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Philip G. Groves,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Docket No. 9974-22L
Document No. 38

Brief of the Center For Taxpayer Rights as Amicus Curiae in support of Petitioner

Certificate of Service

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by Andrew Weiner on behalf of petitioner by Andrew Weiner on behalf of petitioner

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U.S. TAX COURT
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UNITED STATES TAX COURT

PHILIP G. GROVES, Petitioner,	)	Docket No. 9974-22L
v.	)	Judge Kathleen Kerrigan
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

BRIEF OF THE CENTER FOR TAXPAYER RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

A. The IRS Cannot Disregard the Requirement in I.R.C. § 6751(a) to Provide Notice of the Penalty Computation 2

1. Case law addressing statutory safeguards 3

2. Administrative law 7

3. Taxpayer Bill of Rights 12

B. Adequate Notice of the Penalty Computation Is Pivotal to Challenging Erroneously Assessed Penalties and Reducing IRS Errors 14

CONCLUSION 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Alessio Azzari, Inc. v. Comm'r, 136 T.C. 178 (2011)....................9

Baldwin v. Hale, 68 U.S. 233 (1863)....................13

Chai v. Comm'r, 851 F.3d 190 (2d Cir. 2017)....................4, 5

Chicago Joe's Tea Room, LLC v. Village of Broadview, 94 F.4th 588 (7th Cir. 2024)....................7

Colliot v. United States, 2021 WL 2709676 (W.D. Tex. Mar. 24, 2021)....................19

Farhy v. Comm'r, 160 T.C. No. 6 (2023)....................17

Flora v. United States, 362 U.S. 145 (1960)....................15

Ford v. Shalala, 87 F. Supp. 2d 163 (E.D.N.Y. 1999)....................11

Graev v. Comm'r, 147 T.C. 460 (2016)....................6

Grannis v. Ordean, 234 U.S. 385 (1914)....................13

Jones v. United States, 2020 WL 2803353 (C.D. Cal. May 11, 2020)....................8

Larson v. United States, 888 F.3d 578, (2d Cir. 2018)....................15

Mathews v. Eldridge, 424 U.S. 319 (1976)....................10

Morton v. Ruiz, 415 U.S. 199 (1974)....................10

Mukhi v. Comm'r, 162 T.C. No. 8 (2024)....................17

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)....................11

Our Country Home Enters., Inc., v. Comm'r, 855 F.3d 773 (7th Cir. 2017)....................15

Pazden v. Comm'r, T.C. Memo. 2021-28....................12

Romano-Murphy v. Comm'r, 816 F.3d 707 (11th Cir. 2016)....10

Shea v. Comm'r, 112 T.C. 183 (1999)....5, 6

Smith v. Comm'r, 133 T.C. 424, 430 (2009)....14

United States v. Gentges, 531 F. Supp. 3d 731 (S.D.N.Y. 2021)....8

United States v. Hughes, 2022 WL 911721 (N.D. Cal. Mar. 29, 2022)....8

United States v. McKee, 192 F.3d 535 (6th Cir. 1999)....11

United States v. Schwarzbaum, 24 F.4th 1355 (11th Cir. 2022)....7, 8

Statutes

5 U.S.C. § 706....7, 8

26 U.S.C. (I.R.C.):

§ 6039F(c)(1)(B)....17, 18

§ 6330(c)(2)(B)....15

§ 6671(a)....14

§ 6676....14, 20

§ 6707....1, 2

§ 6751(a)....*passim*

§ 6751(b)(1)....4, 5

§ 7422....15

§ 7522(a)....5, 6, 14

§ 7803(a)(3)....3, 11, 13

28 U.S.C. § 1346(a)(1)....15

31 U.S.C.:

§ 5321(a)(5)(C)(i) 8

§ 5321(a)(5)(D)(ii) 8

Other Authorities

Internal Revenue Manual (IRM):

20.1.1.2.3 (Oct. 19, 2020) 9

20.1.2.4.4 (Mar. 9, 2022) 9

IRS, "Taxpayer Bill of Rights: #1, The Right to Be Informed" (Feb. 2016), https://www.irs.gov/newsroom/taxpayer-bill-of-rights-the-right-to-be-informed-2016. 12

National Taxpayer Advocate, 2023 Annual Report to Congress 20

S. Rep. No. 105-174, at 65 (1998) 3, 4

Tax Court Rule 34(b) 5

Technical Assistance Memorandum, TAM CC-TAM-PMTA-00284 (Sept. 29, 1999) 9, 16

INTRODUCTION

The Center for Taxpayer Rights submits this brief of an *amicus curiae* to emphasize that I.R.C. § 6751(a) is an important taxpayer protection that the IRS should not be allowed to ignore. Section 6751(a) instructs, in relevant part, that the IRS "shall include with each notice of penalty under this title [26] . . . a computation of the penalty." In this case, the IRS issued multiple notices to the Petitioner asserting a penalty under I.R.C. § 6707, Failure to Furnish Information Regarding Reportable Transactions, in the amount of $4,351,138. None of the notices contain a computation of the penalty as required by section 6751(a).

While involving a tax shelter promoter penalty, this case has broad implications for all taxpayers and for maintaining the fairness of our tax system. It is crucial that the IRS inform taxpayers regarding the computation of the penalties it imposes so taxpayers can evaluate their accuracy and decide whether to challenge them. Equally important is that the IRS "show its work" to catch common, yet avoidable, errors that can have significant detrimental impacts on taxpayers. This is particularly true for assessable penalties where taxpayers have little recourse against erroneous penalties other than to pay the penalty in full and sue for a refund in district court or the Court of Federal Claims. The computation

requirement in section 6751(a) is a cornerstone of just and effective penalty administration.

The IRS should not be entitled to disregard any statutory directive, let alone one that plays such an important role in protecting taxpayers. Several sources of law provide a basis for holding the IRS accountable, including case law enforcing similar statutory protections, administrative law prohibiting actions that are contrary to law or an agency's own procedures, and The Right to Be Informed and The Right to Challenge the IRS and Be Heard enshrined in the Taxpayer Bill of Rights.

The argument that follows is organized in two sections. First, we address the authorities bearing on the IRS's failure to comply with section 6751(a). Second, we detail the importance of the computation requirement in section 6751(a) for taxpayers and penalty administration.

ARGUMENT

A. The IRS Cannot Disregard the Requirement in I.R.C. § 6751(a) to Provide Notice of the Penalty Computation

Section 6751(a) plainly and unambiguously requires the IRS to provide taxpayers with the computation of any penalty assessed under Title 26, which includes the I.R.C. § 6707 penalty assessed in this case. The statute states as follows:

COMPUTATION OF PENALTY INCLUDED IN NOTICE
The Secretary shall include with each notice of penalty under this title information with respect to the name of the penalty, the section of this title under which the penalty is imposed, *and a computation of the penalty.*

I.R.C. § 6751(a) (emphasis added). The legislative history supports the plain reading of the statute as requiring the IRS to provide notice of the penalty computation:

Present Law

Present law does not require the IRS to show how penalties are computed on the notice of penalty. In some cases, penalties may be imposed without supervisory approval.

Reasons for Change

The Committee believes that taxpayers are entitled to an explanation of the penalties imposed upon them. The Committee believes that penalties should only be imposed where appropriate and not as a bargaining chip.

Explanation of Provision

Each notice imposing a penalty is required to include the name of the penalty, the code section imposing the penalty, *and a computation of the penalty.*

S. Rep. No. 105-174, at 65 (1998) (emphasis added).

There must be consequences following the IRS's failure to comply with the computation requirement of section 6751(a), as indicated by case law addressing

similar statutory safeguards, administrative law, and the Taxpayer Bill of Rights, I.R.C. § 7803(a)(3).

1. Case law addressing statutory safeguards

It is well established that statutory safeguards are to be applied in furtherance of Congressional intent. *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), for example, addressed the companion provision to section 6751(a), which states that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate." I.R.C. § 6751(b)(1). The Second Circuit observed that legislative history made Congress's intent behind the supervisory approval requirement clear, namely, that "'penalties should only be imposed where appropriate and not as a bargaining chip.'" *Chai*, 851 F.3d at 219 (quoting S. Rep. 105-174, at 65 (1998)).

To protect taxpayers from the IRS using penalties as leverage, the Second Circuit reasoned that supervisory approval must be obtained before a penalty is reviewable by the Tax Court. *Id.* at 220. Only then can approval be an effective check on the IRS's discretion to assert penalties. Accordingly, the Court held that "§ 6751(b)(1) requires written approval of the initial penalty determination no later

than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty," and further that "compliance with § 6751(b) is part of the Commissioner's burden of production and proof in a deficiency case in which the penalty is asserted." *Id.* at 221.

Another example of a court holding the IRS accountable for non-compliance with a statutory safeguard is this Court's reviewed opinion in *Shea v. Commissioner*, 112 T.C. 183 (1999). That case concerned the requirement in I.R.C. § 7522(a) that IRS notices, including a notice of proposed deficiency with an opportunity for administrative review, a notice of deficiency, a notice generated out of any information return matching program, and a notice and demand for tax, "shall describe the basis for, and identify the amounts (if any) of, the tax due, interest, additional amounts, additions to the tax, and assessable penalties included in such notice." Like section 6751(b)(1), section 7522(a) was designed to protect taxpayers. In particular, Congress intended the IRS to "make every effort to improve the clarity of all notices . . . that are sent to taxpayers." *Shea*, 112 T.C. at 195 (quoting H.R. Rep. 100-1104, at 219 (1998)). To achieve that end, this Court construed the requirement that the IRS "describe the basis for" a notice of deficiency as conveying what is necessary for taxpayers who want to challenge the notice to comply with Tax Court Rule 34(b) that a petition contain "[c]lear and

concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency or liability," and "[c]lear and concise lettered statements of the facts on which the petitioner bases the assignments of error." *Id.* at 196–97. Succinctly stated by Judge Beghe in concurrence, "[s]ection 7522(a) was a signal from Congress that vague notices would thenceforth be disfavored." *Id.* at 208. Congress was explicit in section 7522(a) that "[a]n inadequate description . . . shall not invalidate such notice." Instead, this Court carried out Congress's intent by shifting the burden of proof to the Commissioner regarding a matter not described in the notice of deficiency and requiring the presentation of different evidence. *Id.* at 197.

These cases belie Respondent's suggestion here that there should be no consequences for the IRS failure to comply with section 6751(a). Respondent relies primarily on *Graev v. Commissioner*, 147 T.C. 460 (2016), *supplemented and overruled in part on other grounds*, 149 T.C. 485 (2017). Resp. Obj. at 11 ¶ 46. But that case is inapposite. Contrary to the present facts, the Court in *Graev* found that the IRS in that case "complied with section 6751(a)." *Graev*, 147 T.C. at 462, 474. The consequences of non-compliance were therefore not before the Court. In any event, the Court recognized that "procedural errors or omissions are not a basis to invalidate an administrative act *unless there was prejudice to the*

complaining party." *Id.* at 474 (emphasis added). While the Graevs may not have been prejudiced, in general, the IRS's failure to include a computation in a notice of penalty prejudices taxpayers by removing a procedural safeguard that allows taxpayers to evaluate the penalty independently and encourages the IRS to catch its own mistakes. *Cf. Chicago Joe's Tea Room, LLC v. Village of Broadview*, 94 F.4th 588, 603–04 (4th Cir. 2024) (explaining that the failure to timely disclose evidence deprived the other party an opportunity to review and contest the evidence, resulting in prejudice). The increased risk of error and potential consequences are both grave and indefensible in light of the statutory directive of section 6751(a). Respondent cannot seriously contend that he should be able to simply ignore statutory protections of taxpayers.

2. Administrative law

The Administrative Procedure Act ("APA") requires a court reviewing agency action to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Respondent's failure to provide a computation of the penalty at issue is a straightforward violation of section 6751(a). As such, it is an agency action not in accordance with law that should be set aside under section 706 of the APA.

In *United States v. Schwarzbaum*, 611 F. Supp. 3d 1356 (S.D. Fla. 2020), *vacated and remanded on other grounds*, 24 F.4th 1355 (11th Cir. 2022), the district court set aside willful penalties for failure to file a Report of Foreign Bank and Financial Accounts ("FBAR") under similar circumstances. The maximum willful FBAR penalty is calculated based on the balance of the foreign financial account(s) not reported at the time of the violation, which in *Schwarzbaum* was the annual June 30 deadline for filing the report. 31 U.S.C. § 5321(a)(5)(C)(i), (D)(ii). The IRS calculated Schwarzbaum's penalties using the highest aggregate balance of the unreported accounts instead of the balance at the time of the violation. Accordingly, the court set aside the penalties under the APA as "not in accordance with law." *Schwarzbaum*, 611 F.Supp.3d at 1374.

In this case, the IRS determined a section 6707 penalty and issued notices to Petitioner that did not comply with section 6751(a) because they lacked a computation of the penalty. Such actions also should be set aside under section 706 of the APA. And for good reason. The failure to furnish the penalty computation deprived Petitioner of the ability to scrutinize whether the penalty was in fact correct.[1] As discussed more fully below, the computation is integral to taxpayers'

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[1] To illustrate, in addition to *Schwarzbaum*, there are numerous cases in which courts determined that the IRS's calculations of FBAR penalties were arbitrary and capricious, an abuse of discretion, or not in accordance with law. *See, e.g., United*

rights to challenge penalties, as well as to the IRS avoiding mistakes and erroneous penalties.

The IRS further abused its discretion by failing to follow its own guidance implementing the computation requirement in section 6751(a). The Internal Revenue Manual ("IRM") states that "IRC 6751(a), Computation of Penalty Included in Notice, requires that each penalty notice include the name of the penalty, applicable IRC section, and a computation of the penalty." IRM 20.1.1.2.3 (10-19-2020) ("Approval Prerequisite to Penalty Assessments"); *see also* IRM 20.1.2.4.4 (02-27-2024) ("IRC 6751(a) requires IRS to include the following information with each notice of penalty . . . [a] computation of the penalty."). The IRS also acknowledges in a Technical Assistance Memorandum that "Section 6751(a) of the Code requires that a computation of a penalty include the base number from which the penalty is calculated, the formula for the penalty, and the amount of the penalty." Technical Assistance Memorandum, TAM CC-TAM-PMTA-00284 (Sept. 29, 1999).

States v. Hughes, 2022 WL 911721, at *7–8 (N.D. Cal. Mar. 29, 2022); *United States v. Gentges*, 531 F. Supp. 3d 731, 753–54 (S.D.N.Y. 2021); *Jones v. United States*, 2020 WL 2803353, at *8–9 (C.D. Cal. May 11, 2020). It would be impossible to make such claims if the IRS did not provide advance notice of the calculation of an FBAR penalty.

In *Alessio Azzari, Inc. v. Commissioner*, 136 T.C. 178 (2011), this Court held that the IRS abused its discretion when it failed to follow IRM guidance implementing I.R.C. § 6325(d), which provides that the IRS "may" subordinate a federal tax lien when doing so will facilitate collections. *Id.* at 191. The IRS in that case refused to consider whether subordination would facilitate collections in contravention of the IRM that it "must" do so. *Id.* at 186 (quoting IRM 5.17.2.8.6(4) (12-14-2007)). The abuse of discretion is clearer in this case in which the statute as well as the IRS's own guidance are non-discretionary.

Still further, a basic principle of administrative law recognized by the Supreme Court is that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *see Romano-Murphy v. Commissioner*, 816 F.3d 707, 718 (11th Cir. 2016) ("'[E]xecutive agencies must comply with the procedural requirements imposed by statute,' and 'must respect their own procedural rules and regulations.'") (quoting *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000)).

The IRS's failure to follow its own guidance to include penalty computations in its notices implicates basic due process rights. The potential deprivation of property interests requires consideration of three factors under *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). Applying this framework, the court in *Ford v. Shalala*, 87 F. Supp. 2d 163 (E.D.N.Y. 1999), held that Social Security Administration notices were prejudicial absent the formula and calculation of eligibility or benefits because they did not allow claimants to evaluate whether the agency's determination is accurate or an appeal is warranted. *Id.* at 178–82, 185; *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process" is to "afford [interested parties] an opportunity to present their objections."). The lack of computation in an IRS notice of penalty has equivalent effect, which underscores the importance of enforcing the computation requirement in section 6751(a) and the IRS's own rules. *See United States v. McKee*, 192 F.3d 535, 540–42 (6th Cir. 1999) (holding the IRS to the terms of the IRM where necessary to protect taxpayers' constitutional and statutory rights).

3. Taxpayer Bill of Rights

The IRS's non-compliance with the computation requirement violates the Taxpayer Bill of Rights ("TBOR"), I.R.C. § 7803(a)(3). In 2015, Congress enacted the current version of TBOR to ensure the fundamental rights of taxpayers in dealing with the IRS. TBOR contains ten rights, including "the right to be informed," "the right to quality service," "the right to challenge the IRS and be heard," and "the right to a fair and just tax system." *Id.* Section 7803(a)(3) imposes an obligation on the Commissioner to "ensure that employees of the Internal Revenue Service are familiar with and act in accord with" such rights.

The first—and arguably the most important—right in TBOR is The Right to Be Informed. I.R.C. § 7803(a)(3)(A). The IRS acknowledges the importance on its website, which includes the following:

> Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.

IRS, "Taxpayer Bill of Rights: #1, The Right to Be Informed" (Feb. 2016), https://www.irs.gov/newsroom/taxpayer-bill-of-rights-the-right-to-be-informed-2016. The IRS's website further states that "[c]ertain notices must include the

amount (if any) of the tax, interest, and certain penalties you owe and must explain why you owe these amounts." *Id.* The Right to Be Informed encompasses section 6751(a), which creates a statutory right to receive certain information about penalty assessments, including the notice of the computation of the penalty.[2]

The Right to Be Informed is inextricably linked to another vital right, "The Right to Challenge the IRS's and Be Heard." I.R.C. § 7803(a)(3)(D). These two rights express the key elements of procedural due process—notice and opportunity to appeal.[3] Taxpayers cannot effectively challenge the IRS without knowing the basis for its actions.

Whether it be under the auspices of TBOR or enforcing the statute itself, the Court should require the IRS to fulfill its obligation to adequately inform taxpayers about the IRS's actions against them by providing adequate notice of the computation of penalty assessments.

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[2] Courts have held that the TBOR did not create new rights, but instead, ensured the protection of already existing taxpayer rights. *See e.g., Pazden v. Comm'r*, T.C. Memo. 2021-28, at *4. However, section 7803(a) places an *affirmative* duty on the Commissioner to ensure his or her employees adhere to these rights.

[3] *See Grannis v. Ordean,* 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *Baldwin v. Hale*, 68 U.S. 233 (1863) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified").

B. Adequate Notice of the Penalty Computation Is Pivotal to Challenging Erroneously Assessed Penalties and Reducing IRS Errors

For many penalties, the IRS's refusal to provide notice of the computation of the penalty makes it more difficult for the taxpayer to understand the basis of the penalty, and to challenge the penalty if the IRS has erroneously assessed it. For penalties subject to the deficiency procedures, the IRS provides a detailed explanation of the penalty computation pursuant to I.R.C. § 7522(a). This is not always the case, however, for "assessable penalties."

Section 6671(a) authorizes the IRS to assess and collect penalties "in the same manner as taxes" without first sending a notice of deficiency. Instead, the IRS makes these summary penalty assessments "upon notice and demand." I.R.C. § 6671(a). There are approximately fifty assessable penalties that apply to a wide-ranging group of taxpayers and tax practitioners. In addition to the section 6707 penalty at issue in this case, some other examples are: I.R.C. §§ 6672 (failure to collect and pay over tax, or attempt to evade or defeat tax); 6676 (erroneous claim for refund or credit); 6695(a)–(c) (tax return preparer failure to furnish copy to taxpayer, sign a return, or furnish a tax identifying number); 6679 (failure to file returns for foreign corporations or foreign partnerships); 6677 (failure to file

information with respect to certain foreign trusts); and 6690 (fraudulent statement or failure to furnish statement to plan participant).

Tax Court review is not available for these penalties.[4] *See e.g., Smith v. Comm'r*, 133 T.C. 424, 430 (2009). Instead, review of these penalties is typically through a refund action under I.R.C. § 7422 and 28 U.S.C. § 1346(a)(1). This requires the taxpayer to pay the penalty in full before bringing suit. *See Flora v. United States*, 362 U.S. 145, 158 (1960); *Larson v. United States*, 888 F.3d 578, 583–84 (2d Cir. 2018). Although one court has noted that it is "troubling" that a taxpayer must pay an assessable penalty in full to receive judicial review, courts have resisted making exceptions. *Larson*, 888 F.3d at 589.[5]

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[4] For some penalties, the IRS offers pre-assessment review by the Independent Office of Appeals. If the IRS issues a Notice of Intent to Levy before the appeal is complete, the taxpayer can challenge the penalty assessment through collection due process ("CDP"), in which case the taxpayer could seek review of the IRS's CDP determination in Tax Court. I.R.C. § 6330(c)(2)(B); *Our Country Home Enters., Inc. v. Comm'r*, 855 F.3d 773, 784–90 (7th Cir. 2017). CDP rights are strictly a product of IRS collection activities. Taxpayers do not have CDP rights as a matter of course. The right to judicial review of the amount or existence of a liability is at times arbitrary and solely in the IRS's control. Most taxpayers are forced to pay the liability in full and file a claim for refund in disrict court or the Court of Federal Claims in order to obtain judicial review.

[5] As stated in *Larson*, "[t]he notion that a taxpayer can be assessed a penalty of $61 million or more without any judicial review unless he first pays the penalty in full seems troubling, particularly where, as Larson alleges here, the taxpayer is unable to do so. But '[w]hile the *Flora* rule may result in economic hardship in some

Because of the lack of a notice of deficiency and pre-assessment judicial review, it is critically important that the IRS provide notice of the computation of the penalty to provide transparency to the taxpayer and ensure that the IRS correctly and accurately computes the penalty in the first instance.

Requiring the IRS to comply with section 6751(a) and provide the computation of the penalty, *i.e.*, to "show its work," may avoid many situations in which the IRS makes an error and overstates or improperly assesses a penalty, leaving the taxpayer with no other remedy than to pay the wrongly assessed penalty in full and bring a refund claim. Also, providing adequate notice of the computation allows taxpayers to determine whether a penalty was correctly assessed.

The IRS seems to have acknowledged that the notices must provide adequate notice of the computation. In a Technical Assistance Memorandum issued shortly after the enactment of section 6751(a), the IRS provided the following guidance:

> The fourth issue is how detailed a computation of the penalty is needed to meet the requirements of § 6751(a) of the Code. In addition to the name of the penalty and the Code section imposing the penalty, § 6751(a) requires that a penalty notice include a computation of the penalty. Compute means to determine by mathematical means. *See*

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cases, it is Congress' responsibility to amend the law.'" 888 F.3d at 589 (quoting *Rocovich v. United States*, 933 F.2d 991, 995 (Fed. Cir. 1991)).

> Merriam Webster Collegiate Dictionary 10th Edition. Thus, only providing a formula would not provide the information required for a computation. We believe that providing the base amount for thc calculation of the penalty, the formula for the penalty, and the bottom-line amount of the penalty, are required to satisfy the computation requirement under § 6751(a).

Technical Assistance Memorandum, TAM CC-TAM-PMTA-00284.

The notice of computation will vary depending on the penalty, such as whether it is based on the amount of tax underpayment or if it is purely an information return penalty. To satisfy section 6751(a), the IRS must provide sufficient detail for the taxpayer to evaluate whether the penalty was accurately assessed.

A hypothetical example similar to many that we have seen in practice illustrates this point. The IRS assesses a penalty for failure to file a Form 3520 (Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts) to report a gift or inheritance from a foreign person or estate. The penalty for late filing a Form 3520 to report a foreign gift is "an amount equal to 5 percent of the amount of such foreign gift for each month for which the failure continues (not to exceed 25 percent of such amount in the aggregate)."

I.R.C. § 6039F(c)(1)(B).[6] The taxpayer received a gift from a foreign relative in the amount of $200,000, and the taxpayer filed Form 3520 two months after the due date, making the maximum penalty 10%, or $20,000. However, the IRS Service Center mistakenly fails to note the actual filing date of the return, and instead, assesses the maximum penalty amount of 25% of the gift, or $50,000. This is a common error in the computation of this penalty.

Under the IRS's view that the notice is adequate without a computation of the penalty, the notice merely states that the IRS has "charged a penalty under IRC 6039F in the amount of $50,000." If the IRS had to "show its work," and state that the penalty was 25% of the gift of $200,000 because the form was five months late,

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[6] As stated in *Farhy v. Commissioner*, 160 T.C. No. 6 (2023), the IRS does not have statutory authority to assess and collect certain penalties for failure to file foreign information returns. *Id.* at *9. In *Farhy* and later in *Mukhi v. Commissioner*, 162 T.C. No. 8 (2024), this Court held that the IRS lacked statutory authority to assess penalties under I.R.C. § 6038(b) for the taxpayer's failure to file Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations). While these cases focused on Form 5471 penalties, as that was the issue before the Court, the rationale extends to all penalties lacking explicit statutory assessment authority. Currently, none of the penalty provisions contained within Chapter 61A of the Code have such authority. One of those provisions is I.R.C. § 6039F(c)(1), which is identical to the relevant statutory language in section 6038(b). Nevertheless, despite the Court's decisions in these cases, the IRS still routinely assesses and attempts to collect these penalties from taxpayers, and so we use this penalty as one example. There are many other situations in which requiring the IRS to "show its work," may avoid erroneous assessments.

the IRS personnel assessing the penalty would be in position to realize that this is not correct and revise the notice accordingly. If the notice nevertheless slipped by with the error, the taxpayer would readily see that the IRS had miscalculated the penalty and would be able to address that issue with the IRS. Instead, the style of the current notices which merely state the Code section and the amount of the penalty requires the taxpayer to reverse engineer the penalty assessment to determine whether it is correct. As plainly stated in section 6751(a), the IRS should be required to provide the formula for the penalty computation in the notice. For these penalties, the formula is 5% of the amount of the gift multiplied by the number of months late, with the maximum penalty not to exceed 25% of the amount of the gift.

Colliot v. United States, 2021 WL 2709676 (W.D. Tex. Mar. 24, 2021), also illustrates the importance of having the IRS "show its work." In that case, the IRS imposed penalties for failure to file Forms 5471. The taxpayers' complaint asserted that the IRS did not provide the computation required by section 6751(a) and that she did not have in interest in one of the entities for two years at issue, and the IRS conceded these claims. *Id.* at *1, 8. The IRS's penalty notices for failure to file Forms 5471 typically state "[y]ou have been charged a penalty under Section 6038 of the Internal Revenue Code for Failure to File Form 5471 and/or Form 8865,"

and state the total amount of penalties and the tax year, but do not provide any further information about how the penalty was computed. If the IRS provided computations in these notices, *i.e.*, indicating that there was a $10,000 penalty for failure to file Form 5471 for each specific entity for each year, the IRS personnel may avoid making errors that taxpayers are forced to remedy by paying the penalties in full, filing a refund claim, and then filing an action in district court or the Court of Federal Claims.

There may be a perception that the foreign information penalties used as examples here only apply to high net worth or sophisticated taxpayers. This is not the case. As the Taxpayer Advocate Service reported, the IRS imposes a substantial amount of these penalties on the non-wealthy, noting that between 2018 and 2021, 71% percent of penalties for failure to file Forms 5471 to report ownership in a foreign corporation were against lower- and middle-income taxpayers. National Taxpayer Advocate, 2023 Annual Report to Congress, at 102. Similarly, 53% of the penalties for failure to report foreign gifts were against taxpayers with income between $50,000 and $400,000, and 36% of those penalties were against taxpayers with income ranging from zero to $50,000. *Id.* at 107–08.

In addition, there are many other assessable penalties that apply to low-income taxpayers, such as the erroneous refund penalty under I.R.C. § 6676 (which

penalizes erroneously claiming credits such as the Earned Income Credit), and many others. Although not receiving adequate notice of penalty computations creates an unnecessary burden on all taxpayers, it is especially problematic for low-income taxpayers who may not have the ability to pay the penalty in full, file a refund claim, and then file a suit in federal court if the IRS does not respond to the claim or denies it.

CONCLUSION

Although requiring the IRS to provide notice of penalty computations cannot solve all the problems in penalty administration, it is a step in the right direction. Better communications to taxpayers about how the IRS computes penalties may avoid many improper assessments in the first place and provide the taxpayers the information that they need to challenge a penalty that has been improperly assessed. Congress added section 6751(a) for these very reasons, and the IRS should not be permitted to ignore its statutory obligations.

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CERTIFICATE OF SERVICE

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