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Alon Farhy,

Petitioner

v.

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Respondent

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Simultaneous Reply Brief

UNITED STATES TAX COURT

ALON FARHY, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 10647-21L FILED ELECTRONICALLY Due November 8, 2022 Judge L. Paige Marvel

PETITIONER'S SIMULTANEOUS REPLY BRIEF

Submitted here is Petitioner's Simultaneous Reply Brief. Some of the Commissioner's points need a response and this reply brief is directed to that end. Otherwise, Petitioner relies on his opening brief.

DATE: November 7, 2022

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PETITIONER'S SIMULTANEOUS REPLY BRIEF

As we read the Commissioner's opening brief, nothing is added to his earlier position we quoted and discussed in our opening brief.[1] The Code does not support Commissioner's authority to assess the § 6038 penalty; authority he is using to forcibly collect from Petitioner. This is not a deficiency matter. The issue is whether the Commissioner has the authority to assess the § 6038 penalty to forcibly collect the § 6038 penalty from Petitioner. The Commissioner cites a handful of unhelpful cases, and Petitioner addresses them below, in alphabetical order.

***Colliot v. United States,* No. l:19-cv-212, 2021 WL 2709676 (W.D. Tx. March 24, 2021)**

In *Colliott,* an unpublished, nonprecedential district court opinion, the issue under consideration did not include the issue in our case. *Colliot* occurred after Mr. Colliot paid the assessed § 6038 penalties and sued the government for a refund. Mr. Colliot argued (1) that the IRS failed to obtain written supervisory approval of the initial penalty determination under § 6751 before assessing the penalty, and (2) the statute of limitations for assessment had expired. Mr. Colliott did not

[1] See Petitioner's Simultaneous Opening Brief, page 20-21.

argue that the Commissioner had no authority to assess the penalty. The Court found that the doctrine of variance precluded Mr. Colliot's claim under § 6751 and that the statute of limitations provided in § 6501 for assessment of "assessable penalties" had not expired.

The district court in *Colliott*, at the government's urging, conflated[2] "assessable penalties" defined in *26 U.S. Code Chapter 68, Subchapter B - Assessable Penalties* with the foreign information penalties (including § 6038) identified in *26 U.S. Code Chapter 61 – Information and Returns*. The government did not point out, and the Court did not consider, that "assessable penalties" are defined in *Chapter 68, Subchapter B* sets forth an elaborate scheme for the assessment of certain foreign information penalties identified in *Chapter 68, Subchapter* B but has nothing to do with the § 6038 penalties. *Chapter 61*, the home of our § 6038 foreign information penalty, contains no such assessment scheme dealing with the penalties in *Chapter 61*. The Code is silent on the Commissioner's ability to assess any *Chapter 61* penalty.

[2] We note that this conflation was not necessary to the ultimate result of the district court's statute of limitations analysis. There is no statute of limitations for § 6038 penalties under the Code.

We have searched the Code and the Treasury Regulations, and we cannot find an assessment scheme dealing with the penalties in *Chapter 61*. The Commissioner has suggested none. Rather the Commissioner sets out a circular argument, *viz.* since the section 6038 penalty is not covered by the deficiency rules, it must otherwise be assessable. But the Cide does not support his argument.

Dewees v. United States, 272 F. Supp. 3d 96 (D.D.C. 2017)

Dewees is another refund suit. Mr. Dewees argued that he was entitled to have a refund of his payment of a § 6038 penalty related to his failure to file a Form 5471 foreign information report. Mr. Dewees advanced several theories for his refund, none of which have application here. Petitioner in our case is not challenging the amount of the assessment like Mr. Dewees. Petitioner in our case is not seeking a refund like Mr. Dewees.

Petitioner is asserting "challenges to the appropriateness of collection actions" as he may do under 26 U.S.C. § 6330(c)(2)(A)(ii). Petitioner maintains that the assessment against him is not appropriate and is unauthorized under the law. Thus, the current assessment cannot trigger the Commissioner's arsenal of collection powers and their use

against Petitioner. The Petitioner asks the Court to order the Commissioner to follow the law. In following the law, the Commissioner has an adequate legal remedy to collect from Petitioner: Refer the matter to the Department of Justice ("DOJ") to collect the penalty.[3] This is the same procedure allowing the Commissioner to collect other penalties he cannot assess under the Code. See e.g., 31 U.S.C. § 3711(g)(4)(C) (FBAR penalty).

Flume v. Commissioner, T.C. Memo. 2017-21

Flume is a garden variety CDP case where Mr. Flume was arguing reasonable cause to defeat a § 6038 penalty. Mr. Flume lost. Our Petitioner is not arguing reasonable cause. Petitioner in this case argues that the assessment here is outside the law.

The Commissioner states in his opening brief in this case:

> Although the taxpayer in *Flume* did not raise petitioner's assessment authority argument, the Court must have concluded that the IRS had authority to assess and collect section 6038 penalties because it ruled entirely in respondent's favor and the collection action was sustained. *Flume,* T.C. Memo. 2017-21, at *17.

[3] The government is free to collect a tax or penalty with or without assessment through an action in district court, so long as the suit is brought within the applicable statute of limitations. See 26 U.S.C. § 6501(a).

Lacking the Commissioner's mind reading skills, we are forced to look at the words in *Flume* to deduce it meaning. *Flume* adds nothing to the analysis of our issue. We note that the Commissioner did not point out to the Court in *Flume* there existed no specific assessment authority in the Code for the § 6038 penalties. Neither did Mr. Flume.

Golsen v. Commissioner, 54 T.C. 742 (1970)

This is the case where the Tax Court held that the Court had to follow a Court of Appeals decision squarely in point where appeal from the Court's decision lies to that Court of Appeals and to that court alone. Petitioner agrees that any appeal of this case will be to the Court of Appeals for the District of Columbia rather than to the Second Circuit, because petitioner resided in Israel when the petition was filed.

Grajales v. Commissioner, 156 T.C. 55 (2021)

In *Grajales* the taxpayer challenged a deficiency imposed under 26 U.S.C. § 72(t) on early distributions from qualified retirement plans. In *Grajales* the petitioner maintained that a section 72(t) 10% exaction was really a "penalty", "addition to tax", or "additional amount" within the

meaning of section 6751(b) and not a "tax" as stated in section 72(t).[4] The Commissioner cites *Grajales* in his opening brief:

> As recently recognized by this Court, whether a penalty falls within the meaning of the term "taxes" as used in section 6201(a) is dependent on context.[5]

Thus, in the Commissioner's analysis, context trumps the language of the Code. Petitioner disagrees. The Commissioner cannot interpolate assessment authority over § 6038 penalties into the Code by referencing the "context" of the Code to create assessment authority where none exists. In any event, Petitioner does not understand why the Commissioner is citing *Grajales*. This case supports Petitioner. After looking at section 72(t) and likely noticing the 10% exaction was defined as a tax in three separate instances in that section, and not finding any reason suggested by the Code to find otherwise, the Court found that the

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[4] **72(t) 10-PERCENT ADDITIONAL TAX ON EARLY DISTRIBUTIONS FROM QUALIFIED RETIREMENT PLANS**

(1) IMPOSITION OF ADDITIONAL TAX

If any taxpayer receives any amount from a qualified retirement plan (as defined in section 4974(c)), the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

[5] Respondent's Simultaneous Opening Brief in this case, page 11.

exaction was a tax. The Court correctly followed the literal language of the Code. When the Court follows the literal language of the Code today, the Court will find no statutory support for the Commissioner's position.

***Heydemann v. United States,* No. WDQ-07-3362, 2008 WL 2502188 (D. Md. April 23, 2008)**

In *Heydemann,* the Bankruptcy Court allowed a government claim for a § 6038 assessment against the taxpayer in a Chapter 13. The government is not required to assess a tax to collect a tax in bankruptcy, so Petitioner is unsure of the Commissioner's point or its relevance to our ultimate question regarding the legality of our assessment.

Ruesch v. Commissioner, 154 T.C. 289 (2020)

Ruesch looks like another garden variety CDP case where Ms. Ruesch was arguing reasonable cause to defeat a § 6038 penalty. The Tax Court held that under the CDP statute it lacked jurisdiction to redetermine Ms. Ruesch's underlying liability for penalties on the facts. Here is the critical language from the Tax Court describing what options a taxpayer has available to contest a § 6038 penalty, if they don't contest it in a CDP:

> Otherwise her remedy is to pay the liability, file a claim for refund, and file a refund suit in Federal District Court or the U.S. Court of Federal Claims. See Bedrosian v. United States,

> 912 F.3d 144, 149 n.1 (3d Cir. 2018) ("[C]laims brought by taxpayers to recover penalties assessed under section 6038(b) * * * are brought under the tax refund statute[.]"); Dewees v. United States, 272 F. Supp. 3d 96, 102 (D.D.C. 2017) ("Full payment of the amount owed followed by a lawsuit in a district court seeking a refund is a proper procedure for challenging penalties assessed under § 6038."), aff'd, 767 F. App'x 4 (D.C. Cir. 2019).

Petitioner here suggests a correct result is requiring the Commissioner to follow the law, like everybody else. The Court should not condone the Commissioner's effort to ignore the law or to interpolate the Code to suit his purpose. The Commissioner has known of this issue since at least 2018. He ignored it. He litigated around this issue and never brought it to any Court's attention. The Commissioner never brought it to the *Ruesch* Court's attention.

Smith v. Commissioner, 133 T.C. 424 (2009)

The issue in *Smith* is whether an "assessable penalty" located under subchapter B of chapter 68, entitled "Assessable Penalties" is subject to the deficiency notice procedures. The obvious answer was and is that no specific authority exists to make those penalties subject to the deficiency notice procedures. Therefore, the assessable penalties of chapter 68 are not subject to the deficiency notice procedures. QED. Here, no specific authority in the Code allows the Commissioner to assess

our § 6038 penalties. Therefore, the Commissioner cannot trigger the Commissioner's forced collection powers by assessing our § 6038 penalties.[6]

Wheaton v. United States, 888 F. Supp. 622 (D. NJ. 1995)

Wheaton was an injunction action by Mr. Wheaton to enjoin the government from collecting a § 6038 penalty related to his failure to file a Form 5471 foreign information reports. The district court held that Mr. Wheaton's case and action was barred by the Anti-Injunction Act, 26 U.S.C.A. § 7421(a). In *Wheaton* the district court concluded with the following observation:

> Taxpayer's only viable avenue to challenge Internal Revenue Service's (IRS) imposition of penalties for failing to report income allegedly derived from ownership of certain foreign corporations was to pay amount at issue and then sue for refund.

Please let Petitioner suggest another viable option covered by the Code: The Petitioner asks this Court to order the Commissioner to follow the law. The Commissioner has an adequate legal remedy to collect from Petitioner. The Commissioner must use the same DOJ procedures he

[6] Of course, the Commissioner can determine and record our §6038 in the Commissioner's records. We submit that the Commissioner's calculation and recordation of the 6038 liability is insufficient to trigger the Commissioners usual forced collection procedures that follow a statutory assessment.

uses to collect other penalties he cannot assess under the Code. See 31 U.S.C. § 3711(g)(4)(C) (FBAR penalty). The Commissioner should refer the case to the Department of Justice ("DOJ") to collect the penalty.

We close by noting a quote from the Fifth Circuit Court of Appeals:

It is a "'longstanding canon of construction' that if 'the words of a tax statute are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.'" *United States v. Marshall,* 798 F.3d 296, 318 (5th Cir. 2015) (collecting cases); accord *Comm'r v. Acker*, 361 U.S. 87, 91 21 (1959).

DATE: November 7, 2022

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