taxnotes® federal

Volume 189, Number 11 ■ December 15, 2025



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Reprinted from *Tax Notes Federal*, December 15, 2025, p. 1807

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In this article, Bernhardt examines the cases underlying the debate over whether the IRS can assess section 6038(b) penalties or if the Justice Department must file a lawsuit in federal district court to collect them.

## I. Introduction

Section 6038(a) requires U.S. persons to provide the IRS with certain information related to any foreign business entity that the person controls. Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," is the IRS form used to comply with the statute. Section 6038(b) provides penalties for U.S. persons required to file Form 5471 that fail to timely do so.

The assessment of penalties for failing to file Form 5471 may seem like a technical matter affecting only a small group of taxpayers. But the increasing number of taxpayers questioning whether the IRS may assess and administratively collect section 6038(b) penalties strikes at the heart of the IRS's enforcement power in international tax.

The dispute over section 6038(b) penalties centers on whether Congress drafted this portion of the Internal Revenue Code in a manner that authorizes the IRS to assess those penalties itself or, instead, whether the Justice Department must file a lawsuit in federal district court to collect them. The answer to this question has far-reaching implications for: IRS foreign reporting obligations; taxpayers and international penalties; and the interrelationship between the language Congress chooses when it drafts a law, the manner in which the IRS as an executive agency chooses to apply the law, and the approach different courts take when they interpret tax statutes.

Between 2023 and 2024 several federal court decisions highlighted these implications. In *Farhy* the full Tax Court concluded that the IRS lacks the authority to assess or collect section 6038(b) penalties, but the D.C. Circuit reversed that decision the next year.[1] In response, the Tax Court has twice insisted that, while it will follow the D.C. Circuit's decision in cases appealable to that court, it will otherwise continue to hold that the IRS has no authority to assess or collect section 6038(b) penalties. The result is a fractured body of law in which geography and appellate venue determine outcomes, producing a consequential split in tax administration.

This article examines the cases underlying that dispute, analyzing both the statutory interpretation issues at play and the broader administrative law context. It considers the implications for taxpayers, the IRS, and the tax system as a whole. Finally, it explores what the future may hold: a possible resolution through Supreme Court review, congressional amendment, or continued circuit-by-circuit divergence.

[1] *Farhy v. Commissioner*, 160 T.C. 399 (2023), *rev'd* 100 F.4th 223 (D.C. Cir. 2024).

## II. The Assessment Dispute

### A. *Farhy I*

Alon Farhy, a U.S. person, owned all the stock in two Belizean corporations. He failed to file Forms 5471 from 2003 through 2010, and the IRS assessed penalties under section 6038(b) totaling nearly half a million dollars. The IRS initiated collection activity, eventually issuing a notice of intent to levy, and Farhy filed a request for a collection due process hearing during which he challenged the IRS's authority to assess the section 6038(b) penalties. After the hearing, the IRS issued Farhy a notice of determination, rejecting his argument. Farhy then filed a Tax Court petition, arguing that the CDP hearing officer abused his discretion by rejecting Farhy's argument that the IRS lacked the authority to assess penalties under section 6038(b).

The Tax Court's April 2023 opinion agreed with Farhy that the IRS lacked authority to assess and collect penalties under section 6038(b) and emphasized that administrative agencies such as the IRS may act only to the extent Congress has delegated them authority to do so.[2] And while the Tax Court acknowledged that section 6038(b) (in chapter 61 of subpart F of the code) imposes penalties for the failure to file Form 5271, it found no statutory authority delegated by Congress granting the IRS the authority to assess those penalties.[3]

The Tax Court identified almost four dozen code provisions in which Congress had granted the IRS authority to assess penalties.[4] For example, some code sections in chapter 68 of subpart F allow penalties to be "assessed and collected . . . in the same manner as taxes."[5] Other code sections outside chapter 68 of subpart F: (1) treat penalties as a tax or an assessable penalty that the IRS may collect;[6] (2) contain a cross-reference to a provision of chapter 68 providing a penalty for a violation and the collection of the penalty;[7] or (3) say that certain conduct is addressed by a penalty provision in subpart F,[8] which provides for collection of the penalty.

But the Tax Court rejected the IRS's argument that section 6201, which authorizes the IRS to make assessments of all taxes and "assessable penalties,"[9] allowed the IRS to assess and collect section 6038(b) penalties. First, the court disagreed that section 6038(b) penalties are assessable penalties.[10] Instead, it read the language in section 6201(a) narrowly, insisting that the phrase "assessable penalties" refers to those penalties explicitly designated as such by Congress and does not automatically include all penalties, like those set forth in section 6038(b), that are not subject to deficiency procedures.[11] Second, the Tax Court rejected the IRS's argument that it could assess section 6038(b) penalties on the ground that the term "taxes" in section 6201 included section 6038(b) penalties, even if those penalties are not assessable penalties.[12] The Tax Court followed its own precedent to conclude that taxes and penalties are distinct categories in the absence of a provision treating them otherwise.[13]

The court also concluded that section 6038(f) did not contain a cross-reference to a provision of chapter 68 providing a penalty for a violation and the collection of the penalty. Instead, section 6038(f) contained only a cross-reference to section 7203, a criminal provision not relevant in the civil collection context.[14]

Thus, the Tax Court agreed with Farhy, finding that Congress did not authorize the IRS's assessment — much less its collection by levy — of the section 6038(b) penalties.[15] The Tax Court's analysis illustrates a textualist approach to the imposition, assessment, and collection of penalties: Absent statutory authorization, the IRS

[2] *Farhy*, 160 T.C. at 404.
[3] *Id.* at 405.
[4] *Id.* at 405-406.
[5] *Id.* at 405.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 406.
[9] Section 6201(a).
[10] *Farhy*, 160 T.C. at 406, *citing* section 6201(a).
[11] *Id.* at 407.
[12] *Id.*
[13] *Id.* at 407-408.
[14] *Id.* at 407.
[15] *Id.* at 413.

may not expand its powers by inference or by reference to administrative convenience. The decision also reflects a skepticism toward agency overreach, echoing the admonitions of the Supreme Court in recent years, both before and after *Farhy I*, that agencies cannot discover sweeping powers in ambiguous text.[16]

### B. *Mukhi I*

*Mukhi*[17] (*Mukhi I*) raised the same issues as *Farhy I*, although in a roundabout manner. In *Mukhi I* the IRS assessed section 6038(b) penalties of $120,000 against Raj Mukhi for his failure to file Forms 5471 for tax years 2002-2013, as well as other penalties. The IRS began collection, issuing Mukhi a notice of intent to levy and a notice of federal tax lien, and Mukhi requested a CDP hearing for each IRS notice.[18] At the hearings (which the IRS consolidated), Mukhi challenged the assessment on the grounds of doubt as to liability. The IRS rejected Mukhi's argument and issued him a notice of determination. He responded by filing a Tax Court petition,[19] and both Mukhi and the IRS filed motions for summary judgment.[20]

All this occurred before the Tax Court issued its decision in *Farhy I.* After the court issued the *Farhy I* opinion, the court in *Mukhi I* asked the parties to brief the impact of that decision, by then on appeal to the D.C. Circuit. Mukhi argued that if the D.C. Circuit affirmed *Farhy I*, the IRS could not assess the 6038(b) penalties, while the IRS urged the Tax Court to overrule *Farhy I*.[21]

In its April 2024 opinion, the Tax Court rejected the IRS's argument. Instead, it adhered to the doctrine of *stare decisis*, giving *Farhy I* precedential weight.[22] The court said the IRS's argument that the Tax Court decided *Farhy I* "incorrectly [was] not sufficient justification alone to warrant reconsideration of its holding."[23]

At the same time, the Tax Court declined to wait for the D.C. Circuit's decision in *Farhy I*. First, it observed that *Mukhi I* was appealable to the Eighth Circuit under the Tax Court's *Golsen* rule, which provides that Tax Court decisions are appealable to the federal court of appeals overseeing cases in the district in which the taxpayer resides. Therefore, any decision by the D.C. Circuit would not bind the Tax Court in *Mukhi I*.[24] Second, the Tax Court saw "no reason to delay resolution of this issue until the resolution of the appeal in *Farhy* [*I*] because it had given notice of the issue to both parties and both parties had made arguments on the issue."[25]

As a result, the precedential weight of *Farhy I* led the Tax Court to conclude that the IRS issued the section 6038(b) penalties against Mukhi without the authority to do so. Therefore, the IRS was not entitled to collect those penalties by the proposed levy or lien.[26]

This ruling offers insight into the Tax Court's view of its own institutional posture. The Tax Court views itself as a national court tasked with promoting uniformity but not bound to acquiesce to the reasoning of a court of appeals outside the venue of appeal in an underlying case. While this creates a risk of disuniformity, it confirms the consistency of the Tax Court's rulings until contradicted or modified by binding appellate or Supreme Court precedent.

### C. *Farhy II*

In May 2024, less than a month after the Tax Court decided *Mukhi I*, the D.C. Circuit reversed *Farhy I*, adopting a pragmatic reading of the code based on what the court described as the text, structure, and function of section 6038(b).[27] The court began with the premise that the IRS's authority to make assessments is "the cornerstone

[16] *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697 (2022). *See also, e.g.*, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

[17] *Mukhi v. Commissioner*, 162 T.C. 177 (2024).

[18] *Id.* at 178-180.

[19] *Id.* at 180, 183.

[20] *Id.* at 183-184.

[21] *Id.* at 184.

[22] *Id.* at 194.

[23] *Id.*

[24] *Id.*, *citing Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

[25] *Mukhi*, 162 T.C. at 194.

[26] *Id.*

[27] *Farhy*, 100 F.4th at 236.

of the government's tax collection authority."[28] Rejecting the Tax Court's analysis of the code's structure, the court observed that nothing in the text of section 6201 limits assessable penalties to those codified in chapter 68.[29] Instead, the court explained that Congress has frequently imposed assessable penalties outside chapter 68 without explicitly describing them as assessable or including a cross-reference to chapter 68.[30] The court emphasized that when Congress imposed the section 6038(b) penalties in 1982, they were designed to enforce the reporting requirements set forth in section 6038(a). Requiring the government to litigate the enforcement mechanism in every case would not only undermine Congress's goal and contradict the congressional purpose of the enforcement provision but would be implausible as well.[31] As a result, the D.C. Circuit reversed the Tax Court and held that the IRS was entitled to assess penalties under section 6038(b).

The D.C. Circuit's decision reflects an approach based on the purpose and history of section 6038. It focuses on the structure of the statutory scheme and its function, rather than the absence of explicit words and cross-references. It also reflects judicial deference to long-standing IRS practice and procedure to which the court found Congress had acquiesced. The court observed in its conclusion that the IRS has assessed section 6038(b) penalties for decades without challenge; and Congress has amended section 6038 seven times, and each time "it has left undisturbed the IRS's practice of assessing and administratively collecting penalties imposed under Section 6038(b)."[32]

### D. *Mukhi II*

After the D.C. Circuit decision in *Farhy II* reversed the Tax Court decision in *Farhy I*, the IRS filed a motion for reconsideration in the Tax Court in *Mukhi I*.[33]

In a November 2024 opinion acknowledging the reversal of *Farhy I* by the D.C. Circuit and its obligation to facilitate national uniformity in the application of the tax law, the Tax Court recognized the need to "thoroughly reconsider the problem in light of the reasoning of the reversing appellate court."[34] At the same time, however, the Tax Court reiterated its adherence to the precedential weight of its own opinions and noted that if it remained certain its original decision was correct, then it could and would continue to follow its own precedent.[35]

Thus, on review of *Mukhi I*, the Tax Court once again rejected the IRS's argument that the agency could assess the section 6038(b) penalties via the provisions of section 6201(a).[36] The Tax Court rejected the IRS's "expansive" interpretation of section 6201,[37] as well as its use of legislative history to overcome the limitations of the language in section 6201.[38] The Tax Court also rejected the IRS's argument that preventing the IRS from assessing section 6038(b) penalties would pose an administrative burden. Even if that were true — and the court said it was not convinced that it was — it rejected the policy argument as a reason to ignore statutory text.[39]

Instead, the Tax Court again applied the *Golsen* doctrine and reaffirmed the holding of *Mukhi I*. In cases appealable to the D.C. Circuit, the Tax Court would follow *Farhy II* and allow the IRS to assess and collect section 6038(b) penalties, but in any case not appealable to the D.C. Circuit, it would not.[40] Since *Mukhi I* was appealable to the Eighth Circuit and not the D.C. Circuit, the Tax Court held, again, that the IRS lacked the authority to assess or collect section 6038(b) penalties.

This stance underscored the Tax Court's statement of its institutional posture in *Mukhi I* — that it is a national court, with limited jurisdiction, focused on promoting uniformity, but adhering to

[28] *Id.* at 226.
[29] *Id.* at 230.
[30] *Id.* at 235.
[31] *Id.* at 231-232.
[32] *Id.* at 236.
[33] *Mukhi v. Commissioner*, 163 T.C. 150 (2024).
[34] *Id.* at 154.
[35] *Id.*
[36] *Id.* at 157.
[37] *Id.* at 157-158.
[38] *Id.* at 158-160.
[39] *Id.* at 168-170.
[40] *Id.* at 154, 175.

its own precedent when not required to do otherwise. The potential lack of uniformity in the tax law anticipated by the IRS in *Mukhi I* and *Mukhi II* had come to pass. But without contrary guidance from a binding court of appeals or the Supreme Court, the Tax Court chose to accept that lack of uniformity as the cost of granting its own opinions precedential weight.

### E. *Safdieh*

Less than a month later, in December 2024, the Tax Court again affirmed its position that the IRS had no authority to assess or collect section 6038(b) penalties.[41] In *Safdieh*, Joseph Safdieh, a pro se taxpayer from New York, found himself the beneficiary of *Farhy I*, *Mukhi I*, and *Mukhi II* even though he had not raised the issue.[42]

The IRS filed a motion for summary judgment to sustain the determination from a CDP hearing that it was entitled to file a federal tax lien to collect penalties it had previously assessed against Safdieh under section 6038(b).[43] Tax Court Judge Mark V. Holmes denied the IRS's motion and, on his own, granted summary judgment in favor of Safdieh and against the IRS.[44]

Holmes said that an appeals officer in a CDP hearing is required to verify that the IRS has met the requirements of applicable laws and administrative procedures.[45] Here, however, it would have been impossible for the appeals officer to do so because of the Tax Court's decisions in *Farhy I*, *Mukhi I*, and *Mukhi II* holding that the IRS may not assess the section 6038 penalties.[46] As a result, and since any decision in *Safdieh* was appealable to the Second Circuit and not the D.C. Circuit, Holmes confirmed, yet again, that the IRS lacked the authority to assess the section 6038 penalties and prohibited the IRS from proceeding with any collection action related to them.[47]

*Safdieh* not only reaffirmed the Tax Court's opinions in *Farhy I*, *Mukhi I*, and *Mukhi II*, but also pushed them further. By affirmatively applying the *Farhy I* analysis in a case in which the taxpayer lacked representation and did not raise the issue, it sent a strong signal that it would not back down in any case from its conviction that the IRS lacks assessment and collection authority under section 6038(b). In a short three-page opinion, the Tax Court confirmed that its interpretation of the law — not the IRS's interpretation or the D.C. Circuit's interpretation — governed the outcome in section 6038(b) penalty cases not appealable to the D.C. Circuit.

*Safdieh* is currently on appeal to the Second Circuit.[48]

## III. Implications

### A. Statutory Interpretation Implications

The differing analyses and outcomes in these decisions reflect two competing interpretive philosophies. Moving forward, taxpayers will need to advance their arguments in a way that enables them to prevail in both the Tax Court and those circuit courts that may analyze the section 6038(b) penalties in a way similar to the D.C. Circuit. The differences are stark when competing interpretations are juxtaposed.

This interpretive divide reveals a tension in tax law between fidelity to text and the practical necessities of administration. The code, along with the regulations and the substantial guidance issued by the IRS, is sprawling and imperfectly drafted. The Tax Court's insistence on strict textual authorization risks disabling key enforcement mechanisms. On the other hand, permitting the IRS to infer authority from structure and purpose in the absence of textual authority risks increasing executive power beyond what Congress intended.

This juxtaposition shows that the dispute over section 6038(b) is emblematic of different judicial approaches to statutory interpretation and agency authority more generally.

The Tax Court's insistence on explicit statutory text reflects a formalistic concern with

[41] *Safdieh v. Commissioner*, No. 11680-20L, at *3 (T.C. Dec. 5, 2024).
[42] *Id.* at *2-3.
[43] *Id.*, at *2.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at *2-3.
[48] *See Safdieh v. Commissioner*, No. 25-501 (2d Cir. June 11, 2025).

**Differences in Analysis by Tax Court and D.C. Circuit**

| Analytical Method | Tax Court Analysis in *Farhy I*, *Mukhi I*, *Mukhi II*, and *Safdieh* | D.C. Circuit Analysis in *Farhy II* |
|---|---|---|
| Statutory text | Section 6038(b) imposes penalties but does not authorize the IRS to assess or collect them. Assessment requires explicit statutory authority. | Section 6201(a) authorizes assessment of "all taxes" and "assessable penalties." The code limits "assessable penalties" to chapter 68. |
| Placement in IRC | Penalties outside chapter 68 are not "assessable" unless expressly labeled or subject to a cross-reference. | Congress often places penalties outside chapter 68 without repeating the word "assessable" or using a cross-reference. |
| Agency power | Agencies only have powers explicitly conferred by Congress. Silence means no authority. | Assessment is the default enforcement mechanism. Congress must speak clearly if it chooses otherwise. |
| Administrative practice | Long-standing IRS practice cannot create authority when none exists in the statute. | Decades of IRS practice assessing section 6038(b) penalties show congressional acquiescence. |
| Statutory purpose | Courts must enforce statutes as written, even if that creates inefficiencies. Congress can fix drafting gaps. | Requiring the Justice Department to sue in every case would undermine Congress's intent to ensure compliance with foreign reporting rules. |
| Themes of the opinions | The consideration of textualism and the separation of powers. | The examination of statutory purpose and legislative goals with pragmatic deference to agency practice. |
| Result | The IRS lacks authority to assess section 6038 (b) penalties or collect them through liens or levies. The government must sue in district court to collect the penalties. | The IRS may assess section 6038(b) penalties and collect them administratively through liens or levies, like other penalties. |

preserving congressional primacy and constraining administrative expansion. It treats statutory silence as prohibitive. It says Congress did not authorize assessment of the section 6038(b) penalties, either expressly or through a different provision of the code, and therefore the IRS lacks assessment and collection power. The Tax Court is unwilling to infer assessment authority from structure, purpose, or legislative history. This approach reflects caution against administrative overreach and aligns with a historically more conservative approach. In doing so, it limits the deference that the Tax Court often grants the IRS.

The D.C. Circuit, in contrast, takes a more pragmatic view of the code as a whole. It views the IRS's assessment authority as implicit in the code's overall design. Rather than requiring explicit authorization in the text, it treats assessment as the default method of collection unless Congress specifies otherwise. For the D.C. Circuit, the statutory purpose of section 6038(b), deterring offshore tax evasion by penalizing noncompliance with information reporting, justifies treating section 6038(b) penalties as assessable.

With today's Supreme Court majority seemingly focused on shifting interpretive authority away from executive agencies, requiring courts to exercise their independent judgment to interpret statutory provisions, and using a textualist approach, a section 6038(b) case before the Supreme Court might pose a difficult challenge to the IRS. At the same time, however, a

taxpayer will likely need to prevail in a court of appeals before the Supreme Court reviews the issue; and if other circuit courts, such as the *Safdieh* court in the Second Circuit, follow the D.C. Circuit, it may be some time before the Supreme Court takes up the issue.

### B. Administrative Law Implications

The interpretive split between the Tax Court and the D.C. Circuit also reveals a deeper tension in contemporary administrative law about whether courts should consider statutory silence as a limit on agency power or infer authority from statutory structure and long-standing practice.

The Supreme Court's decision in *Loper Bright*[49] indicates a shift away from agency power, and it is worth remembering that the D.C. Circuit decided *Farhy II* before *Loper Bright*. Thus, while the D.C. Circuit's decision in *Farhy II* shows a judicial willingness to interpret statutory schemes holistically, with deference to agency practice, the Tax Court's decision in *Farhy I* can be seen as a check on agency self-expansion, echoing the Supreme Court's subsequent skepticism in *Loper Bright* toward implied powers in regulatory contexts. The Tax Court's approach, like that of the Supreme Court, demonstrates that agencies, including the IRS, operate only within powers specifically granted by Congress.[50]

### C. Implications for Taxpayers and the IRS

The Tax Court's decisions have important consequences for both taxpayers and the IRS. For taxpayers, the consequences are profound. The failure to file a Form 5471 triggers an initial $10,000 penalty[51] and additional penalties of up to $50,000 per year.[52] For filing failures that persist for many years across multiple entities, the liability can easily reach hundreds of thousands of dollars. But if the IRS cannot assess or collect the penalties, and the Justice Department must instead file suit against taxpayers in federal district court, it creates a significant enforcement barrier. This is especially true given staffing cuts and reorganizations that have hindered coordination between the IRS and the Justice Department.

For taxpayers outside the D.C. Circuit, the Tax Court's decisions create an opportunity to challenge the imposition of section 6038(b) penalties in the Tax Court, which continues to side with taxpayers on this issue. At the same time, taxpayers face a risk that other appellate courts will agree with the D.C. Circuit. Taxpayers on the losing side of those decisions will not only have to pay the penalties and interest but will do so after paying what are sure to be expensive costs of litigation.

The stakes are high for the IRS, too. If appellate courts adopt the Tax Court's position, the agency will have no choice but to continue litigation throughout the country and ultimately ask a conservative Supreme Court to reverse lower court opinions based on a textualist approach in favor of a policy-oriented approach. The uncertainty also undermines the ideal of taxpayer voluntary compliance as taxpayers aware of a split among the circuit courts may gamble on noncompliance, betting on a favorable venue for their own potential litigation in the Tax Court and then on appeal.

## IV. What's Next and What to Watch For

The biggest question for the future is: What happens next? Several possibilities present themselves.

First, Congress could amend section 6038 to clarify whether the IRS may assess the penalties. A one-sentence amendment expressly designating section 6038(b) penalties as assessable, not assessable, or subject to deficiency procedures before assessment would presumably eliminate the controversy. The national taxpayer advocate has already urged Congress to address this statutory gap by making the penalties subject to the deficiency procedures to which taxpayers are already entitled when contesting taxes.[53]

[49] *Loper Bright*, 603 U.S. 369.

[50] *See also, e.g.*, *Green Valley Investors LLC v. Commissioner*, 159 T.C. 80 (2022) (Notice 2017-10, 2017-4 IRB 544, identifying syndicated conservation easements as a listed transaction for reporting and penalty purposes was held to be invalidly issued in violation of the Administrative Procedure Act).

[51] Section 6038(b)(1).

[52] Section 6038(b)(2).

[53] "National Taxpayer Advocate 2025 Purple Book," at Recommendation No. 14 (Dec. 31, 2024).

Congressional clarification would restore uniformity and avoid costly litigation, though political gridlock may delay that action.

Second, the Supreme Court may eventually resolve the issue. If one or more circuit courts align with the Tax Court, the issue will be ripe for certiorari review. Although the current Court's apparent interest in executive authority and some members' use of originalism would seem to favor the IRS, its recent skepticism toward implied agency authority combined with other members' use of a textualist analysis makes the Court's ultimate decision difficult to predict.

Third, the issue may remain unsettled, with no clear national rule and outcomes varying throughout the country. In that scenario, taxpayers will face forum-driven disparities. This geographic fragmentation benefits no one. Taxpayers in the D.C. Circuit must accept that section 6038(b) penalty assessments are valid and enforceable, while taxpayers in other jurisdictions will continue to argue (with likely success in Tax Court but as of yet unknown success elsewhere) that the IRS lacks that authority. Taxpayer venue will become outcome determinative. The IRS will pursue appeals in circuits likely to follow the D.C. Circuit, while taxpayers will seek to litigate in circuits more sympathetic to the Tax Court's approach.

In the meantime, taxpayers and their advisers will have to navigate uncertainty. Compliance planning should emphasize the timely filing of Forms 5471 and the documentation of reasonable cause when filing failures occur. For taxpayers that have already been assessed penalties by the IRS, it is essential to use CDP procedures, refund claims, and litigation strategies tailored to the venue. The stakes are significant since liabilities can quickly escalate into the hundreds of thousands of dollars.

## V. Practitioner Corner

When counseling a client that may have Form 5471 exposure, practitioners should begin with a thorough inventory of the taxpayer's interests in foreign corporations, tracing both direct and indirect ownership. This step is essential because filing obligations arise not only from majority ownership but also from certain categories of control and related-party attribution. Once the scope of the filing obligation is established, advisers should carefully review whether the taxpayer has filed all required Forms 5471 for the relevant years. When filings are incomplete or absent, practitioners should evaluate the availability of reasonable cause defenses, ensuring contemporaneous documentation that demonstrates diligence, reliance on professional advice, or other mitigating circumstances.

If the IRS has already assessed penalties, advisers must determine the procedural posture of the case. A CDP hearing will provide an opportunity to challenge the IRS's assessment authority, at least for taxpayers outside the D.C. Circuit. A settlement officer, faced with a taxpayer that has no hazards of litigation in the Tax Court, may well concede the entire penalty, or at least concede enough to make settlement a better option than litigation with an expensive appeal and the risks that entails. Moreover, taxpayers could pay the penalties, file a refund claim, and litigate the issue in district court; but this strategy presupposes that the taxpayer has the funds to pay the penalties for at least one year (leaving the government to file a counterclaim for the remainder) and also assumes that a district court, which may never have examined section 6038(b), will provide an opinion as favorable and as well written as the Tax Court. Of these two options, waiting for an opportunity for a CDP hearing, while potentially a slower process, appears to provide more options for a successful outcome.

Still, advisers must remain attentive to the taxpayer's broader compliance posture. Voluntary disclosure programs, streamlined filing procedures, or protective filings may minimize ongoing exposure. Throughout, practitioners should explain the unsettled state of the law to taxpayers, noting the divergence between the Tax Court and the D.C. Circuit, cautioning that outcomes will depend on geography, timing, and judicial interpretation.

## VI. Conclusion

The controversy over section 6038(b) penalties highlights how statutory ambiguity, administrative practice, and judicial philosophy interact to shape tax enforcement. While the Tax Court rejects assessment authority in the absence of any statutory authorization, the D.C. Circuit

infers assessment authority from structure and purpose. The resulting split leaves both taxpayers and the IRS with uncertainty.

For taxpayers and their advisers, the lesson is twofold. First, compliance is the surest protection; filing Form 5471 on time avoids the issue entirely. Second, for taxpayers already facing section 6038(b) penalty assessments, the strategy moving forward must account for procedural posture, appellate venue, and the evolving judicial and potential legislative landscape.

Ultimately, however, the questions raised here are not just about Form 5471. They are about the scope of agency power, the role of courts in constraining or enabling that power, and the clarity of congressional drafting. Until the split between the Tax Court and the D.C. Circuit (and potentially other courts of appeal) is resolved, taxpayers and the IRS must operate in a fragmented environment in which geography, as much as the facts of compliance, will determine penalty liability.

The section 6038(b) controversy is a bellwether for how courts balance textual precision, administrative efficiency, and congressional intent. The eventual resolution will either reaffirm the IRS's ability to use its most powerful collection tools in the international reporting context or restrict it to more cumbersome judicial remedies. Either way, the outcome will likely ripple across the world of tax administration, shaping the enforcement landscape for years to come. ■