verify lawful assessment, an issue which had not yet been decided by the Ninth Circuit in a Tax Court review, but had been decided by the Ninth Circuit against IRS in two district court cases, *Genov* and *Huff*, *supra* (Form 4340 irregular and thus not sufficient evidence of legal assessment). MacPherson relied on evidence of gross irregularities in the secondary verification documents in both *Best* and *May*. In *Best*, the IRS provided a rubber- or machine-stamped signature on Form 4340; MacPherson relied upon *U.S. v. Dockins*, 986 F.2d 888, 894 (5th Cir. 1993) (rejecting finger print card signed by stamp). In *May*, IRS provided no signature by the person named on the signature line with the requisite delegation order. The IRS admitted the transcripts it produced for *May* were grossly in error: they showed Mrs. May had been assessed by IRS substitute for return procedures when such was clearly false, validating MacPherson's major premise that only a valid SRA proves legal assessment. Also, the RACS failed to provide any correlation to the Mays.¹¹

2. MacPherson had requested the delegation order authorizing the IRS employee who signed a Form 4340. In March of 2016, after the Tax Court decisions

¹¹ The Tax Court was critical of MacPherson in *May* for having requested the RACS 006 from the IRS when he had received it through a Freedom of Information Act request. However, as MacPherson explained to the Tax Court and the Ninth Circuit, the RACS he received showed no correlations to his clients, as he knew they should from past experience.

here, the Eighth Circuit reversed the Tax Court in *Muncy*, *supra*, on this issue, despite the Tax Court's reliance on its own numerous decisions holding that the delegation order issue is "frivolous."

3. MacPherson relied on *Brafman*, *supra*, which held that: (1) the SRA is the only valid proof of assessment; and (2) because the SRA lacked a signature it was void under §6203. MacPherson also presented circuit, district, and bankruptcy court decisions following *Brafman*, which were repeatedly referenced by MacPherson as "*Brafman* and its progeny." In the four Tax Court decisions and the two Ninth Circuit decisions *sub judice*, the court failed to acknowledge *Brafman* or its progeny.

4. Relying on the dissent of two Tax Court judges in *Nestor*, MacPherson repeated *Nestor's* claim that due process entitled MacPherson's clients to examine the Form 4340 prior to or at the CDPH, an issue that had not yet been decided by the Ninth Circuit. Except for a footnote in one of the four decisions, the Tax Court did not mention MacPherson's repeated reliance on the dissenting opinions in *Nestor* that *Nestor* was denied due process for failure of the IRS to provide him with a copy of the Form 4340 prior to or at the hearing, the same circumstances were present in both *Best* and *May*: the Form 4340 was provided well after petitions to Tax Court were filed.

5. MacPherson raised the question of whether "sanctionable delay" was caused by IRS' failure to adhere to §6330(g), providing that if IRS determines a CDPH request is "frivolous" or "reflects a desire to delay or impede" tax collection, IRS may totally

ignore the submission, pursue collection immediately, and thereby preclude administrative and judicial review. MacPherson, then, did not “cause delay” where the IRS *itself* chose to delay collection, despite claiming that MacPherson raised nothing but frivolous arguments.

6. MacPherson challenged the assessment regulation for lack of compliance with the APA, an issue not yet decided by any court.¹²

Further, MacPherson relied in good faith on legal publications written by renowned attorneys regarding the delegation order and “lawful assessment,” the Secretary of Internal Revenue’s lack of compliance with the APA in its promulgation of the assessment regulation, and the lack of uniformity in CDPH verification of assessment cases decided by the Tax Court.

The latter issue, the lack of uniformity in CDPH verification cases, is in great need of review, since it creates confusion and uncertainty as to: (a) what document(s) must be reviewed by IRS for verification of lawful assessment, and (b) whether the taxpayer is to receive a copy of the verification document(s), or even be told upon which document(s) the IRS relied. See *Best v. Commissioner*, T.C. Memo 2014-72, *14–*18. It would appear, however, that the Tax Court and the Ninth Circuit choose to sanction attorneys attempting to clarify this issue for their clients,

¹² The Tax Court opined that the issue was raised after the CDPH and thus waived, ignoring the case of *Hoyle v. Commissioner*, 131 T.C. 197 (2008) which held that CDPH verification issues under § 6330(c)(1) are never waived.

rather than undertake principled review. This situation is akin to sanctioning an attorney in a civil matter merely for requesting non-privileged matter relevant to his client's defense.

The Tax Court and Ninth Circuit also disregarded MacPherson's reliance on legal articles submitted to the courts. Alan Johnson's article, "An Inquiry Into the Assessment Process," 35 *N.Y.U. Tax Law Review* 286 (1980) cites to *Brafman* and states:

Let us suppose that, *the law of averages being what it is*, from time to time the Service does not follow the requirements of the statute and regulations. Does this mean that the taxpayer is not liable for the improperly assessed tax? Much to the distress of the Service, *the answer, sometimes, is 'yes.'* (Emphasis supplied.) *Id.* at 286.

William Elliot's article "Tax Practice – Assessment Irregularities," published in the CCH *Journal of Tax Practice & Procedure* (Aug-Sep 2010, pp. 21-28) explains that challenges to the signature requirement for assessments are not frivolous but sometimes win. "Assessment irregularities, if successfully argued, can void an assessment," Elliot writes. *Id.* at 24. "For example, if an IRS official fails to sign the assessment certificate, the assessment can be invalidated." *Id.*, citing to *Brafman*.

Gregory Gawlik and LaVonda Napka's article "Authority? Authority?! Of Course I Have Authority! Thoughts on Closing Agreements, Delegation Orders

and Signature Authority,” published in the *Journal of Tax Practice & Procedure* (June-July 2009, pp. 39-46), explains that IRS closing and settlement agreements are unenforceable by the taxpayer if the IRS employee signing the agreement did not have authority to sign. “The IRS recently reaffirmed the principle that it will not be bound by agreements signed by agents lacking actual authority pursuant to the relevant Delegation Order,” the authors write. *Id.* at 40. It does not matter if the employee acted with apparent authority. They cite *Webb, Jr. v. Commissioner*, 68 T.C.M. 1106 (1994), where the Tax Court held that because the section chief who signed the closing agreement lacked actual authority under any delegation order, his apparent authority could not and did not bind the IRS. The Tax Court said: “An agent ‘cloaked only with apparent authority’ cannot bind the United States.” *Id.* at 41. The article cites other cases for the same holding, concluding that attorneys must obtain proof of authority for IRS actions.

The Tax Court and the Ninth Circuit ignored the obvious double standard being applied: the IRS relies on lack of delegation orders to establish a lack of authority, but a taxpayer or his representative may not raise even the issue as to whether or not a delegation order exists without being sanctioned.

Arbitrary punishment of attorneys who raise the issue of proper delegation of authority and the documentation therefor, while the IRS is simultaneously allowed to raise this issue and prevail, favors the government over the due process and petition rights of the citizenry. As stated in *Nat'l*

Ass'n for Advancement of Colored People v. Button, at 433, *supra*, the threat of such sanctions may deter the attorney from exercising his clients' freedom to secure information for their defense from the government. This Court should provide clarity and oversight in this arena; otherwise, the Tax Court — an Article I court — may continue to so “regulate” without the narrow specificity the constitution requires.

Otherwise, if the sanctions against an attorney with as distinguished a career as MacPherson are allowed to stand, the ultimate outcome will be that issues raised with respect to delegation orders, and with respect to which documents may be discovered to establish taxpayers' claims or defenses, will henceforth be routinely treated by the Tax Court as sanctionable. Despite Circuit Court cases upholding the relevance of these issues, attorneys will find themselves sanctioned in the lower Tax Court for raising them.

III. *This Court should resolve the conflict between the Ninth, Eighth and Eleventh Circuits regarding the IRS delegation of authority issue, an exceptionally important issue affecting all taxpayers and counsel.*

A century ago this Court established that officials can act only with specific authority, reversing the Fifth Circuit, *U.S. v. Beebe*, 180 U.S. 343 (1901). In *Beebe*, the federal district attorney entered into a compromise agreement with the taxpayer-litigant. This Court said, “there can be no serious question that a district attorney of the United

States has no power to agree upon a compromise of a claim in suit except under circumstances not present in this case,” explaining that no statute or regulation provided the district attorney “any such power” to compromise, rather, the Treasury regulation provided that a district attorney could not compromise a federal tax debt “without express instructions from the Solicitor of the Treasury, unless circumstances exist which do not obtain in this case.” *Id.* at 351.

In *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929), *Botany Worsted Mills* sought to invalidate a federal tax compromise agreement as unauthorized. The statute at the time required administrative steps of advice and consent from high government officials, which steps were not followed. This Court examined the statutory requirements and found, at 288:

Here the attempted settlement was made by a subordinate official in the Bureau of Internal Revenue. And although it may have been ratified by the Commissioner [of Internal Revenue] in making the additional assessment based thereon, it does not appear that it was assented to by the Secretary [of the Treasury], or that the opinion of the Solicitor [of Internal Revenue] was filed in the Commissioner’s office. (Emphasis supplied.)

Finding that Congress intended the method prescribed by the statute to be “the exclusive method by which tax cases could be compromised,” this Court

concluded the unauthorized agreement was invalid. *Id.*

MacPherson argued that his clients were entitled to a copy of the delegation order that authorized the assessment officer who signed the operative SRA to assess. The Tax Court did not address the issue, and just before the entry of orders in *Best* and *May*, the Eighth Circuit reversed the Tax Court in holding that a taxpayer in a CDPH is entitled to the delegation order which authorized the signing by the IRS official of the statutory notice of deficiency in *Muncy v. Commissioner*, 637 Fed. App. 276 (8th Cir. 2016) (unpublished). MacPherson made the *Muncy* argument before the Ninth Circuit, but the court failed to address it. The court in *Best, et al.* held that:

Nor was the Appeals Office required to provide Taxpayers with a specific, signed delegation order for the Forms 4340. There is no requirement that the taxpayer receive a copy of the delegation of authority order from the Secretary to the person who signed the verification required under section 6330 (c)(1).

The Ninth Circuit misconstrued MacPherson's argument. First, he did not request a "signed delegation order"; he requested a copy of the delegation order which evidences authority of the officer who signed the Forms 4340; *i.e.*, proof of delegated authority. Second, he never requested a delegation order respecting verification.

Muncy demonstrates the error in holding MacPherson “multiplied the proceedings in [both cases] unreasonably and vexatiously.” §6673(a)(2). MacPherson did not “knowingly or recklessly raise a frivolous argument.” (App 2). Rather, MacPherson raised the exact issue — entitlement to the delegation order which authorized the IRS official to act — raised successfully by *Muncy*, where the Eighth Circuit agreed with *Muncy* and remanded the case to Tax Court for IRS disclosure of the delegation order.

The Ninth Circuit decision also conflicts with the Eleventh Circuit case of *Creel v. Commissioner*, 419 F.3d 1135 (11th Cir. 2005), in which the Commissioner of Internal Revenue made a novel delegation of authority claim, but one which Tax Court and the Eleventh Circuit did not find “frivolous.” Creel was convicted of tax crimes by plea agreement and agreed to the restitution amount of tax, “plus any applicable penalties and interest.” Creel paid the tax but not the “applicable penalties and interest.” The U.S. Attorney was satisfied with the tax payment, informed the district court that the restitution obligation had been paid, and released the judgment lien because the debt was “paid in full.” *Id.* at 137-38.

Nonetheless, IRS thereafter sought to collect additional taxes, penalties and interest for the same period. At a CDPH, his counsel argued that Creel’s tax liability was satisfied by the restitution payment already made. The IRS disagreed and Creel petitioned the Tax Court, which concluded “the U.S.

Attorney had the authority to compromise Creel's civil tax liabilities." *Id.* at 139-140.

On appeal, the Commissioner argued otherwise, claiming that:

Without such authority, the U.S. Attorney's actions would not bind the government, even if he intended to compromise Creel's tax liabilities. *U.S. v. Beebe*, 180 U.S. 343, 351 (1901) [citations omitted]; *Klein v. Commissioner*, 899 F2d. 1149, 1152 (11th Cir. 1990). 'It is well settled that persons dealing with a governmental agent must take notice of the agent's authority and that any unauthorized acts taken by the agent do not bind the government.' *United States v. Killough*, 848 F2d 1523, 1526 (11th Cir. 1988). *Id.* at 1141.

In affirming the Tax Court, the Eleventh Circuit found that by statute the Attorney General *can* compromise a civil tax case, which authority, by regulation, has been delegated to the Assistant Attorney General, Tax Division, and again, by regulation, has been re-delegated to U.S. Attorneys. However, although acknowledging "that some civil settlement authority has been re-delegated to U.S. Attorneys," the Commissioner argued that *Creel* failed "to show that the formal requirements of a re-delegation were satisfied." *Id.* at 142-43. The Eleventh Circuit held:

Because the U.S. Attorney had the authority to settle the criminal side of the case, and the

civil penalties were consolidated within the criminal case, the U.S. Attorney acted within the scope of his authority. *Cf. In re Knopf v. United States*, 190 B.R. 647, 651–52 (Bankr. D. Mont. 1995) (noting that “it does not bode well for an IRS attorney to ...challenge the authority of the Assistant U.S. Attorney to settle a tax prosecution case by a court accepted Plea Agreement.”) *Id.*

In *Creel*, IRS counsel unsuccessfully challenged the delegated authority claimed by a federal officer. Unlike MacPherson, however, IRS counsel was neither criticized nor sanctioned for raising the issue.

IV. *Whether the Treasury regulation promulgated under §6203 is valid concerns all taxpayers, and this Court has never visited nor settled the issue.*

- A.** 26 C.F.R. §301.6203-1 is invalid as contrary to the language of the statute.

The statute, §6203, is two sentences:

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary [of Treasury] in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary *shall* furnish the taxpayer *a copy of the record of assessment*. (Emphasis supplied.)

26 C.F.R. §301.6203-1 (App. 60), provides that the assessment shall be made by an Assessment

Officer signing the SRA, and that the date of the assessment is the date signed. But the regulation does not require a copy of the SRA to be furnished to the taxpayer. Instead, it provides that the taxpayer “shall be furnished a copy of the pertinent parts of the assessment” — parts which do not include two essential components of assessment: the signature of the Assessment Officer, and the date signed.

B. The regulation was passed in violation of the APA and is therefore void.

The APA was passed in 1946, codified at 5 U.S.C. §1003. Section 4(c) thereof provides a minimum 30-day period for notice and comment before a proposed regulation becomes effective:

The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

However, the regulation at issue received only half the notice and public comment period. On December 11, 1954, the Department of Treasury published a notice of “proposed regulation,” §301.6203-1, with a request for public comments. 19 Fed.Reg. 8457-59. (App 61). The comment period expired in 15 days, on December 26. The rule and rationale requiring public notice and comment were

not satisfied by a notice and comment period of only two weeks preceding Christmas.

The pertinent part of the notice reads:

Although 30 days are ordinarily provided for furnishing views, data, and arguments pertaining to proposed rule making, a period of *15 days* is provided with respect to these proposed regulations *in order to make possible more expeditious promulgation of the regulations* under these chapters which generally become effective on January 1, 1955. (Emphasis added.) (App. 62)

The original regulation (App. 63-64) reads substantially the same as the current version (App 48), with no differences germane to the issues raised in this petition.¹³

The adoption of Reg. § 301.6203-1 is found at 20 Fed. Reg. 28-30 (January 4, 1955). (App 64). It recites that the proposed regulation was published for notice and comment 24 days earlier, on December 11. There is no question, then, that the comment period was less than the statutorily required 30 days.

Although this Court has not yet decided a case on the precise issue raised here — lack of proper APA

¹³ In 1959, a non-substantive amendment directed district directors to appoint assessment officers, including those in the service center serving his district (24 Fed. Reg. 9193 (Nov. 11, 1959)). In 1967, another non-substantive amendment directing the director of the regional service center to appoint assessment officers jointly with the district director (32 Fed. Reg. 15241-75 (Nov. 3, 1967)). Neither called for comment.

notice and comment period in the promulgation of a Treasury regulation — this Court has repeatedly emphasized that federal agencies must satisfy the public notice and comment requirements of the APA.

In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) claimed its rule-making was not rule-making, arguing: “As the changes made by this document relate solely to interpretive rules, general statement of policy, and to rules of agency procedure and practice, neither notice of proposed rule making nor public participation therein is required by 5 U.S.C§ 553....” *Id.* at 316. This Court held otherwise:

In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decision making require that agency decisions be made only after affording interested persons notice and an opportunity to comment. With the consideration that is necessary and intended consequence of such procedures, OFCCP might have decided that a different accommodation was more appropriate. *Id.* at 316.

In other words, OFCCP made a rule, and *rule-making requires public notice and opportunity to comment per the APA*.

In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Department of Labor argued that a mere opinion letter is entitled to deference under *Chevron*, the case in which this Court “held that a court must

give effect to an agency’s regulation containing a reasonable interpretation of an ambiguous statute.” *Id.* at 587. Declining the Department’s invitation, this Court said:

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron* deference. *See, e.g., Reno v. Koray*, 515 U.S. 50, 61 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (internal agency guideline, which is not “subject to the rigors of the Administrative Procedur[e] Act, *including public notice and comment*,” entitled to only “some deference” (internal quotation marks omitted)). *Id.*, at 587. (Further citations omitted and emphasis supplied.)

The following year in *U.S. v. Mead*, 533 U.S. 218 (2001), this Court found a tariff ruling was not entitled to *Chevron* deference, noting *inter alia* that “...the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rule making or formal adjudication. [fn 12] ...” (emphasis added). *Id.* at 230. None of the cases referenced in fn 12, ranging from year 1985 to 2000, involved Treasury regulations. Not until *Mayo Foundation for Medical Educ. and Research v. U.S.*, 562 U.S. 44 (2011) did this Court declare that Treasury Regulations are subject to the same *Mead*

and *Chevron* standards as other agency regulations, eliminating what many perceived as “tax exceptionalism,” *i.e.*, that tax regulations are not subject to judicial oversight. “The principles underlying our decision in *Chevron* apply with full force in the tax context.” *Mayo*, at 55.

Accordingly, this case presents the first opportunity to decide a Treasury regulation under the APA notice and comment requirement. The regulation is substantive and legislative and clearly contradicts an unambiguous statute.

The current APA provides for three exceptions to notice and comment requisites: “... (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.” 5 U.S.C. § 553(d). None of the three exceptions apply. Providing a conclusory “good cause” statement is not sufficient; and, as this Court has made clear; *e.g.*, *Chrysler Corp v. Brown*, a regulation which violates APA notice and comment is void. It logically follows that the assessment regulation is void.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

DONALD W. MACPHERSON, *pro se*
The MacPherson Group, P.C.
3039 W. Peoria Ave. #102-620
Phoenix, Arizona 85029
(623) 209-2003

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD MACPHERSON,
Petitioner-Appellant,
and
ESTATE OF JUDITH A. MAY,
DECEASED, et al.,
Petitioners,
v.
COMMISSIONER OF
INTERNAL REVENUE,
Respondent-Appellee.

No. 16-71795

Tax Ct. No. 14545-12L

MEMORANDUM*

DONALD MACPHERSON,
Petitioner-Appellant,
and
LEONARD L. BEST and
EVELYN R. BEST,
Petitioners,
v.
COMMISSIONER OF
INTERNAL REVENUE,
Respondent-Appellee.

No. 16-72599

Tax Ct. No. 26662-10L

FILED November 16, 2017

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from a Decision of the
United States Tax Court

Submitted November 14, 2017**
San Francisco, California

Before: THOMAS, Chief Circuit Judge, PAEZ, Circuit Judge, and SAVAGE,*** District Judge.

Attorney Donald W. MacPherson appeals the Tax Court's imposition of sanctions in two cases in which he counseled his taxpayer clients to maintain frivolous positions. We have jurisdiction pursuant to 26 U.S.C. § 7482(a)(1), and we affirm. Because the parties are familiar with the history of this case, we need not recount it here.

The Tax Court did not abuse its discretion in ordering MacPherson to pay excess costs pursuant to 26 U.S.C. § 6673(a)(2). *See Grimes v. CIR*, 806 F.2d 1451, 1454 (9th Cir. 1986) (standard of review). MacPherson “multiplied the proceedings in [both cases] unreasonably and vexatiously.” 26 U.S.C. § 6673(a)(2). He “knowingly or recklessly raise[d] a frivolous argument.” *Moore v. Keegan Mgmt. Co. (In re Keegan Mgmt. Co. Sec. Litig.)*, 78 F.3d 431, 436 (9th Cir. 1996). On behalf of his clients, he advanced a position contrary to established law and unsupported by fact. In a signed declaration, he represented that he knew his position would be unsuccessful. The Tax Court appropriately ordered

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Timothy J. Savage, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

MacPherson to pay only those costs incurred in responding to MacPherson's frivolous arguments. *See Moore*, 78 F.3d at 435.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD MACPHERSON,
Petitioner-Appellant,
and
ESTATE OF JUDITH A. MAY,
DECEASED, et al.,
Petitioners,
v.
COMMISSIONER OF
INTERNAL REVENUE,
Respondent-Appellee.

No. 16-71795

Tax Ct. No. 14545-12L

ORDER

DONALD MACPHERSON,
Petitioner-Appellant,
and
LEONARD L. BEST and
EVELYN R. BEST,
Petitioners,
v.
COMMISSIONER OF
INTERNAL REVENUE,
Respondent-Appellee.

No. 16-72599

Tax Ct. No. 26662-10L

FILED February 28, 2018

Before: THOMAS, Chief Circuit Judge, PAEZ, Circuit Judge, and SAVAGE,* District Judge.

* The Honorable Timothy J. Savage, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 356. The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B

T.C. Memo. 2016-32

UNITED STATES TAX COURT

LEONARD L. BEST AND EVELYN R. BEST, Petitioners, *v.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.*

Docket No. 26662-10L. Filed February 29, 2016.

Held: Order to show cause why Ps' counsel should not pay excessive costs pursuant to I.R.C. sec. 6673(a)(2) or be sanctioned pursuant to Rule 33(b), Tax Court Rules of Practice and Procedure, will be made absolute and excessive costs imposed on counsel.

Donald W. MacPherson, for petitioners.
Chris J. Sheldon, Doreen M. Susi, and Brandon A. Keim, for respondent.

[*2] **SUPPLEMENTAL MEMORANDUM
OPINION**

HALPERN, Judge: Donald W. MacPherson is petitioners' counsel in this case. In a prior report, *Best v. Commissioner*, T.C. Memo. 2014-72, we held that respondent may proceed with collection of

* This opinion supplements our previously filed Memorandum Opinion *Best v. Commissioner*, T.C. Memo. 2014-72.

petitioners' unpaid 1993 and 1994 Federal income tax, determined that petitioners must pay a penalty of \$5,000 pursuant to section 6673(a)(1), and contemplated sanctioning Mr. MacPherson for unnecessarily bringing and prolonging these proceedings.¹ By order dated April 28, 2014, we ordered Mr. MacPherson to show cause why we should not require him to pay respondent's excessive costs pursuant to section 6673(a)(2) or sanction him pursuant to Rule 33(b) (order to show cause). We also ordered respondent to express his view on whether the Court should sanction Mr. MacPherson and, if so, to provide a computation of the excess costs respondent incurred. Mr. MacPherson and respondent have complied with our order, and we have considered their responses. Although Mr. MacPherson initially asked for a hearing, he has withdrawn that request. For the reasons stated, we will make the order to show cause absolute and award to the United States \$19,837.50. Because, [*3] in his response, Mr. MacPherson also addressed the penalty that we determined to impose on petitioners, we will briefly elaborate on our grounds for imposing that penalty.

Background

This proceeding to review respondent's determination to proceed with collection of petitioners' unpaid 1993 and 1994 Federal income taxes is not the first proceeding in this Court addressing those

¹ Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended and in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

taxes. Previously, petitioners challenged respondent's determination of deficiencies in, and additions to, petitioners' 1993 and 1994 income tax liabilities. That proceeding, *Best v. Commissioner*, T.C. Dkt. No. 22241-07 (Jan. 2, 2009) (stipulated decision), was ended by agreement of the parties. We entered a stipulated decision sustaining substantial portions of the deficiencies in tax along with additions to tax for both failure to file a return and failure to pay tax timely and also for failure to pay estimated tax (all amounts, without distinction, taxes). Mr. MacPherson represented petitioners in that proceeding. Respondent assessed the resulting taxes. Petitioners failed to pay the assessed amounts, and respondent issued to them a Final Notice of Intent to Levy and Notice of Your Right to a Hearing.

Petitioners requested a section 6330 hearing, stating that they wished to pursue collection alternatives and penalty abatement. Mr. MacPherson [*4] represented them at the hearing. Settlement Officer Irma Hernandez of the Internal Revenue Service Appeals Office (Appeals) reviewed various computer transcripts of petitioners' accounts for 1993 and 1994 and concluded that proper assessments had been made and that collection of the unpaid taxes could proceed. Mr. MacPherson requested account transcripts for both years, which Ms. Hernandez provided to him. The transcripts identified petitioners and the year and type of tax reported and showed the amounts and dates of assessments. During a telephone conference with Ms. Hernandez, Mr. MacPherson told her that petitioners had changed their minds about desiring a collection alternative and were withdrawing their request for such. He conceded that petitioners had stipulated a

decision entered by the Tax Court and were not disputing the underlying liabilities. He stated that he was disputing the postdecision procedural steps. Although he claimed that the assessments were neither timely nor proper, he gave no specifics. He reiterated his earlier request that Ms. Hernandez “provide a ‘summary record of assessment’, Form 23C and a Form 4340, plus a copy of the actual document signed by the officer delegated authority to assess in this case, his name, and the delegation order showing his authorization to assess in this case.”

In making that request, Mr. MacPherson had communicated to Ms. Hernandez: “Clients are doubting liability/contesting timely & proper assessment & delegated [*5] authority of assessment officer.” Ms. Hernandez refused his request for those documents. She explained that there was no requirement in the Internal Revenue Code or the regulations that Appeals provide the taxpayer with any documents during the hearing process. She stated that, as a matter of practice, petitioners had been furnished the account transcripts, which “identify the taxpayers, the character of the liability assessed, the taxable period and the amount of the assessment”. Ms. Hernandez informed Mr. MacPherson that Appeals would issue a determination sustaining the levy. On November 1, 2010, Appeals sent to petitioners a Notice of Determination Concerning Collection Actions(s) Under Section 6320 and/or 6330, informing them that the notice of intent to levy was correct and that respondent would proceed with collection.

On December 1, 2010, in response to the notice, petitioners filed the petition, which Mr. MacPherson

signed on their behalf. By the petition, petitioners prayed that, “for lack of proper assessment”, we determine that they have no tax liabilities for the years in issue. They averred that Ms. Hernandez abused her discretion by failing to give them copies of Form 4340, Form 23C, RACS 006, or a delegation order for the assessment officer who signed petitioners’ [*6] assessment.² Respondent answered the petition and, eventually, the case was set for trial in June 2012, in Phoenix, Arizona.

In early February 2012, respondent’s counsel contacted Mr. MacPherson to discuss the case. Among other things, he warned Mr. MacPherson that the issues petitioners had raised during their section 6330 hearing and had alleged in the petition were listed in respondent’s frivolous position notice and were contrary to established law. At Mr. MacPherson’s request, respondent’s counsel provided him with copies of Notice 2010-33, 2010-17 I.R.B. 609, and Rev. Rul. 2007-21, 2007-14 I.R.B. 865, and he directed him to *Craig v. Commissioner*, 119 T.C. 252, 262 (2002) (“Nor does * * * [section 6330(c)(1)] mandate that the Appeals officer actually give a taxpayer a copy of the verification upon which the Appeals officer relied.”), and *Nestor v. Commissioner*, 118 T.C. 162, 166 (2002) (“Section 6330(c)(1) does not require the Appeals officer to give the taxpayer a copy of the verification that the requirements of any applicable law or administrative procedure have

² Form 4340 is a “Certificate of Assessments, Payments, and Other Specified Matters”. Form 23C is an “Assessment Certificate—Summary Record of Assessments”. RACS 006 is an “Revenue Accounting Control System Report 006”, a computer-generated equivalent of Form 23C. They all evidence assessment. For clarity, we do not include the form names in the text.

been met.”). Respondent’s counsel warned Mr. MacPherson that, if petitioners proceeded, respondent would request the Court to impose a section [*7] 6673(a)(1) penalty against them. Sometime after they filed the petition, respondent provided to petitioners Certificates of Official Records attesting that the annexed Forms 4340 were true Forms 4340 for petitioners’ 1993 and 1994 tax years.

On April 4, 2012, respondent filed a motion for summary judgment and for a continuance (to give the Court time to consider the motion for summary judgment). On April 11, 2012, in a conference call with the parties, we stated our reluctance to continue the case if there was a genuine dispute as to a material fact. Mr. MacPherson was unwilling to state that there was no such dispute. As a result, we denied the motions. Five days later, Mr. MacPherson contacted respondent’s counsel to suggest that the parties submit the case to the Court fully stipulated under Rule 122 or that the parties make cross-motions for summary judgment. The time for making summary judgment motions having expired, the parties agreed to proceed with a fully stipulated case. They submitted a stipulation of facts and a Rule 122 motion, which we granted. They filed briefs.

In our prior report, we stated that we discerned from the petition two grounds underlying petitioners’ assignments of error. *Best v. Commissioner*, T.C. Memo. 2014-72, at *9. One, collection could not proceed because Ms. Hernandez had abused her discretion in relying on transcripts to verify that their unpaid tax [*8] had been properly assessed. Two, collection could not proceed because neither the account transcripts nor the Forms 4340 provided to petitioners during pendency of this case meet

respondent's duty imposed by section 6203 to furnish them with copies of the Commissioner's records of assessment for the unpaid tax in issue. We treated petitioners' grounds as raising questions of law.

We found substantial authority rebutting petitioners' claim that Ms. Hernandez could not rely on computer transcripts to verify that their unpaid tax had been properly assessed. We stated: "Nothing in evidence indicates any irregularity in the assessment procedure that would raise a question that the assessments were not validly made in accordance with the requirements of section 301.6203-1, *Proced. & Admin. Regs.*" *Id.* at *14.

We likewise found substantial authority that respondent had satisfied his obligation under section 6203 to furnish petitioners with the records of assessments of their unpaid tax. We stated that the information in the account transcripts furnished to petitioners by Ms. Hernandez "constitutes all of 'the pertinent parts of the assessment', which, pursuant to section 301.6203-1, *Proced. & Admin. Regs.*, on their request, respondent must furnish to them." *Id.* at *15. We cited both cases of this Court and of the Court of Appeals for the Ninth Circuit for the proposition that "[The Commissioner] may choose among documents so [*9] long as the form used identifies the taxpayer, states the character of the liabilities assessed, the tax period giving rise to the assessment, the amount of the assessment, and the date of assessment." *Best v. Commissioner*, at *16 (alteration in original) (quoting *Battle v. Commissioner*, T.C. Memo. 2009-171, 2009 WL 2151786, at *5). The Forms 4340 furnished to petitioners after this case commenced contained

information much the same as that contained in the account transcripts. *Id.* at *16-*17.

We imposed a section 6673(a)(1) penalty on petitioners because their two grounds lacked merit and were contrary to established law. We found that their arguments were frivolous; that nothing supported their assignments of error, which caused us to further conclude that their claims were groundless; and, finally, that they maintained the proceedings primarily for delay. We rejected their reliance-on-counsel defense.

We contemplated levying excess costs on Mr. MacPherson for unreasonably and unnecessarily bringing and prolonging the proceedings. We said that we would accord him the opportunity to respond to that charge.

[*10]

Discussion

I. Requirements for an Award of Excess Costs

A. Introduction

Section 6673(a)(2) plainly imposes three prerequisites to an award of excess costs. First, the attorney or other practitioner (without distinction, attorney) must engage in “unreasonable and vexatious” conduct. Second, that “unreasonable and vexatious” conduct must be conduct that “multiplies the proceedings.” Finally, the dollar amount of the sanction must bear a financial nexus to the excess proceedings; *i.e.*, the sanction may not exceed the costs, expenses, and attorneys’ fees reasonably incurred because of such conduct. See *Gillespie v. Commissioner*, T.C. Memo. 2007-202, 2007 WL

2120069, at *10, *aff'd*, 292 F. App'x 517 (7th Cir. 2008).

B. Unreasonable and Vexatious Conduct

The purpose of section 6673(a)(2) is to penalize an attorney for his misconduct in unreasonably and vexatiously multiplying the proceedings. Congress has not, however, specified the degree of culpability that an attorney must exhibit before we may conclude that his conduct in multiplying the proceedings is unreasonable and vexatious. We have previously relied on interpretations of 28 U.S.C. sec. 1927 (2012) to ascertain misconduct justifying [*11] sanctions under section 6673(a)(2) because both serve the same purpose and have substantially identical language. *See, e.g., Takaba v. Commissioner*, 119 T.C. 285, 296-297 (2002); *Gillespie v. Commissioner*, 2007 WL 2120069, at *10. The Courts of Appeals are not uniform on the level of misconduct required for sanctions. Moreover, appellate venue regarding section 6673(a)(2) is uncertain. Venue for appeal of Tax Court decisions is governed by section 7482(b). The venue for appeal is likely either the Court of Appeals for the Ninth Circuit (because of the legal residence of petitioners), *see* sec. 7482(b)(1)(A), or the Court of Appeals for the District of Columbia Circuit, *see* sec. 7482(b)(1) (flush language). The Court of Appeals for the Ninth Circuit is among the majority of the Courts of Appeals requiring a showing of bad faith. *See Moore v. Keegan Mgt. Co. (In re Keegan Mgmt. Co. Sec. Litig.)*, 78 F.3d 431, 436 (9th Cir. 1996) (stating that 28 U.S.C. sec. 1927 sanctions must be supported by a finding of subjective bad faith). But it has held that bad faith is shown when an attorney “knowingly or recklessly” raises a

frivolous argument. *Id.* The Court of Appeals for the District of Columbia Circuit may require only a showing of recklessness. *See LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 905 (D.C. Cir. 1998) (“This court has not yet established whether the standard for imposition of sanctions under 28 U.S.C. § 1927 should be ‘recklessness’ or the more stringent ‘bad faith.’”); [*12] *Dover v. Medstar Wash. Hosp. Ctr., Inc.*, 989 F. Supp. 2d 57, 63 (D.D.C. 2013) (repeating Court of Appeals’ admonition). Because we are unsure of appellate venue, and because we find that Mr. MacPherson’s conduct would constitute bad faith under the Court of Appeals for the Ninth Circuit’s test for bad faith, we will for purposes of this case (and without deciding the standard in this Court), adopt that standard. *See Takaba v. Commissioner*, 119 T.C. at 298.

We have already found that petitioners’ assignments of error are frivolous and groundless and were raised primarily for delay. *See Best v. Commissioner*, at *21. We believe that Mr. MacPherson intentionally abused the judicial process by bringing and continuing this case on behalf of petitioners knowing their claims to be without merit. Indeed, by his own declaration submitted in support of petitioners’ response to respondent’s motion to impose sanctions on petitioners, Mr. MacPherson appears to concede that at least one of petitioners’ assignments was frivolous. *Id.* at *23. He states that he “concluded many years ago that the ‘23C issue’ was a ‘dead letter’ in so far as obtaining the 23C,” *id.*, and yet, as described *supra*, he assigned error related to Form 23C. Despite Mr. MacPherson’s now arguing that it was not a concession, his statement, along with cases cited in the petition, demonstrates an awareness on his part

that petitioners are not legally entitled any particular document for section 6203 purposes. Mr. [*13] MacPherson knowingly raised a frivolous argument by arguing otherwise, and so he acted in bad faith. *See Keegan Mgmt. Co.*, 78 F.3d at 436.

Moreover, as to petitioners' remaining assignments of error, months before respondent made his motion for summary judgment respondent's counsel put Mr. MacPherson on notice that respondent considered those arguments frivolous and contrary to established law. At Mr. MacPherson's request, respondent's counsel provided to him the authority on which counsel relied. And so Mr. MacPherson had further knowledge that his claims were without merit.

C. Multiplication of the Proceedings

In the face of both the authority Mr. MacPherson knew at the time the petition was filed and the authority provided by respondent's counsel, Mr. MacPherson persisted.³ At no point did he concede

³ One of the authorities respondent's counsel brought to his attention was *Nestor v. Commissioner*, 118 T.C. 162, 166 (2002) ("Section 6330(c)(1) does not require the Appeals officer to give the taxpayer a copy of the verification that the requirements of any applicable law or administrative procedure have been met."). Mr. MacPherson points to Judge Foley's dissenting opinion, *id.* at 179-180, in which he opined that the Appeals Officer's verification was erroneous because he had not complied with the requirement of sec. 6203 that, upon his request, "the Secretary shall furnish the taxpayer a copy of the record of the assessment." The facts here are distinguishable, because Ms. Hernandez provided petitioners with account transcripts containing the "pertinent parts of the assessment", which is all that is required by sec. 301.6203-1, *Proced. & Admin. Regs.* In any case, the dissenting opinion was not that adopted by the Court.

any of his assignments of [*14] error. It was reckless and unreasonable of Mr. MacPherson to disregard the authority respondent's counsel brought to his attention and to continue prosecution of petitioners' meritless claims.

Mr. MacPherson further multiplied the proceedings and vexatiously impeded the resolution of this case by objecting to respondent's motion for summary judgment on the grounds that there was a genuine dispute as to material facts and then, in less than a week, reversing course and suggesting that the parties submit the case to the Court fully stipulated under Rule 122 or make cross-motions for summary judgment. In response to the order to show cause, he states that his reason for wanting a trial was to allow petitioners to testify in defense to the section 6673 (a)(1) penalty. He never made that clear to the Court in his objection and has not offered an explanation for his almost immediate change of mind.

Finally, we find Mr. MacPherson to have multiplied proceedings in his response to our order to show cause. He submitted over 400 pages purporting to support his claim that sanctions are not appropriate, but much of it consists of Mr. MacPherson's persistence with arguments we have already told him are frivolous.⁴

[*15] D. Financial Nexus to Excess Proceedings

These proceedings never should have been brought. All of respondent's costs are, thus, in a sense, excessive. There is, however, some disagree-

⁴ Despite Mr. MacPherson's inappropriate persistence with frivolous arguments, respondent has not asked and we will not impose on Mr. MacPherson excess costs for time spent reading and responding to his over 400 pages of submissions.

ment among the Courts of Appeals in interpreting 28 U.S.C. sec. 1927 as to whether it is only possible to multiply, or prolong, the proceedings after a case has been initiated; presumably because an attorney cannot begin to multiply the proceedings until some proceeding has come into existence for the attorney to multiply. *Compare Keegan Mgmt. Co.*, 78 F.3d at 435 (stating that 28 U.S.C. sec. 1927 “applies only to unnecessary filings and tactics once a lawsuit has begun”), *with In re TCI Ltd.*, 769 F.2d 441, 448 (7th Cir. 1985) (stating that, under 28 U.S.C. sec. 1927, trial judge “had the authority to award the fees incurred right from the beginning”). We have not addressed the analogous issue under section 6673 (a)(2), and we are not compelled to do so today both because respondent has asked only for excessive costs associated with the work beginning more than a year after respondent answered the petition and because, as discussed *infra*, we find Mr. MacPherson independently sanctionable under Rule 33(b).

[*16]

II. Violation of Rule 33(b)

Mr. MacPherson has also violated Rule 33(b) and the ABA Model Rules of Professional Conduct (Model Rules), which, by Rule 201(a), govern his practice before this Court.

In pertinent part, Rule 33(b) provides:

(b) Effect of Signature. The signature of counsel * * * constitutes a certificate by the signer that the signer has read the pleading; that, to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* * * If a pleading is signed in violation of this Rule, the Court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable counsel's fees.

In pertinent part, Model Rule 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." As we have already stated, petitioners' arguments were frivolous. We further find that arguments to modify or reverse existing law were not made in good faith.

[*17] Petitioners argued that section 301.6203-1, *Proced. & Admin. Regs.*, is invalid and a denial of due process because, in response to a taxpayer's request for a copy of the record of the assessment, *see* sec. 6203, the regulation requires only that the Secretary provide "the pertinent parts of the assessment", which do not include the assessment source document (Form 23C or RACS 006), including the name and signature of the assessment officer and the

date of assessment.⁵ In response, respondent argued that petitioners were barred from arguing the invalidity of the regulation because they had not raised the issue during their section 6330 hearing and the issue played no role in Appeals' determination to proceed with collection. It is true that with rare exception we do not have authority to consider issues that were not raised before Appeals. *See, e.g., Giamelli v. Commissioner*, 129 T.C. 107, 115 (2007) (underlying liability); *Magana v. Commissioner*, 118 T.C. 488, 493-494 (2002) (abuse of discretion); secs. 301.6320-1(f)(2), Q&A-F3, 301.6330-1(f)(2), Q&A-F3, *Proced. & Admin. Regs.* Principally for that reason, we did not discuss the validity of the regulation in our prior report.

[*18] In any event, even if the validity of section 301.6203-1, *Proced. & Admin. Regs.*, were properly before us, petitioners have made no plausible argument for its invalidity. The pertinent sentence of the regulation, providing that the Secretary fulfills his duty to a taxpayer requesting a copy of the record of assessment by furnishing him a copy of the pertinent parts of the assessment, has been a part of the regulation since its promulgation in 1954. *See* T.D. 6119, 1955-1 C.B. 145, 149-150. The Court of Appeals for the Ninth Circuit has stated with respect to that sentence: "This represents a permissible interpretation of section 6203, and we are therefore bound to give it deference." *Koff v. United States*, 3 F.3d

⁵ In pertinent part, sec. 301.6203-1, *Proced. & Admin. Regs.*, provides: "If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed."

1297, 1298 (9th Cir. 1993). Also, numerous cases hold that, to satisfy a taxpayer's section 6203 request for the record of the assessment, the Secretary need not provide original documents, such as a Form 23C, RACS 006, or the name and signature of the assessment officer. *E.g., Goodman v. United States*, 185 F. App'x 725, 728 (10th Cir. 2006) ("No particular form or document is needed to satisfy the requirements of I.R.C. § 6203 and Treasury Regulation § 301.6203-1. Instead, an assessment record is sufficient if it provides the taxpayer with the required information."); *Niemela v. United States*, 995 F.2d 1061 (1st Cir. 1993) (unpublished table decision) (citing *Gentry*); *Gentry v. United States*, 962 F.2d 555, 558 (6th Cir. 1992) ("The Treasury Regulations specify that the taxpayer is [*19] entitled to a copy of the pertinent parts of the assessment documents * * * [and] [n]either the Tax Code nor the Treasury Regulations require those pertinent parts to be original documents[.]"); *United States v. Hart*, 917 F.2d 26 (7th Cir. 1990) (unpublished table decision) (stating that the law is settled that the Government does not have to produce original documents to comply with section 6203 and section 301.6203-1, *Proced. & Admin. Regs.*); *Battle v. Commissioner*, 2009 WL 2151786, at *5. The long existence of section 301.6203-1, *Proced. & Admin. Regs.*, and the weight of authority contrary to petitioners' argument that the regulation is invalid lead us to conclude that petitioners did not make their contrary argument in good faith.

While Mr. MacPherson may be dissatisfied that Congress has not given taxpayers carte blanche to search the Commissioner's records when the Commissioner must take action to collect unpaid

taxes,⁶ petitioners have no legal [*20] grounds to complain about Ms. Hernandez’s treatment of them or Appeals’ resulting determination to proceed with collection. Mr. MacPherson had no basis in fact and in law for bringing this proceeding and signing the petition.

“Rule 33(b) clearly imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed.” *Versteeg v. Commissioner*, 91 T.C. 339, 343 (1988). Mr. MacPherson has signed pleadings and other papers to bring and defend these proceedings knowing petitioners’ claims to be meritless.⁷ He has done so in violation of our Rules and the Model Rules and, thus, has intentionally abused the judicial process. We may sanction him for that conduct.

Accordingly, sanctions should be imposed on Mr. MacPherson under both section 6673(a)(2) and Rule

⁶ In his declaration submitted in support of petitioners’ response to respondent’s motion to impose sanctions on petitioners, Mr. MacPherson states that, since petitioners “had a major collection problem * * * [he] decided to try the assessment issue believing there is some chance of lack of proper assessment which will result in voiding the assessment and causing * * * [petitioners] to be free of the debt as a result of the statute of limitations”. See *Best v. Commissioner*, T.C. Memo. 2014-72, at *23. We do not directly address whether the assessment was proper but, rather, whether Ms. Hernandez complied with sec. 6330(c)(1) and (3)(A) and whether petitioners received “a copy of the pertinent parts of the assessment”, which is all that they were entitled to under sec. 301.6203-1, *Proced. & Admin. Regs.*

⁷ The pleadings and papers we have in mind are the petition, petitioners’ brief, petitioners’ reply brief, petitioners’ response to respondent’s motion to impose a penalty, supplement to petitioners’ response to respondent’s motion to impose a penalty, petitioners’ motion for reconsideration, and petitioners’ notice of relevant judicial decisions.

33(b) for filing the petition and multiplying the proceedings unreasonably and vexatiously. Because only frivolous issues were raised, the bringing of this case in and of itself was nothing more than a meritless [*21] tactic requiring the use of Government and Court resources that could otherwise have been applied to hear legitimate taxpayer concerns. Respondent is entitled to his attorney's fees incurred in defending this case. The tactics Mr. MacPherson employed in this case were designed to impede respondent's legitimate efforts to collect petitioners' unpaid 1993 and 1994 taxes.

III. Amount of Sanctions

One option for determining the amount of sanctions to impose on Mr. MacPherson is to follow what we said in *Harper v. Commissioner*, 99 T.C. 533, 549 (1992): "Attorney's fees awarded under section 6673(a)(2) are to be computed by multiplying the number of excess hours reasonably expended on the litigation by a reasonable hourly rate. The product is known as the 'lodestar' amount." We ordered respondent to provide us with a computation of costs to assist us in computing a lodestar amount. In that regard, respondent has provided us with declarations of Attorneys Brandon A. Keim and Doreen M. Susi. Attached to both declarations are copies of respondent's internal timekeeping records, showing the time expended on this case by, among others, Mr. Keim and Ms. Susi.

Respondent submits for reimbursement 115.25 hours of Mr. Keim's time at \$150 an hour. Mr. Keim is the attorney with day-to-day responsibility for this case. He is employed in the Office of Chief Counsel in

Phoenix, Arizona. He has [*22] been admitted to practice law in Arizona since 2011. He has detailed time spent on this case since January 28, 2012, which involves time spent on research, drafting, telephone calls, and review of submissions to the Court. Respondent also submits for reimbursement 12.75 hours of Ms. Susi's time at \$200 an hour. Ms. Susi is Mr. Keim's supervisor. She is an Associate Area Counsel in the Office of Chief Counsel in Phoenix, Arizona. She has been employed by that office since 1983. She has detailed time spent on this case since April 7, 2012, which principally involves review of various submissions to the Court.

Mr. MacPherson does not challenge the reasonableness of either Mr. Keim's or Ms. Susi's hourly rates. For the most part, he also does not challenge the time spent by either Mr. Keim or Ms. Susi. He claims that respondent did not provide time sheets/records showing time expended. That claim is untrue. Respondent's internal timekeeping records were attached to both Mr. Keim's and Ms. Susi's declarations. He also argues that Mr. Keim's expenditure of 27 hours to prepare a motion for summary judgment and motion for continuance, and Ms. Susi's expenditure of 2.25 hours to review those motions were not reasonable or necessary: "No award should be provided for time expended re the useless MSJ". We do not find 27 hours expended to prepare a motion for summary judgment and a motion for continuance to be unreasonable. And the only reason [*23] that motion was "useless" was that Mr. MacPherson represented to respondent and the Court that trial was necessary as there were genuine issues of fact to be tried. As we have already stated, that representation was quickly refuted when, five

days later and after we denied the motions, Mr. MacPherson suggested that the parties submit the case to the Court fully stipulated under Rule 122. If Mr. MacPherson had not made his initial representation, we could have fully resolved the case through respondent's motion for summary judgment. And so Mr. MacPherson prolonged these proceedings even further. We also find 2.25 hours expended to review a motion for summary judgment and motion for continuance to be reasonable.

Mr. MacPherson knew or should have known that this case should never have been commenced. And for that reason, we are inclined to hold that Mr. MacPherson is liable for *all* of the time spent by respondent, not to mention time expended by the Court in processing and reviewing all of Mr. MacPherson's submissions. We will limit our sanctions, however, to the lodestar amount submitted by respondent: 115.25 hours of Mr. Keim's time at \$150/hour and 12.75 hours of Ms. Susi's time at \$200/hour equals \$19,837.50. We will sanction Mr. MacPherson and require him to pay that amount.

[*24]

IV. Section 6673(a)(1)(B) Penalty Imposed on Petitioners

In Mr. MacPherson's response to the order to show cause, he continues to address the section 6673(a)(1) penalty that we determined to impose on petitioners. See *Best v. Commissioner*, at *22. We will briefly expand on our reasons for imposing the penalty.

Section 6673(a)(1)(B) allows the Tax Court to sanction taxpayers for advancing frivolous or groundless positions. In our prior report, we stated that

reliance on the advice of counsel is not a defense to the imposition of a section 6673(a)(1)(B) penalty. *Best v. Commissioner*, at *22. Mr. MacPherson points out that in *Neonatology Assocs., P.A. v. Commissioner*, 115 T.C. 43, 103 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002), we allowed just such a defense. That is true. In that case, the Commissioner moved for the sanction, on the basis in part of the taxpayers' counsel's litigation conduct, *i.e.*, "contest[ing] unreasonably the admissibility of documents", "fail[ing] to comply fully with discovery requests," unreasonably calling certain witnesses, and "unreasonabl[y] * * * defend[ing] against (1) respondent's motion to compel documents * * * and (2) respondent's offer of evidence as to certain marketing materials and other evidence." *Id.* at 102. With respect to those grounds, we said:

[*25] Petitioners are not directly responsible for most of the actions listed by respondent in support of his motion to impose penalties. Those actions are best traced to petitioners' counsel, and, given the facts of this case, we decline to impute the actions of petitioners' counsel to petitioners themselves for the purposes of imposing a penalty under section 6673(a)(1)(B). Petitioners have reasonably relied on the advice of their trial counsel that their litigating positions had merit. * * * [*Id.* at 103.]

The facts that were before us in *Neonatology Assocs.* are distinguishable from the facts here before us. We are not here dealing with taxpayers relying on counsel for how to conduct litigation. We are

dealing with petitioners' decisions to bring this case in the first place and then to maintain it. Their declarations, set forth in part in *Best v. Commissioner*, at *21-*22, make it clear that it was not their idea to raise before Appeals and in this Court the issues with respect to which they assigned error. Each declares: "I have relied totally on the tax advice of MACPHERSON concerning my Collection Due Process Hearing * * * request, petition to the Tax Court, and Tax Court litigation." *Id.* (alteration in original). Petitioners' assignments of error challenge established law. Neither declares that he (or she) either read the petition or asked Mr. MacPherson about its content. As we said, *id.* at *22, "[we] need * * * [not] excuse a taxpayer's failure to review pleadings and other documents filed on his behalf." Also: "The purpose of section 6673 is to compel taxpayers to think and to conform their conduct to [*26] settled principles before they file returns and litigate." *Id.* We have no evidence that petitioners fulfilled those obligations. Petitioners may not blindly rely on counsel to advance arguments and use ignorance as a shield to avoid a section 6673(a)(1)(B) penalty. We continue to believe that petitioners should pay a section 6673(a)(1) penalty of \$5,000 to the United States in this case.⁸

⁸ Respondent informed Mr. MacPherson that petitioners' position was frivolous, and Mr. MacPherson had a duty to inform petitioners of respondent's position. See Rule 201(a); Model Rules of Prof'l Conduct r. 1.4. It should have been petitioners' decision as to whether they wanted to proceed with arguments that respondent regarded as frivolous. See Model Rules of Prof'l Conduct r. 1.2(a), 1.4. If Mr. MacPherson did not communicate such important information to petitioners, that may resolve a matter between them, but it does not discharge petitioners'

V. Conclusion

We will make absolute the order to show cause in that we will award the United States \$19,837.50 as a penalty imposed against Mr. MacPherson under section 6673(a)(2).

*The order to show cause will be
made absolute.*

obligations before this Court. *See United States v. Boyle*, 469 U.S. 241, 250 (1985).

UNITED STATES TAX COURT
WASHINGTON, DC 20217

LEONARD L. BEST &	)	
EVELYN R. BEST,	)	
Petitioner(s),	)	
v.	)	Docket No. 26662-10 L.
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2014-72) filed April 28, 2014, and its Supplemental Memorandum Opinion (T.C. Memo. 2016-32) filed February 29, 2016, it is

ORDERED that petitioners shall pay to the United States a penalty in the amount of \$5,000, pursuant to I.R.C. section 6673(a)(1). It is further

ORDERED that the Court's Order to Show Cause, dated April 28, 2014, is hereby made absolute, and respondent's Motion to Impose Penalty Under I.R.C. Section 6673 filed August 31, 2012, is granted in regards to petitioners' counsel Donald W. MacPherson. It is further

ORDERED that petitioners' counsel, Donald W. MacPherson, shall pay to the United States a penalty in the amount of \$19,837.50, pursuant to I.R.C. section 6673(a)(2). It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable years 1993 and 1994, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated November 1, 2010.

(Signed) James S. Halpern
Judge

Entered: March 3, 2016

APPENDIX C

T.C. Memo. 2016-43

UNITED STATES TAX COURT

HOWARD E. MAY AND ESTATE OF JUDITH A. MAY,
DECEASED, MARCIA M. MAY, PERSONAL
REPRESENTATIVE, Petitioners *v.*
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 14545-12L. Filed March 8, 2016.

Donald W. MacPherson and Bradley S. MacPherson,
for petitioners.
Brandon A Keim, for respondent.

SUPPLEMENTAL MEMORANDUM OPINION

LAUBER, Judge: In our prior report in this case, we held that respondent may proceed with collection of petitioners' unpaid 2004 Federal income tax [*2] liability; decided that petitioners shall pay a penalty of \$500 to the United States under section 6673(a)(1); and contemplated sanctioning petitioners' counsel, Donald W. MacPherson (Mr. MacPherson), for advancing frivolous arguments and unnecessarily prolonging these proceedings.¹ By order dated Septem-

¹ All statutory references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all monetary amounts to the nearest dollar. All references to "Mr. MacPherson" are to Donald W. MacPherson, and not to Bradley

ber 26, 2014, we ordered Mr. MacPherson to show cause why we should not require him to pay respondent's excess costs pursuant to section 6673(a)(2) or sanction him pursuant to Rule 33(b). We also asked respondent to express his view as to whether the Court should sanction Mr. MacPherson and to provide a computation of any excess costs that the Internal Revenue Service (IRS) had incurred. Having considered their responses, we will order Mr. MacPherson to pay respondent's excess costs of \$7,188.

Background

Neither Howard May nor Judith May, then husband and wife, filed a timely Federal income tax return for 2004. The IRS prepared a substitute for return (SFR) for petitioner-husband using third-party information and issued a notice of deficiency to him in 2010. The IRS did not prepare an SFR for petitioner-wife and [*3] did not issue a notice of deficiency to her.² Petitioner-husband did not seek redetermination of the deficiency in this Court and the IRS assessed the deficiency.

In early 2011 petitioners jointly submitted a Form 1040, U.S. Individual Income Tax Return, for 2004. The IRS thereupon combined its computer-based tax modules for petitioner-husband and petitioner-wife. As a result of that combination,

S. MacPherson, who subsequently entered an appearance in this case.

² Judith May died in 2013 and was replaced as a party by her estate's personal representative. For convenience, we will continue to refer to Howard May's deceased wife as "petitioner-wife."

petitioners' consolidated Form 4340, Certificate of Assessments, Payments, and Other Specified Matters, for 2004 indicated (incorrectly) that the IRS had issued notices of deficiency both to petitioner-husband and to petitioner-wife. That was because the "notice of deficiency" transaction code, which was originally posted correctly to petitioner-husband's tax module, migrated to petitioners' consolidated tax module after the IRS received their untimely 2004 joint return. This computer entry was later corrected.

After receiving the late-filed 2004 return, the IRS abated the tax previously assessed against petitioner-husband in an amount necessary to conform the assessment to the amount petitioners had self-reported. Accordingly, petitioners' Form 4340 for 2004, as of year end 2012, reflected the following: \$16,465 of tax as-[*4]sessed on August 30, 2010; \$4,407 of tax abated on May 2, 2011; and \$12,058 of net assessed tax. The net assessed tax reflects the tax that petitioners self-reported on their late-filed return, which they had not paid in full.

The IRS initiated proceedings to collect petitioners' unpaid 2004 tax liability. On October 10, 2011, the IRS sent petitioners a Final Notice of Intent to Levy and Notice of Your Right to a Hearing, and petitioners timely requested a collection due process (CDP) hearing. In their request petitioners stated that they intended to seek relief through collection alternatives, hardship waivers, penalty abatement, and a challenge to their underlying tax liability for 2004. Petitioners also demanded that the IRS "produce 23c, RACS 006 and any other assessment documents"; a signed assessment document "with legible signatures and [the] typed name of [the]

officer who signed”; and the delegation order authorizing the assessment officer to sign the assessment.

The CDP hearing was assigned to Settlement Officer Silva (SO Silva). SO Silva sent a letter to petitioners and Mr. MacPherson scheduling a telephone CDP hearing for March 6, 2012. The letter explained that, if petitioners wished the IRS to consider collection alternatives, they should provide before the conference a completed Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, along with supporting financial information.

[*5] On February 7, 2012, Mr. MacPherson wrote SO Silva to request an extension of time to provide the requested documents. SO Silva granted that request, but Mr. MacPherson submitted no documents by the extended deadline. On March 6, 2012, the day of the scheduled hearing, SO Silva received a fax from Mr. MacPherson requesting that the hearing be continued. SO Silva granted that request and rescheduled the hearing for March 14, 2012. SO Silva called Mr. MacPherson at the rescheduled hearing time, but he was not available.

Later that day, SO Silva sent petitioners a letter, with a copy to Mr. MacPherson, noting that Mr. MacPherson had been unavailable for the hearing and that she had not received any documents relevant to consideration of collection alternatives. Mr. MacPherson called SO Silva the next day to say that he had been ill and was confused about the rescheduled hearing. SO Silva granted him an extension of time until March 28, 2012, to submit the required financial information. Mr. MacPherson submitted no relevant documents by that date. Instead he submitted, on March 29, 2012, another letter demanding that

the IRS produce delegation orders, certificates of assessment with original signatures, and so on.

At this point SO Silva reviewed the computer transcripts of petitioners' 2004 account and concluded that the requirements of applicable law and administrative procedure had been met. She confirmed that the net assessed tax for 2004, which corresponded to the tax liability petitioners had self-reported on their late-filed 2004 return, had been properly assessed. She determined that petitioners were not entitled to consideration of a collection alternative because they had failed to provide the required financial information despite several extensions of time in which to do so. She accordingly closed the case and, on May 8, 2012, the IRS sent petitioners a notice of determination sustaining the collection action.

Shortly before the scheduled CDP hearing, Mr. MacPherson had filed with the IRS a Freedom of Information Act (FOIA) request seeking copies of "the forms 23C, 4340, RACS006 and any other assessment documents" for petitioners' 2001-2010 tax years. On April 2, 2012, the IRS disclosure office supplied him with the requested documents, stating that "[t]his is a full grant of your request." The cover letter noted that "the Form 23C and Revenue Accounting Control System (RACS) 006 reports are a summary record of assessment that does not identify specific taxpayers by name."

On June 7, 2012, petitioners timely petitioned this Court for review. The only ground of error alleged in the petition, prepared and signed by Mr. MacPherson, concerned the supposed impropriety of the assessment for 2004. The petition acknowledged that petitioners "agreed to" that assessment by self-

reporting a lia-[*7]bility in that amount on their late-filed 2004 return. The petition nevertheless contended that the assessment “was not legally made” because the IRS had not supplied “a proper assessment document” bearing “the signature of the assessment officer” together with a copy of the delegation order authorizing the officer to make the assessment. The petition alleged that petitioners had “requested of respondent a summary record of assessment Form 23C, RACS 006, and a Form 4340” but that “respondent failed to supply petitioners with a Form 23C, RACS006 [or] Form 4340.” Mr. MacPherson advanced this contention even though the IRS had provided those documents to him on April 2, 2012, in response to his FOIA request.

On August 1, 2012, after filing his answer, counsel for respondent notified Mr. MacPherson that the assessment-focused arguments he advanced in the petition had been identified, in Notice 2010-33, 2010-17 I.R.B. 609, as frivolous tax positions. This letter advised Mr. MacPherson that, if he persisted in pressing such arguments, respondent would ask the Court to impose a penalty for taking a “frivolous or groundless” position in a Tax Court proceeding or instituting such proceeding “primarily for delay.” See sec. 6673(a)(1)(A) and (B).

In early 2013 counsel for respondent discovered that petitioner-wife should have been afforded an opportunity to dispute her 2004 tax liability at the CDP [*8] hearing because she (unlike petitioner-husband) had not received a notice of deficiency. Respondent accordingly moved to remand the case to the IRS Appeals Office for a supplemental CDP hearing to give petitioner-wife “an opportunity to provide evidence disputing [her] underlying liability”

for 2004. Petitioners did not oppose that request, and we granted it.

Mr. MacPherson represented petitioner-wife at the supplemental hearing. During that hearing he advanced no arguments and submitted no evidence concerning her actual tax liability for 2004, which was the stated purpose for the remand. Rather, he advanced the same series of assessment-focused contentions that he had previously been warned were frivolous. SO Silva again reviewed petitioners' account transcripts and confirmed that petitioner-wife's tax liability for 2004 had been properly assessed in the amount that she had self-reported on her delinquent return. SO Silva further determined that petitioners had not submitted, either at the original or the supplemental CDP hearing, any documentation that would entitle them to consideration of a collection alternative. On May 29, 2013, the IRS issued a supplemental notice of determination sustaining the proposed collection action.

On July 26, 2013, Mr. MacPherson filed on petitioners' behalf an amendment to petition. It alleged that SO Silva's actions in connection with the supplemental hearing "emphasize[d] the need for production by respondent to petitioners of a Form 23C or RACS 006." Mr. MacPherson advanced this contention even though he was already in possession of those assessment documents.

On September 18, 2013, respondent moved for summary judgment and for imposition of a penalty under section 6673(a). Mr. MacPherson filed a response (including 17 exhibits) that totaled 159 pages. From this welter of paper we discerned two theories. First, he contended that SO Silva had

abused her discretion by relying on computerized account transcripts, rather than physical source documents, to verify that the IRS had properly assessed petitioners' self-reported tax liabilities. Second, he contended that these liabilities were not owed, or were per se uncollectible, because SO Silva failed to furnish petitioners with copies of signed records of assessment accompanied by a delegation order attesting to the assessing official's capacity to assess.³

In *May v. Commissioner*, T.C. Memo. 2014-194, we rejected both arguments and granted summary judgment for respondent. First, we held that SO Silva could properly rely on the computerized account transcripts for petitioners' [*10] account, as opposed to original source documents, to verify that the 2004 assessments had been properly made, noting established case law to this effect. *See, e.g., Craig v. Commissioner*, 119 T.C. 252, 262 (2002) (holding that section 6330(c)(1) does not "mandate that the Appeals officer actually give a taxpayer a copy of the verification upon which the Appeals officer relied"); *Sherwood v. Commissioner*, T.C. Memo. 2005-268, 90 T.C.M. (CCH) 512, 515. Second, we held that SO Silva's refusal to supply petitioners with delegation orders and assessment source documents containing original signatures was entirely proper and provided no basis on which they could

³ The arguments Mr. MacPherson advanced ranged from accusing the IRS of defrauding the public to asserting that sec. 301.6203-1, *Proced. & Admin. Regs.*, should be invalidated because it mentions district and regional directors, positions that no longer exist. Many of his arguments, besides being frivolous, were not raised at the CDP hearing, and we therefore declined to address them.

challenge their tax liability for 2004, again noting established case law to this effect. *See Koff v. United States*, 3 F.3d 1297, 1298 (9th Cir. 1993); *Roberts v. Commissioner*, 118 T.C. 365, 370 n.7 (2002), *aff'd*, 329 F.3d 1224 (11th Cir. 2003); *Nestor v. Commissioner*, 118 T.C. 162, 166-167 (2002) (“There is no requirement under internal revenue laws or regulations that the Appeals officer give the taxpayer a copy of the delegation * * * [order] from the Secretary to the person * * * who signed the verification required under section 6330(c)(1)).”); *Battle v. Commissioner*, T.C. Memo. 2009-171, 98 T.C.M. (CCH) 45, 48.

We further held that petitioners’ assessment-focused arguments were frivolous and had been interposed solely to delay the collection of their 2004 tax liability-[*11]ty. *May v. Commissioner*, at *17-*19. Because respondent (to his credit) had acknowledged an error that supported remand of the case to the IRS Appeals Office, we found at least a scintilla of support for a portion of petitioners’ original position. We accordingly concluded that a relatively modest penalty was justified and required petitioners to pay to the United States a section 6673(a)(1) penalty of \$500.

Finally, we concluded that Mr. MacPherson could be deserving of sanction under section 6673(a)(2) or Rule 33(b) for advancing frivolous arguments and unnecessarily prolonging the proceedings. We ordered him to show cause why he should not be sanctioned. We concurrently ordered respondent to express his views on this point and to furnish the Court with computations of any excess costs the IRS had incurred on account of Mr. MacPherson’s conduct.

On October 24, 2014, Mr. MacPherson filed on behalf of petitioners a motion for reconsideration (including 52 exhibits) that totaled 259 pages. This document presented rambling variations on the assessment-focused arguments that the Court had rejected in its opinion. Mr. MacPherson concurrently filed a separate 42-page motion for reconsideration, supposedly on his own behalf. This asserted that the regulation governing “method of assessment,” section 301.6203-1, *Proced. & Admin. Regs.*, was invalid when promulgated in 1954 because the [*12] Department of the Treasury had allowed an insufficient number of days for public notice and comment. Petitioners had not advanced this argument previously at any stage of this litigation, and it was not addressed in the Court’s opinion. We denied both motions for reconsideration.

On November 10, 2014, respondent filed a response to our order concerning sanctions. In respondent’s view, “the tactics used in this case were designed to delay collection because, with the exception of the underlying liability challenge that was quickly abandoned on remand, the pleadings and other filings in this case, raised nothing but frivolous, groundless, and statutorily-precluded arguments, which could have no purpose but to delay collection.” Respondent sought attorney’s fees only for the period after May 29, 2013, the date on which the supplemental notice of determination was issued. During that period, respondent’s trial attorney logged 24.75 hours and a law clerk logged 34.75 hours, chiefly in preparing respondent’s motion for summary judgment with supporting memorandum and affidavit. Employing hourly rates of \$150 and

\$100, respectively, respondent requested that we award excess costs of \$7,188. Mr. MacPherson does not challenge the reasonableness of these rates but contends that the 59.5 hours expended were excessive.

[*13] On December 3, 2014, Mr. MacPherson filed a response to our order concerning sanctions that totaled (including exhibits) 299 pages. This document was largely cut and pasted from his 259-page motion for reconsideration. It reiterated the assessment-focused arguments he had made previously.

Discussion

Section 6673(a)(2)(A) provides that “[w]henver it appears to the Tax Court that any attorney * * * has multiplied the proceedings in any case unreasonably and vexatiously,” we may require that the attorney “pay personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

We may sua sponte impose such costs on the offending attorney. *See Waltner v. Commissioner*, T.C. Memo. 2014-133, at *23; *Edwards v. Commissioner*, T.C. Memo. 2002-169, *aff’d*, 119 F. App’x 293 (D.C. Cir. 2005); *Leach v. Commissioner*, T.C. Memo. 1993-215.

Shortly after this case was docketed in this Court, respondent’s counsel notified Mr. MacPherson that his assessment-focused arguments had been identified as “frivolous” in Notice 2010-33, *supra*. This Notice explicitly characterizes as “frivolous” the submission that

[v]erification under section 6330 that the requirements of any applicable law or administrative procedure have been met may only be based on one or more particular forms or documents (which must be [*14] in a certain format), such as a summary record of assessment, or that the particular forms or documents or the ones on which verification was actually determined must be provided to a taxpayer at a collection due process hearing. [*Id.*, 2010-17 I.R.B. at 611-612.]

These are precisely the arguments that Mr. MacPherson has advanced at every stage of this proceeding.

The case was later remanded to the IRS Appeals Office to enable petitioner-wife, if she wished, to challenge her underlying tax liability for 2004. Rather than advance a good-faith argument (if one existed) concerning that liability, Mr. MacPherson continued to press the same assessment-focused arguments that he had recently been told were frivolous. He then persisted in advancing those same arguments repeatedly in this Court. These arguments were frivolous, not only in a legal, but also in a factual sense. He argued again and again that “respondent failed to supply petitioners with a Form 23C, RACS006 [or] Form 4340” even though the IRS had provided those documents to him, months or years earlier, in response to his FOIA request.

Mr. MacPherson also represented the taxpayers in *Best v. Commissioner*, T.C. Memo. 2014-72. He advanced on behalf of those taxpayers, and we found frivolous, exactly the same assessment-focused arguments that we have found frivolous here. In a

Supplemental Memorandum Opinion in *Best*, we concluded that [*15] Mr. MacPherson, by advancing these arguments, had “multiplied the proceedings * * * unreasonably and vexatiously,” sec. 6673(a)(2), and required him to pay the excess costs incurred by respondent, *Best v. Commissioner*, T.C. Memo. 2016-32, at *20-*21. For the reasons stated at length in that opinion, we reach the same conclusion here. We find that Mr. MacPherson knowingly or recklessly advanced arguments that he knew were frivolous and lacking in any legal basis. Because his actions thus manifested subjective bad faith, they are deserving of sanction under section 6673(a)(2). See *Moore v. Keegan Mgmt. Co. (In re Keegan Mgmt. Co., Sec. Litig.)*, 78 F.3d 431, 436 (9th Cir. 1996); *Reliance Ins. Co. v. Sweeney Corp.* 792 F.2d 1137, 1138 (D.C. Cir. 1986); *Takaba v. Commissioner*, 119 T.C. 285, 296-297 (2002).

As in *Best*, we will limit our sanctions to the lodestar amount submitted by respondent, which covers attorney’s fees incurred during the period after the supplemental notice of determination was issued. Mr. MacPherson does not chal-[*16]lenge the reasonableness of the hourly rates respondent employed or the number of hours his personnel logged, contending only that the number of hours was excessive relative to the tasks performed. We do not find 59.5 hours to be an excessive amount of time for preparing a 37-page memorandum in support of summary judgment, a supporting affidavit, and miscellaneous court papers during this period. We will accordingly make absolute the order to show cause and award the United States \$7,188 as a

penalty imposed against Mr. MacPherson under section 6673(a)(2).

To reflect the foregoing,

*The order to show cause
will be made absolute..*

UNITED STATES TAX COURT
WASHINGTON, DC 20217

HOWARD E. MAY &	)	
ESTATE OF JUDITH A.	)	
MAY, DECEASED, MARCIA	)	
M. MAY, PERSONAL	)	
REPRESENTATIVE	)	
Petitioner(s),	)	
v.	)	Docket No. 14545-12L.
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

Pursuant to the Court's Memorandum Opinion (T.C. Memo. 2014-194) filed September 23, 2014, and its Supplemental Memorandum Opinion (T.C. Memo. 2016-43) filed March 8, 2016, it is

ORDERED that respondent's Motion for Summary Judgment and to Impose a Penalty Under I.R.C. Section 6673, filed September 19, 2013 is granted. It is further

ORDERED that petitioners shall pay to the United States a penalty in the amount of \$500 pursuant to I.R.C. §6673(a)(1). It is further

ORDERED that the Court's Order to Show Cause, dated September 26, 2014, is hereby made absolute. It is further

ORDERED that petitioners' counsel, Donald W. MacPherson, shall pay pursuant to I.R.C. §6673(a)(2) excess costs incurred by respondent in the amount of \$7,188. It is further

ORDERED AND DECIDED that respondent's Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 dated May 8, 2012, upon which this case is based, is sustained.

(Signed) Albert G. Lauber
Judge

Entered: MAR 11 2016

APPENDIX D

CONSTITUTIONAL PROVISIONS

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

5. U.S.C. §553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved-

- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of

written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except-

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy;
or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

26 U.S.C. § 6203

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

26 U.S.C. § 6330

(a) Requirement of notice before levy

(1) In general

No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice

The notice required under paragraph (1) shall be—

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address;

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice

The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth—

- (i) the provisions of this title relating to levy and sale of property;
- (ii) the procedures applicable to the levy and sale of property under this title;
- (iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;
- (iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and
- (v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing

(1) In general

If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period

A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A

taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing

In the case of any hearing conducted under this section—

(1) Requirement of investigation

The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing

(A) In general

The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability

The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination

The determination by an appeals officer under this subsection shall take into consideration—

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded

An issue may not be raised at the hearing if—

(A) (i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding;

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A); or

(C) a final determination has been made with respect to such issue in a proceeding brought under subchapter C of chapter 63.

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing

(1) Petition for review by Tax Court

The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Suspension of running of period for filing petition in title 11 cases

In the case of a person who is prohibited by reason of a case under title 11, United States Code, from filing a petition under paragraph (1) with respect to a determination under this section, the running of the period prescribed by such subsection for filing such a petition with respect to such determination shall be suspended for the period during which the person is so prohibited from filing such a petition, and for 30 days thereafter, and¹

(3) Jurisdiction retained at IRS Office of Appeals

The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

(e) Suspension of collections and statute of limitations

(1) In general

Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to

¹ *So in original.*

collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) Levy upon appeal

Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

(f) Exceptions

If—

- (1) the Secretary has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy,
- (2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund,
- (3) the Secretary has served a disqualified employment tax levy, or

(4) the Secretary has served a Federal contractor levy,
this section shall not apply, except that the taxpayer shall be given the opportunity for the hearing described in this section within a reasonable period of time after the levy.

(g) Frivolous requests for hearing, etc.

Notwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review.

(h) Definitions related to exceptions

For purposes of subsection (f)—

(1) Disqualified employment tax levy

A disqualified employment tax levy is any levy in connection with the collection of employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a hearing under this section with respect to unpaid employment taxes arising in the most recent 2-year period before the beginning of the taxable period with respect to which the levy is served. For purposes of the preceding sentence, the term “employment taxes” means any taxes under chapter 21, 22, 23, or 24.

(2) Federal contractor levy

A Federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a Federal contractor.

26 U.S.C. § 6502

(a) Length of period

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax, or

(2) if—

(A) there is an installment agreement between the taxpayer and the Secretary, prior to the date which is 90 days after the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer at the time the installment agreement was entered into; or

(B) there is a release of levy under section 6343 after such 10-year period, prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before such release.

If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

(b) Date when levy is considered made

The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

26 U.S.C. § 6673

(a) Tax court proceedings

(1) Procedures instituted primarily for delay, etc.

Whenever it appears to the Tax Court that—

(A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,

(B) the taxpayer's position in such proceeding is frivolous or groundless, or

(C) the taxpayer unreasonably failed to pursue available administrative remedies, the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of \$25,000.

(2) Counsel's liability for excessive costs

Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require—

(A) that such attorney or other person pay personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct, or

(B) if such attorney is appearing on behalf of the Commissioner of Internal Revenue, that the United States pay such excess costs, expenses, and attorneys' fees in the same manner as such an award by a district court.

(b) Proceedings in other courts

(1) Claims under section 7433

Whenever it appears to the court that the taxpayer's position in the proceedings before the court instituted or maintained by such taxpayer under section 7433 is frivolous or groundless, the court may require the taxpayer to pay to the United States a penalty not in excess of \$10,000.

(2) Collection of sanctions and costs

In any civil proceeding before any court (other than the Tax Court) which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, any monetary sanctions, penalties, or costs awarded by the court to the United States may be assessed by the Secretary and, upon notice and demand, may be collected in the same manner as a tax.

(3) Sanctions and costs awarded by a court of appeals

In connection with any appeal from a proceeding in the Tax Court or a civil proceeding described in paragraph (2), an order of a United States Court of Appeals or the Supreme Court awarding monetary sanctions, penalties or court costs to the United States may be registered in a district court upon filing a certified copy of such order and shall be enforceable as other district court judgments. Any such sanctions, penalties, or costs may be assessed by the Secretary and, upon notice and demand, may be collected in the same manner as a tax.

REGULATION

26 C.F.R. § 301.6203-1

Method of assessment.

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

APPENDIX E

19 Federal Register 8457

December 11, 1954

[26 CFR (1954) Part 301]

REGULATIONS RELATING TO ASSESSMENT, COLLECTION, ABATEMENT, CREDIT, AND REFUND OF INTERNAL REVENUE TAXES UNDER SUBTITLE F OF THE INTERNAL REVENUE CODE OF 1954

NOTICE OF PROPOSED RULE MAKING

Notice is hereby given, pursuant to the Administrative Procedure Act, approved June 11, 1946, that the regulations set forth in tentative form below are proposed to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. These proposed regulations relate to the administrative provisions under chapter 63, chapter 64 (except section 6316, the regulations under which will be issued at a later date) and chapter 65 of Subtitle F of the Internal Revenue Code of 1954. Prior to final adoption of such regulations, consideration will be given to any data, views, or arguments pertaining thereto which are submitted in writing, in duplicate, to the Commissioner of Internal Revenue, Washington 25, D.C., within the period of 15 days from the date of publication of this notice in the FEDERAL REGISTER. The proposed regulations are

to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (6SA Stat. 917; 26 U.S.C. 7305)

Although 30 days are ordinarily provided for furnishing views, data, and arguments pertaining to proposed rule making, a period of 15 days is provided with respect to these proposed regulations in order to make possible more expeditious promulgation of the regulations under these chapters which generally become effective on January 1, 1955.

[SEAL]

T. COLEMAN ANDREWS,
Commissioner of Internal Revenue.

PART 301 - PROCEDURE AND ADMINISTRATION

ASSESSMENT, COLLECTION, ABATEMENT, CREDIT, AND REFUND

In order to provide regulations under chapter 63, relating to assessment, chapter 64 (except section 6316, the regulations under which will be prescribed at a later date) relating to collection, and chapter 65, relating to abatement, credit, and refund, of the Internal Revenue Code of 1954; the following regulations are prescribed:

ASSESSMENTS

IN GENERAL

* * *

Sec.

301.6203 Statutory provisions; method of
assessment.

301.6203-1 Method of assessment.

* * *

§ 301.6203 *Statutory provisions; method of
assessment.*

SEC. 6203 METHOD OF ASSESSMENT.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment.

§ 301.6203-1 *Method of Assessment.*

The district director shall appoint one or more assessment officers, and the assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period if applicable, and the amount of the assessment. The amount of the assessment shall in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a

copy of the record of assessment the district director shall furnish the taxpayer a copy of the pertinent parts of the assessment which set set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

* * *

20 Federal Register 28

January 4, 1955

TITLE 26 - INTERNAL REVENUE, 1954

Chapter 1 - Internal Revenue Service, Department of the Treasury

Subchapter F - Procedure and Administration [T.D. 6119]

PART 301 - PROCEDURE AND ADMINISTRATION

REGULATIONS RELATING TO ASSESSMENT, COLLECTION, ABATEMENTS, CREDITS, AND REFUNDS

On December 11, 1954, there was published in the FEDERAL REGISTER (19 F R. 8457) a notice of proposed rule making regarding regulations under chapter 63 relating to assessment, chart 64 (except section 6316) relating to collection, and chapter 65, relating to abatements, credits, and refunds, of the Internal Revenue Code of 1954. On December 15, 1954, a correction notice making four changes in the

proposed regulations was published in the FEDERAL REGISTER (19 F R. 8580) After consideration of all relevant matter presented by interested parties regarding the rules proposed, the following regulations are hereby adopted.

* * *

**Pub. L. 79-404, ch. 324, § 4,
60 Stat. 238**

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to a public property, loans, grants, benefits, or contracts—

(a) NOTICE. —General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedures, or practice, or in any situation in which the agency for good

cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES —After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for any agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.