# APPENDIX

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**APPENDIX A**

25-501-cv
*Safdieh v. Comm'r*

# In the
# United States Court of Appeals
# for the Second Circuit

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AUGUST TERM 2025

No. 25-501-cv

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JOSEPH SAFDIEH,

*Petitioner-Appellee,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent-Appellant.*

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Appeal from the United States Tax Court.

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ARGUED: DECEMBER 17, 2025
DECIDED: FEBRUARY 27, 2026

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Before: JACOBS, CABRANES, and LOHIER,
*Circuit Judges.*

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Respondent-Appellant, the Commissioner of Internal Revenue, appeals from a December 5, 2024, order of the United States Tax Court (Mark V. Holmes, *Judge*) granting summary judgment to Petitioner-Appellee Joseph Safdieh.

The Commissioner assessed Safdieh $50,000 in penalties for allegedly failing to report control of a foreign business in tax years 2005–09. *See* I.R.C. § 6038(b). But the Tax Court granted Safdieh summary judgment, reasoning that Congress did not empower the Commissioner to collect the penalties through assessment, an administrative process. If the Commissioner wanted to collect the penalties, the Tax Court ruled, he had to go to federal district court.

Seeing things differently, we hold that the Commissioner may assess penalties under § 6038(b). Accordingly, we **VACATE** the Tax Court's order granting Safdieh summary judgment and **REMAND** for further proceedings consistent with this opinion.

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AUDREY PATTEN, Legal Services Center of Harvard Law School, Jamaica Plain, MA, *for Amicus Curiae Center for Taxpayer Rights*.

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JOSÉ A. CABRANES, *Circuit Judge*:

The question presented is whether Respondent-Appellant, the Commissioner of Internal Revenue, can collect penalties under Internal Revenue Code ("I.R.C.") § 6038(b)[1] through administrative assessment, or instead must obtain a judgment in federal district court.

The Commissioner appeals from a December 5, 2024, order of the United States Tax Court (Mark V. Holmes, *Judge*) granting Petitioner-Appellee Joseph Safdieh summary judgment.[2]

Safdieh allegedly failed to report control of a foreign business in violation of I.R.C. § 6038. That provision carries a $10,000 penalty for each year during which such a reporting failure exists.[3] For Safdieh, who allegedly failed to report in tax years 2005–09, the penalties add up to $50,000.

When Safdieh did not pay the penalties, the Commissioner filed notice of a federal tax lien. Safdieh challenged the lien before the Independent Office of Appeals in a Collection Due Process hearing.[4] When

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[1] I.R.C. § 6038 requires "[e]very United States person [to] furnish, with respect to any foreign business entity which such person controls, such information as the Secretary may prescribe . . . ." I.R.C. § 6038(a). Though the statute speaks of the Secretary of the Treasury, the Secretary has delegated his authority to administer and enforce the I.R.C. to the Commissioner. *See generally* Treas. Reg. §§ 301.7701-9, 301.6201-1(a), 301.7601-1.

[2] *Safdieh v. Comm'r*, No. 11680-20L (T.C. Dec. 5, 2024).

[3] I.R.C. § 6038(b)(1).

[4] *See generally Farhy v. Comm'r*, 100 F.4th 223, 227 (D.C. Cir. 2024). A Collection Due Process hearing gives the taxpayer

he lost that appeal, he petitioned the Tax Court for relief.

The Tax Court sided with Safdieh, granting him summary judgment. Its rationale was purely legal. It held that Congress had not statutorily authorized the Commissioner to collect the § 6038(b) penalty through assessment, the administrative process that records a taxpayer's liability and triggers the Internal Revenue Service's collection powers.[5] If the Commissioner wished to penalize Safdieh's reporting failures, the Court held, he had to go to federal district court.

In this Court, whether the Commissioner may assess the penalty for failure to report control of a foreign business under § 6038(b) is a new question. Like the D.C. Circuit,[6] the only other court of appeals to have decided the issue, we hold that he can.

## DISCUSSION

The IRS normally does not have to go to federal district court to take taxpayers' money, though some might wish it did. Only in rare instances is a lawsuit necessary.[7] The agency can instead usually collect taxpayers' liabilities through "assessment." The power of assessment is vital, handing the Commissioner the tools needed to collect "*all* taxes."[8] As such, assessment is commonplace in tax collection.

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a chance for a highly "informal oral or written conversation with the IRS before he must pay." *Id.* (citation omitted).

[5] *See Safdieh*, No. 11680-20L at 1–2.

[6] *Farhy*, 100 F.4th at 223.

[7] *Id.* at 226.

[8] I.R.C. § 6201(a) (emphasis added).

Take the familiar example of a taxpayer adding up how much she owes Uncle Sam and mailing off her return with the payment due. This process is "self-assessment,"[9] which one Commissioner called a "marvel of the world."[10] The Commissioner will normally accept the taxpayer's self-assessment. But if the taxpayer does not file a tax return or misstates what she owes, the Commissioner will calculate the tax liability on her behalf and record it in the government's books.[11]

Assessment does much more than keep the IRS's books in good order. It plays the singular role of triggering an all-important process: collection. "[I]t is the assessment, and only the assessment, that sets in motion the collection powers of the IRS."[12] Those powers allow the IRS to seize assets, freeze bank accounts, and create liens—all without setting foot in a courtroom.[13]

We have noted that these tools, "which quite obviously place the Government in a better position to collect on alleged tax debts than individuals seeking to collect on private debts, are said to be necessary because . . . 'taxes are the life-blood of government,

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[9] *United States v. Galletti*, 541 U.S. 114, 122 (2004).

[10] Bob Kuttner, *The Taxing Trials of I.R.S.*, N.Y. Times, Jan. 6, 1974, https://www.nytimes.com/1974/01/06/archives/the-taxing-trials-of-irs-white-house-heat-and-artful-dodging.html.

[11] *Galletti*, 541 U.S. at 122.

[12] *Phila. & Reading Corp. v. United States*, 944 F.2d 1063, 1064 n.1 (3d Cir. 1991).

[13] *Id.* That said, the IRS may have to go to court if the taxpayer challenges the assessment. *See generally Farhy*, 100 F.4th at 226–28.

and their prompt and certain availability an imperious need.'"[14]

Critical to this case, the Commissioner's assessment power extends beyond "all taxes" to include "assessable penalties."[15] There is no question that the dollar amount at issue here is a "penalty": the statute says so outright.[16] The only doubt is whether this penalty is "assessable." Though the great Professor Boris Bittker and his coauthors observed that "[v]irtually all civil penalties are assessed,"[17] Safdieh contends that § 6038(b) is an exception.

Section 6038(b)'s text is silent as to whether the penalty is assessable.[18] In this sense, it is unlike the provisions in the I.R.C. that expressly allow, or bar, assessment.[19] Section 6201(a), which covers the

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[14] *United States v. Forma*, 42 F.3d 759, 766 (2d Cir. 1994) (quoting *Bull v. United States*, 295 U.S. 247, 259 (1935)).

[15] I.R.C. § 6201(a).

[16] *Id.* § 6038(b) ("such person shall pay a penalty of $10,000").

[17] Boris I. Bittker, Martin J. McMahon & Lawrence Zelenak, *Federal Income Taxation of Individuals* ¶ 50.03 (3d ed. 2002).

[18] The core of the penalty provision reads:

> If any person fails to furnish, within the time prescribed under paragraph (2) of subsection (a), any information with respect to any foreign business entity required under paragraph (1) of subsection (a), such person shall pay a penalty of $10,000 for each annual accounting period with respect to which such failure exists.

I.R.C. § 6038(b)(1). Despite the parties' attempts at exegesis, the text simply does not say whether the penalty is, or is not, assessable.

[19] *Contrast*, *e.g.*, I.R.C. § 527(j)(1) ("shall be assessed"), *with id.* § 7269 ("to be recovered . . . in a civil action").

Commissioner's assessment authority, is likewise silent. That ambiguity has not stopped the parties from claiming the texts of these provisions for themselves. But because their arguments struggle to make sense out of silence, we do not parse them here.

We instead focus on § 6038(b)'s history, purpose, and structure[20]—including the text of a key coordination clause—which lead us to hold that the penalty is assessable.[21] There are three reasons why.

I.

First, the history of § 6038(b) strongly suggests that the penalty is assessable.

Start by understanding the reason for § 6038(b)'s existence. At the time of its enactment in 1982, there already existed a penalty for a taxpayer's failure to report control of a foreign business: a 10-percent reduction of the violator's foreign tax credit.[22] This provision was assessable, meaning that the Commissioner did not have to go to court to collect it.[23]

Even so, the provision was too hard to use. As a Senate report put it, "penalties generally are not

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[20] *Accord, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 627 & n.16 (1993).

[21] Our review is *de novo*. *Maier v. Comm'r*, 360 F.3d 361, 363 (2d Cir. 2004).

[22] *Farhy*, 100 F.4th at 228 (citing Act of Sept. 14, 1960, Pub. L. No. 86-780, § 6(a), 74 Stat. 1010, 1014–16; Revenue Act of 1962, Pub. L. No. 87-834, § 20(a), 76 Stat. 960, 1059–60)). This provision is now codified at I.R.C. § 6038(c).

[23] *Farhy*, 100 F.4th at 231; *see also* Appellee's Letter (Jan. 7, 2026) at 2 (conceding that the § 6038(c) penalty is assessable). That the existing penalty was assessable may explain why Congress did not specify that the new, supplemental penalty was also to be assessable.

imposed."[24] This was partly "because the penalty is complicated."[25] It was "unduly harsh" to taxpayers who "could incur a substantial penalty for a minor failure."[26] And it was toothless in the cases of taxpayers who paid no foreign taxes, and so had no foreign tax credit to reduce.[27]

Under-enforcement resulted, and the Senate heard "complaints about inadequate reporting with respect to controlled foreign corporations."[28] In other words, even though the Commissioner did not have to go to district court and could assess the penalty, the process was cumbersome. To supplement this assessable tax-credit penalty, Congress enacted § 6038(b)'s dollar penalty.

As the Senate report makes clear in noting the problem of under-enforcement, Congress wanted to make it easier, not harder, for the IRS to penalize reporting failures. If an assessable penalty was too "complicated" to impose (as the Senate report said), a non-assessable one would be even more so.

Yet Safdieh argues that Congress made the new dollar penalty non-assessable anyway. In his view, Congress required the tax collector to make a detour to the nearest federal district court to wage a legal battle for the money. That seems implausible. It is unlikely that Congress would have wished to put even

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[24] S. Rep. No. 97-494(I), at 299 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 781, 1042.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

more logs in the way of the tax harvester when its stated aim was to clear the road.[29]

Indeed, the IRS got the message from the start and has assessed the penalty ever since its enactment in 1982.[30] Given Congress's aim in enacting the provision, the IRS's early (and consistent) view of the statute is unsurprising. As evidence of the statute's original meaning, it deserves substantial weight.[31]

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[29] This conclusion finds further support in a Committee Print accompanying the Tax Compliance Act of 1982, a bill which contained the same language that would work its way into § 6038(b). *Compare* Tax Compliance Act of 1982, H.R. 6300, 97th Cong. § 411(b) (1982), *with* Tax Equity and Fiscal Responsibility Act of 1982, H.R. 4961, 97th Cong. § 338(b) (1982). The Committee Print indicates that the fixed dollar penalty was meant to "simplify the penalty for failure to furnish information" by "giv[ing] Internal Revenue Service agents a simple straight-forward penalty to impose where reports . . . are not filed or are inadequate." Staff of Joint Comm. on Taxation, Comparative Description of H.R. 6300 and H.R. 5829 at 30 (Comm. Print 1982). Safdieh asks us to conclude that the § 6038(b) penalty can be collected only through a civil suit filed by the Department of Justice. This is hardly a "simple straight-forward penalty" that "Internal Revenue Service agents" can "impose."

[30] *Farhy*, 100 F.4th at 229–30, 236.

[31] To be clear, we cannot and do not "defer" to the IRS's interpretation of the provision. *Contra Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Rather, in our *de novo* quest to say what the law is, we look to the IRS's contemporaneous understanding of the statute as evidence of its original meaning. To ask what the law meant to its intended audience at the time of enactment is a well-worn interpretive tool in the face of textual ambiguity, one that predates *Chevron*. *See*, *e.g.*, *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959) (collecting cases); *Shen v. Esperdy*, 428 F.2d 293, 301–02 (2d Cir. 1970). It is not unique to administrative law, either. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S.

What is more, in the forty-three years since enacting the provision, Congress has never, to our knowledge, questioned the IRS's practice. In fact, it has acquiesced. "The failure of Congress to alter or amend [a statute], notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight."[32] Congress has amended § 6038 seven times since first enacting the dollar penalty in 1982, most recently in 2017.[33] Yet, on each amendment, it has done nothing to curb the use of assessment.

And contrary to Safdieh's claim, Congress's acquiescence was not born of ignorance. The legislature knew of the Commissioner's view that he could assess penalties under § 6038(b).[34] Congress's decision not to challenge the Commissioner's

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416, 432 (2024) (constitutional law); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943) (treaty law); *Clark v. Carolina & Yadkin River Ry. Co.*, 122 N.E. 453, 454 (N.Y. 1919) (contract law). Nothing in *Loper Bright* forecloses courts from considering this kind of evidence.

[32] *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932); *accord*, *e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

[33] I.R.C. § 6038; *see also Farhy*, 100 F.4th at 236.

[34] *See, e.g.*, *Treasury and General Government Appropriations for Fiscal Year 1998: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 105th Cong. 254 (1998) (discussing a proposal to "allow taxpayers an *administrative* appeal prior to the payment of the penalty") (emphasis added). An administrative appeal before payment would make sense if the administrative agency, and not an Article III court, were to impose the penalty.

assessment power over the course of four decades and seven amendments thus seems to be a choice.

Other historical context backs up our conclusion that the penalty is assessable. At the time of the penalty's enactment, the backlog of pending civil cases in federal district court had surged to a record high.[35] The same year that § 6038(b) became law, Congress enacted the Federal Courts Improvement Act with the overriding aim of clearing that pileup.[36] It seems improbable that amid this crisis Congress required the Commissioner to mount a potentially protracted federal case to stand any chance of collecting a modest penalty.

That conclusion is reinforced by the fact that the penalty was magnitudes lower then than now, both in real and nominal terms. The original penalty was $1,000 (that's $3,400 in today's money).[37] For perspective, at that time a diversity case could get into federal court only if it was worth at least ten times the penalty's amount—a floor that, in just six years, Congress would raise to fifty times the amount.[38]

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[35] Administrative Office of the United States Courts, *Report of the Proceedings of the Judicial Conference of the United States: March 11–12, 1982*, at 4 (1982), https://share.google/SWT3p20gI-LYLEDsfT [https://perma.cc/XN5Q-BT3V].

[36] R. Anthony Howard, Jr., Note, *The Federal Courts Improvement Act of 1982: No Relief for the Disappointed Bidder*, 11 J. Legis. 403, 418 (1984).

[37] *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 338, 96 Stat. 324, 631 (1982); *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm.

[38] Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (raising the

Saddling the Commissioner with a federal case over such a small sum would hamper the federal courts and the Commissioner at a time when the evidence suggests that Congress wished to relieve both.[39]

Safdieh responds that going to federal court for the penalty, which now stands at $10,000 a year, could nonetheless be worth the Commissioner's trouble, since "[r]eporting failures across several years can result in penalties of more than $100,000."[40] But Safdieh points to no evidence showing that Congress meant to make it worthwhile to pursue only serial offenders. Such an approach would allow tax-reporting failures—so long as there were not too many of them. We have no reason to believe that was Congress's intent.[41]

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amount-in-controversy requirement for diversity jurisdiction from $10,000 to $50,000).

[39] At first glance, it seems that the Internal Revenue Code makes *lesser* penalties recoverable in a civil action only. *See* I.R.C. § 5761(a) ($1,000); 7269 ($500). First glances mislead. When Congress set those penalties in 1954, they were, in inflation-adjusted terms, 3.6 and 1.8 times higher respectively than the original $1,000 § 6038(b) penalty that Congress enacted in 1982. *See* Internal Revenue Code of 1954, 68A Stat. 3, 736, 865 (1954); *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm.

[40] Appellee's Br. at 63; *cf. Mukhi v. Comm'r*, 163 T.C. 150, 173 (2024).

[41] Similarly, we are not swayed by Safdieh's claim that the Department of Justice "generally collects" another $10,000 penalty by suing in district court. *See* Appellee's Br. at 64 (citing 31 U.S.C. § 5321(a)(5)(B)(i)). To start, this other penalty is in fact also assessable, as Safdieh concedes. *See id.* (citing 31 U.S.C. § 5321(b)). It is thus undisputed that Congress gave the Executive a choice between assessing that penalty or going to court. And while it is true that the Executive sometimes does go to

II.

Second, requiring the Commissioner to sue for § 6038(b) penalties would badly disrupt the section's overall enforcement scheme, defeating Congress's design.

To see why, understand that Congress expected § 6038(b) to work in concert with another provision, § 6038(c). That provision, briefly noted above, penalizes failure to report control of a foreign business with a 10-percent reduction of the taxpayer's foreign tax credit.[42] But that penalty does not work in isolation. A coordination clause reduces "[t]he amount of the reduction . . . by the amount of the penalty imposed by subsection (b)"—that is, by the yearly dollar penalty.[43]

The coordination clause suggests that Congress meant for the Commissioner to be able to impose the subsection (b) and (c) penalties at the same time. Under Safdieh's argument, however, that would be impossible. Before the Commissioner could coordinate the two penalties, he would have to await a federal district court's entry of judgment for the subsection (b) penalty. Only then could he know "the amount of the penalty imposed by subsection (b)" and reduce the subsection (c) penalty accordingly.

"To agree with that reading, we would have to conclude that, in enacting subsection (b), Congress not

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court, the cases in which it does so routinely have more than $10,000 at stake. *See Mukhi*, 163 T.C. at 174 n.12 (collecting cases). A federal case may not be worthwhile when lesser amounts are in controversy. *See Farhy*, 100 F.4th at 232.

[42] I.R.C. § 6038(c)(1).

[43] *Id.* § 6038(c)(3).

only failed in its avowed quest to streamline, but also counterproductively threw sand in the gears of section 6038's existing enforcement scheme."[44] We give Congress more credit than that.

Safdieh's view of the law would greatly complicate the penalty's collection. If the Commissioner were to seek penalties under subsections (b) and (c), there might be proceedings in federal district court for the former and in the Tax Court for the latter.[45] Both courts might have to address the same questions. Did the taxpayer really control the business during the relevant years? Did the business count as a "foreign business entity"? Were there any defenses, such as reasonable cause?[46] The duplication of effort would be wasteful.

Once one of the two relevant courts resolves the issues, questions of preclusion may arise. It has long been the law that "where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding."[47] Taking note of this, parties may try to game the proceedings by rushing to judgment in the "right"

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[44] *Farhy*, 100 F.4th at 232–33.

[45] *Id.* at 234. Safdieh argues that it is unlikely that the Commissioner would use subsections (b) and (c) at once. But likelihood is beside the point since Congress intended the dual option to be available.

[46] *Id.*

[47] *Comm'r v. Sunnen*, 333 U.S. 591, 601 (1948) (citing *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944) (L. Hand, J.)); *see also Farhy*, 100 F.4th at 234 (citing *Burrows v. United States*, 945 F.2d 408 (9th Cir. 1991) (unpublished table decision)).

court and erecting barriers to judgment in the "wrong" one.

All this complicates the penalization of tax-reporting failures and promotes gamesmanship. Could that have been the known effect of a provision that aimed to simplify things—to make a penalty less "complicated" and the tools of enforcement easier to wield? We doubt it.

III.

Third, if the Commissioner cannot assess the § 6038(b) penalty, what litigation authority does he have to sue for it?

Safdieh cites 28 U.S.C. § 2461(a) as the Commissioner's "only" collection authority.[48] This provision provides that "[w]henever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action."

One problem with this argument is that § 2461(a) is not in the I.R.C. Congress instead directed that it be codified in Title 28, which concerns the judiciary.[49] That placement is telling.[50]

Even more revealingly, in the thirty-four years between this provision's enactment in 1948 and the dollar penalty's enactment in 1982, the provision was

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[48] Appellee's Br. at 38.

[49] An Act to revise, codify, and enact into law title 28 of the United States Code entitled "Judicial Code and Judiciary," Pub. L. No. 80-773, § 2461(a), 62 Stat. 869, 974 (1948).

[50] *See*, *e.g.*, *Yates v. United States*, 574 U.S. 528, 541–42 (2015) (plurality opinion).

never used to collect a tax or tax penalty.[51] It is doubtful that Congress silently meant to require the Commissioner to look for the first time to this provision outside the I.R.C. to be able to do his job.

In sum, § 6038(b)'s history, purpose, and structure all point in the same direction: the penalty is assessable.

## CONCLUSION

For the reasons set out above, we hold that the Commissioner can assess penalties incurred under § 6038(b). Accordingly, we **VACATE** the judgment of the Tax Court and **REMAND** for further proceedings consistent with this opinion.

[51] Neither the Court nor the parties have been able to find any such example. Appellant's Letter (Jan. 7, 2026) at 1; Appellee's Letter (Jan. 7, 2026) at 2.

**APPENDIX B**

# United States Tax Court

Washington, DC 20217

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| JOSEPH SAFDIEH,<br><br>Petitioner<br><br>v.<br><br>COMMISSIONER OF INTERNAL REVENUE,<br><br>Respondent | Docket No. 11680-20L. |

**ORDER AND DECISION**

This case was originally on the Court's May 24, 2021 trial calendar for New York City. It arises from a notice of determination sustaining the filing of a notice of federal tax lien to collect penalties assessed under IRC § 6038[1] for tax years 2005–2009. Respondent moved for summary judgment, but the question of the assessability of section 6038 penalties was bubbling up in other cases as well. In *Farhy v. Commissioner,* 160 T.C. 399, 403–13 (2023), we finally held that those penalties are not assessable, but likely

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

**Entered and Served 12/05/24**

recoverable only in a civil action. *Id.* The government then appealed *Farhy* to the D.C. Circuit. *See Farhy v. Commissioner*, 100 F.4th 223 (D.C. Cir. 2024).

While that appeal was pending, we declined to overrule *Farhy* in a case appealable to the Eighth Circuit. *Muhki v. Commissioner*, No. 4239-22L, 162 T.C., slip op. at 18 (Apr. 8, 2024). Our citation to *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971) meant that we would not wait on the appeal in *Farhy* for cases appealable other than to the D.C. Circuit.

But then the D.C. Circuit reversed our decision in *Farhy*. *See Farhy v. Commissioner*, 100 F.4th 223 (D.C. Cir. 2024). Our Court's tradition when we've been reversed is to reexamine our reasoning when the issue is next raised in a case appealable to a different circuit. As it turned out, *Mukhi* was not yet final and unappealable when the D.C. Circuit issued *Farhy*. The Commissioner moved to reconsider our decision in *Mukhi* itself. Last week we issued *Mukhi II*, No. 4329-22L, 163 T.C. (Nov. 18, 2024), in which we held that we still think we're right in our interpretation of section 6038, and expressly held that we would continue our disagreement with the D.C. Circuit in cases appealable to other circuits.

Mr. Safdieh was a New York resident when he filed his petition, so appellate venue presumptively lies in the Second Circuit. He is representing himself, and we infer from the fact that his filings are mostly handwritten that he is not the most sophisticated of litigants in Tax Court. In his response to the IRS's summary-judgment motion in his case, he did not include his own motion for summary judgment, and he

did not raise the argument that ultimately prevailed in *Farhy* and *Mukhi*.

We have nevertheless held that we can grant summary judgment *against* the Commissioner even when he is the only party moving for summary judgment. *See Rogers v. Commissioner*, 157 T.C. 20, 49 (2021) (Court, in rejecting respondent's lone summary judgment motion, held that respondent abused his discretion). We have also held that it is the obligation of the appeals officer conducting a CDP hearing to verify "that the requirements of any applicable law or administrative procedure have been met." I.R.C. §§ 6320(c), 6330(c)(1). *See Freije v. Commissioner*, 125 T.C. 14, 32–37 (2005) (finding an appeals officer's verification was insufficient due to an error of law). In this case, verification is a legal impossibility now that we've twice held that the Code does not permit the assessment of section 6038 penalties. And because the Commissioner lacks the power to assess these penalties in the first place, Mr. Safdieh's notice of determination cannot survive.

Our Rule 121(g) required that we give respondent notice and an opportunity to point out any difference between this case, and *Farhy* and *Mukhi*. The Commissioner admitted in his response that "the basic facts that underlie the assessment issue in these cases do not differ."

That means that we can now enter decision in Mr. Safdieh's favor —and we will note that we regard any arguments in *Farhy* and *Mukhi* as having been made in this one as well.

Therefore, it is

ORDERED that respondent's February 8, 2021 motion for summary judgment is denied. It is also

ORDERED that summary judgment in favor of petitioner is granted. It is also

ORDERED and DECIDED that respondent may not proceed with the collection of petitioner's liability for penalties under section 6038 for the tax years 2005 through 2009 as described in the Notice of Determination Concerning Collection Action(s)under Section 6320 and/or 6330, dated September 1, 2020.

The undersigned respectfully suggests, if this decision is appealed to the Second Circuit, that Court consider appointing *pro bono* counsel to represent Mr. Safdieh.

**(Signed) Mark V. Holmes**
**Judge**

**APPENDIX C**

# United States Tax Court

Washington, DC 20217

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| JOSEPH SAFDIEH,<br><br>Petitioner<br><br>v.<br><br>COMMISSIONER OF INTERNAL REVENUE,<br><br>Respondent | Docket No. 11680-20L |

**ORDER**

This case was originally on the Court's May 24, 2021 trial calendar for New York City. It arises from a notice of determination sustaining the filing of a federal tax lien to collect penalties assessed under IRC § 6038 for tax years 2005– 2009. Respondent moved for summary judgment, but the question of the assessability of section 6038 penalties was bubbling up in other cases as well. In Farhy v. Commissioner, no. 10647-21L, 160 T.C. No. 6, slip op. at 7 (Apr. 3, 2023) we finally held that those penalties are not assessable, but likely recoverable only in a civil action. Id., 160 T.C., slip op. at 7–8. Our decision in Farhy is still pending on appeal to the D.C. Circuit. See Farhy v.

**Served 04/16/24**

Commissioner, No. 23-1179 (D.C. Cir. filed July 24, 2023).

Last week we declined to overrule Farhy in a case appealable to the Eighth Circuit, even though the D.C. Circuit has not yet spoken on the issue. Muhki v. Commissioner, no. 4239-22L, 162 T.C. No. 8, slip Op. At 18 (Apr. 8, 2024). Our citation to Golsen v. Commissioner, 54 T.C. 742, 747 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971) means that we will not wait on the appeal in Farhy any longer for cases appealable other than to the D.C. Circuit.

Mr. Safdieh was a New York resident when he filed his petition, so appellate venue presumptively lies in the Second Circuit. He is representing himself, and we infer from the fact that his filings are mostly handwritten that he is not the most sophisticated of litigants in Tax Court. In his response to the IRS's motion he did not include his own motion for summary judgment, and he did not raise the argument that ultimately prevailed in Farhy and Mukhi.

We have nevertheless held that we can grant summary judgment against the Commissioner even when he is the only party moving for summary judgment. See Rogers v. Commissioner, 157 T.C. 20 (2021) (Court, in rejecting respondent's lone summary judgment motion, held that respondent abused his discretion rather than remand or try issue). We have also held that it is the obligation of the appeals officer conducting a CDP hearing to verify "that the requirements of any applicable law or administrative procedure have been met." I.R.C. §§ 6320(c), 6330(c)(1). See Freije v. Commissioner, 126 T.C. 14, 32–37 (2005) (finding an appeals officer's verification was insufficient due to an error of law). This would

appear to be a legal impossibility in this case now that we've twice held that the Code does not permit the assessment of section 6038 penalties.

Nevertheless, our Rule 121(g) requires that we give respondent notice and an opportunity to point out any difference between this case, and Farhy and Mukhi. If not, we will enter decision in Mr. Safdieh's favor -- though we will note that we regard any arguments in those two cases as having been made in this one as well.

Therefore, it is

ORDERED that on or before May 15, 2024 respondent file a response to this order.

**(Signed) Mark V. Holmes**
**Judge**

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of June, two thousand twenty-six.

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Joseph Safdieh,
Petitioner-Appellee,
v.
Commissioner of Internal Revenue,
Respondent-Appellant.

**ORDER**
Docket No: 25-501

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Appellee, Joseph Safdieh, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



## APPENDIX E

### I.R.C. § 6038. Information reporting with respect to certain foreign corporations and partnerships

**(a) Requirement**

**(1) In general**

Every United States person shall furnish, with respect to any foreign business entity which such person controls, such information as the Secretary may prescribe relating to—

(A) the name, the principal place of business, and the nature of business of such entity, and the country under whose laws such entity is incorporated (or organized in the case of a partnership);

(B) in the case of a foreign corporation, its post-1986 undistributed earnings (as defined in section 902(c));

(C) a balance sheet for such entity listing assets, liabilities, and capital;

(D) transactions between such entity and—

(i) such person,

(ii) any corporation or partnership which such person controls, and

(iii) any United States person owning, at the time the transaction takes place—

(I) in the case of a foreign corporation, 10 percent or more of the value of any class of stock outstanding of such corporation, and

(II) in the case of a foreign partnership, at least a 10-percent interest in such partnership; and

(E)(i) in the case of a foreign corporation, a description of the various classes of stock outstanding, and a list showing the name and address of, and number of shares held by, each United States person who is a shareholder of record owning at any time during the annual accounting period 5 percent or more in value of any class of stock outstanding of such foreign corporation, and

(ii) information comparable to the information described in clause (i) in the case of a foreign partnership.

The Secretary may also require the furnishing of any other information which is similar or related in nature to that specified in the preceding sentence or which the Secretary determines to be appropriate to carry out the provisions of this title.

**(2) Period for which information is to be furnished, etc.**

The information required under paragraph (1) shall be furnished for the annual accounting period of the foreign business entity ending with or within the United States person's taxable year. The information so required shall be furnished at such time and in such manner as the Secretary shall prescribe.

**(3) Limitation**

No information shall be required to be furnished under this subsection with respect to any

foreign business entity for any annual accounting period unless the Secretary has prescribed the furnishing of such information on or before the first day of such annual accounting period.

**(4) Information required from certain shareholders in certain cases**

If any foreign corporation is treated as a controlled foreign corporation for any purpose under subpart F of part III of subchapter N of chapter 1, the Secretary may require any United States person treated as a United States shareholder of such corporation for any purpose under subpart F to furnish the information required under paragraph (1).

**(5) Information required from 10-percent partner of controlled foreign partnership**

In the case of a foreign partnership which is controlled by United States persons holding at least 10-percent interests (but not by any one United States person), the Secretary may require each United States person who holds a 10-percent interest in such partnership to furnish information relating to such partnership, including information relating to such partner's ownership interests in the partnership and allocations to such partner of partnership items.

**(b) Dollar penalty for failure to furnish information**

**(1) In general**

If any person fails to furnish, within the time prescribed under paragraph (2) of subsection (a), any information with respect to any foreign

business entity required under paragraph (1) of subsection (a), such person shall pay a penalty of $10,000 for each annual accounting period with respect to which such failure exists.

**(2) Increase in penalty where failure continues after notification**

If any failure described in paragraph (1) continues for more than 90 days after the day on which the Secretary mails notice of such failure to the United States person, such person shall pay a penalty (in addition to the amount required under paragraph (1)) of $10,000 for each 30-day period (or fraction thereof) during which such failure continues with respect to any annual accounting period after the expiration of such 90-day period. The increase in any penalty under this paragraph shall not exceed $50,000.

**(c) Penalty of reducing foreign tax credit**

**(1) In general**

If a United States person fails to furnish, within the time prescribed under paragraph (2) of subsection (a), any information with respect to any foreign business entity required under paragraph (1) of subsection (a), then—

(A) in applying section 901 (relating to taxes of foreign countries and possessions of the United States) to such United States person for the taxable year, the amount of taxes (other than taxes reduced under subparagraph (B)) paid or deemed paid (other than those deemed paid under section 904(c)) to any foreign country or possession of the

United States for the taxable year shall be reduced by 10 percent, and

(B) in the case of a foreign business entity which is a foreign corporation, in applying section 960 to any such United States person which is a corporation (or to any person who acquires from any other person any portion of the interest of such other person in any such foreign corporation, but only to the extent of such portion) for any taxable year, the amount of taxes paid or deemed paid by each foreign corporation with respect to which such person is required to furnish information during the annual accounting period or periods with respect to which such information is required under paragraph (2) of subsection (a) shall be reduced by 10 percent.

If such failure continues 90 days or more after notice of such failure by the Secretary to the United States person, then the amount of the reduction under this paragraph shall be 10 percent plus an additional 5 percent for each 3-month period, or fraction thereof, during which such failure to furnish information continues after the expiration of such 90-day period.

**(2) Limitation**

The amount of the reduction under paragraph (1) for each failure to furnish information with respect to a foreign business entity required under subsection (a)(1) shall not exceed whichever of the following amounts is the greater:

(A) $10,000, or

(B) the income of the foreign business entity for its annual accounting period with respect to which the failure occurs.

**(3) Coordination with subsection (b)**

The amount of the reduction which (but for this paragraph) would be made under paragraph (1) with respect to any annual accounting period shall be reduced by the amount of the penalty imposed by subsection (b) with respect to such period.

**(4) Special rules**

(A) No taxes shall be reduced under this subsection more than once for the same failure.

(B) For purposes of this subsection and subsection (b), the time prescribed under paragraph (2) of subsection (a) to furnish information (and the beginning of the 90-day period after notice by the Secretary) shall be treated as being not earlier than the last day on which (as shown to the satisfaction of the Secretary) reasonable cause existed for failure to furnish such information.

**(d) Two or more persons required to furnish information with respect to same foreign corporation**

Where, but for this subsection, two or more United States persons would be required to furnish information under subsection (a) with respect to the same foreign business entity for the same period, the Secretary may by regulations provide that such information shall be required only from one person. To the extent practicable, the determination of which person shall furnish the information shall be made on the basis of actual ownership of stock.

**(e) Definitions**

For purposes of this section—

**(1) Foreign business entity**

The term "foreign business entity" means a foreign corporation and a foreign partnership.

**(2) Control of corporation**

A person is in control of a corporation if such person owns stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or more than 50 percent of the total value of shares of all classes of stock, of a corporation. If a person is in control (within the meaning of the preceding sentence) of a corporation which in turn owns more than 50 percent of the total combined voting power of all classes of stock entitled to vote of another corporation, or owns more than 50 percent of the total value of the shares of all classes of stock of another corporation, then such person shall be treated as in control of such other corporation. For purposes of this paragraph, the rules prescribed by section 318(a) for determining ownership of stock shall apply; except that—

(A) subparagraphs (A), (B), and (C) of section 318(a)(3) shall not be applied so as to consider a United States person as owning stock which is owned by a person who is not a United States person, and

(B) in applying subparagraph (C) of section 318(a)(2), the phrase "10 percent" shall be substituted for the phrase "50 percent" used in subparagraph (C).

**(3) Partnership-related definitions**

**(A) Control**

A person is in control of a partnership if such person owns directly or indirectly more than a 50 percent interest in such partnership.

**(B) 50-percent interest**

For purposes of subparagraph (A), a 50-percent interest in a partnership is—

(i) an interest equal to 50 percent of the capital interest, or 50 percent of the profits interest, in such partnership, or

(ii) to the extent provided in regulations, an interest to which 50 percent of the deductions or losses of such partnership are allocated.

For purposes of the preceding sentence, rules similar to the rules of section 267(c) (other than paragraph (3)) shall apply.

**(C) 10-percent interest**

A 10-percent interest in a partnership is an interest which would be described in subparagraph (B) if "10 percent" were substituted for "50 percent" each place it appears.

**(4) Annual accounting period**

The annual accounting period of a foreign business entity is the annual period on the basis of which such foreign business entity regularly computes its income in keeping its books. In the case of a specified foreign business entity (as defined in section 898), the taxable year of

such foreign business entity shall be treated as its annual accounting period.

**(f) Cross references**

**(1) For provisions relating to penalties for violations of this section, see section 7203.**

**(2) For definition of the term "United States person", see section 7701(a)(30).**

## APPENDIX F

### I.R.C. § 6201(a). Assessment authority

**(a) Authority of Secretary**

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

**(1) Taxes shown on return**

The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists (or payments under section 6225(c)(2)(B)(i)) are made under this title.

**(2) Unpaid taxes payable by stamp**

**(A) Omitted stamps**

Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary determines to be liable for such tax.

**(B) Check or money order not duly paid**

In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

**(3) Erroneous income tax prepayment credits**

If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary in the same manner as in the case of a mathematical or clerical error appearing upon the return, except that the provisions of section 6213(b)(2) (relating to abatement of mathematical or clerical error assessments) shall not apply with regard to any assessment under this paragraph.

**(4) Certain orders of criminal restitution**

**(A) In general**

The Secretary shall assess and collect the amount of restitution under an order pursuant to section 3556 of title 18, United States Code, for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.

**(B) Time of assessment**

An assessment of an amount of restitution under an order described in subparagraph (A) shall not be made before all appeals of such order are concluded and the right to make all such appeals has expired.

**(C) Restriction on challenge of assessment**

The amount of such restitution may not be challenged by the person against whom assessed on the basis of the existence or amount of the underlying tax liability in any proceeding authorized under this title (including in any suit or proceeding in court permitted under section 7422).

## APPENDIX G

### 28 U.S.C. § 2461(a). Mode of recovery

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.