

MLI #10 Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions

SUMMARY

From June 1, 2018, through May 31, 2019, the federal courts issued decisions in at least 16 cases involving the Internal Revenue Code (IRC) § 6673 “frivolous issues” penalty, with one case involving an analogous penalty at the appellate level. Appellate level penalties are imposed for maintaining a case primarily for delay, raising frivolous arguments, unreasonably failing to pursue administrative remedies, or filing a frivolous appeal.¹ In many of the cases we reviewed, taxpayers escaped liability for the penalty but were warned they could face sanctions for similar conduct in the future.² Nonetheless, we included these cases in our analysis to illustrate what conduct will and will not be tolerated by the courts.

TAXPAYER RIGHT IMPACTED³

- *The Right to Appeal an IRS Decision in an Independent Forum*

PRESENT LAW

The U.S. Tax Court is authorized to impose a penalty against a taxpayer if the taxpayer institutes or maintains a proceeding primarily for delay, takes a frivolous position in a proceeding, or unreasonably fails to pursue available administrative remedies.⁴ The maximum penalty is \$25,000.⁵ In some cases, the IRS requests that the Tax Court impose the penalty;⁶ in other cases, the Tax Court exercises its discretion, *sua sponte*,⁷ to consider whether the penalty is appropriate.

- 1 The Tax Court generally imposes the penalty under IRC § 6673(a)(1). Other courts may impose the penalty under IRC § 6673(b)(1). U.S. Courts of Appeals are authorized to impose sanctions under IRC § 7482(c)(4), or Rule 38 of the Federal Rules of Appellate Procedure, although some appellate-level penalties may be imposed under other authorities.
- 2 See, e.g., *Belanger v. Comm’r*, T.C. Memo. 2019-1, *aff’d*, 2019 WL 4316498 (5th Cir. Sept. 11, 2019) (The Tax Court concluded that the taxpayer’s positions were “unquestionably frivolous” but recognized it was his first appearance before the court and therefore gave just a warning).
- 3 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. See IRC § 7803(a)(3).
- 4 IRC § 6673(a)(1)(A), (B), and (C). Likewise, the Tax Court is also authorized to impose a penalty against any person admitted to practice before the Tax Court for unreasonably and vexatiously multiplying the proceedings in any case. See IRC § 6673(a)(2). We did not identify any cases under this authority during this review cycle. 28 U.S.C. § 1927 authorizes federal courts to sanction an attorney or any other person admitted to practice before any court of the United States or any territory thereof for unreasonably and vexatiously multiplying proceedings; such person may be required to personally pay the excess costs, expenses, and attorneys’ fees reasonably incurred because of his or her conduct. We identified one case under 28 U.S.C. § 1927, *Lopez v. IRS*, 2018 U.S. Dist. LEXIS 179364 (D. Conn. Aug. 27, 2018), where the District Court sanctioned the taxpayer’s counsel \$2,500 for vexatiously multiplying the proceedings and introducing frivolous issues, however, we do not discuss it here (nor is it in the case table) as this behavior is attributable to the representative and not indicative of issues taxpayers are litigating.
- 5 IRC § 6673(a)(1).
- 6 The standards for the IRS’s decision to seek sanctions under IRC § 6673(a)(1) are found in the Chief Counsel Directives Manual (CCDM). See CCDM 35.10.2 (Aug. 11, 2004). For sanctions of any attorney or other person authorized to practice before the Tax Court, under IRC § 6673(a)(2), all requests for sanctions are reviewed by the designated agency sanctions officer (currently the Associate Chief Counsel (Procedure & Administration)). This review ensures uniformity on a national basis. See, e.g., CCDM 35.10.2.2.3 (Aug. 11, 2004).
- 7 “*Sua sponte*” means without prompting or suggestion; on its own motion. BLACK’S LAW DICTIONARY (10th ed. 2014). Thus, for conduct that it finds particularly offensive, the Tax Court can choose to impose a penalty under IRC § 6673 even if the IRS has not requested the penalty. See, e.g., *Walquist v. Comm’r*, 2019 WL 962901 (T.C. Feb. 25, 2019).

Taxpayers who institute actions under IRC § 7433⁸ for certain unauthorized collection actions can be subject to a maximum penalty of \$10,000 if the court determines the taxpayer's position in the proceedings is frivolous or groundless.⁹ In addition, IRC § 7482(c)(4),¹⁰ § 1912 of Title 28 of the U.S. Code,¹¹ and Rule 38 of the Federal Rules of Appellate Procedure¹² (among other laws and rules of procedure) authorize federal courts to impose penalties against taxpayers or their representatives for raising frivolous arguments or using litigation tactics primarily to delay the collection process. Because the sources of authority for imposing appellate-level sanctions are numerous and some of these sanctions may be imposed in nontax cases, this report focuses primarily on the IRC § 6673 penalty.

In our report last year, we took special note of the decision in *Williams v. Commissioner*, even though it fell outside of last year's reporting cycle, as it involved the novel issue of whether IRC § 6751(b)(1) constrained the ability of the Tax Court to impose a penalty under IRC § 6673(a)(1).¹³ Section 6751(b)(1) generally prohibits the imposition of a penalty unless the penalty is approved, in writing, by the supervisor of the employee imposing the penalty or other higher level designee of the Secretary.¹⁴ Section 6673(a)(1) gives the authority to impose the penalty in a Tax Court proceeding solely to the Tax Court, and permits the Tax Court to impose it either at the request of the Commissioner or *sua sponte* (of its own accord). The Tax Court looked to the legislative history of IRC § 6751(b)(1) and § 6673(a)(1) to determine whether the two sections can coexist or whether IRC § 6751(b)(1) supersedes IRC § 6673(a)(1). The Tax Court found that the legislative intent behind IRC § 6751(a)(1) was to prevent the IRS from using the threat of a penalty as a bargaining chip when negotiating with taxpayers, whereas the intent of IRC § 6673(a)(1) was to dissuade taxpayers from wasting judicial resources. Because the Tax Court is not mentioned in IRC § 6751(b)(1) or its legislative history, the Tax Court held that IRC § 6751(b)(1) does not apply when it imposes a penalty pursuant to IRC § 6673(a)(1). Thus, when an IRS Office of Chief Counsel attorney requests the Tax Court impose a penalty under IRC § 6673(a)(1), the decision to request the penalty does not require personal written supervisory approval.

ANALYSIS OF LITIGATED CASES

We analyzed 16 opinions issued between June 1, 2018, and May 31, 2019, in which courts addressed the IRC § 6673 penalty. Twelve of these opinions were issued by the Tax Court and four were issued by U.S. Courts of Appeals in cases brought by taxpayers seeking review of the Tax Court's imposition of the penalty. The Courts of Appeals sustained the Tax Court's position in all four cases. One decision issued

⁸ IRC § 7433(a) allows a taxpayer a civil cause of action against the United States if an IRS officer or employee intentionally or recklessly, or by reason of negligence, disregards any IRC provision or regulation promulgated under Title 26 of the United States Code in connection with collecting the taxpayer's federal tax liability.

⁹ IRC § 6673(b)(1).

¹⁰ IRC § 7482(c)(4) provides that the United States Courts of Appeals and the Supreme Court have the authority to impose a penalty in any case where the Tax Court's decision is affirmed and the appeal was instituted or maintained primarily for delay or the taxpayer's position in the appeal was frivolous or groundless.

¹¹ 28 U.S.C. § 1912 provides that when the Supreme Court or a United States Court of Appeals affirms a judgment, the court has the discretion to award to the prevailing party just damages for the delay, and single or double costs.

¹² Federal Rule of Appellate Procedure 38 provides that if a United States Court of Appeals determines an appeal is frivolous, the court may award damages and single or double costs to the appellee.

¹³ 151 T.C. 1 (2018). See National Taxpayer Advocate 2018 Annual Report to Congress 547-550.

¹⁴ IRC § 6751(b)(2) provides an exception for additions to tax imposed under §§ 6651, 6654, or 6655. Or any other penalty automatically calculated through electronic means.

by the Fifth Circuit Court of Appeals addressed both an analogous appellate level penalty and reviewed the Tax Court's imposition of the IRC § 6673 penalty.¹⁵

In five cases, the Tax Court imposed penalties under IRC § 6673, with the amounts ranging from \$1,000 to \$12,500. In three cases, taxpayers prevailed when the IRS asked the court to impose a penalty. In most of these cases the court warned the taxpayers not to bring similar arguments in the future.¹⁶ Thirteen taxpayers appeared *pro se* (represented themselves) while three were represented. The taxpayers presented a wide variety of arguments that the courts have generally rejected on numerous occasions. Upon encountering these arguments, the courts almost invariably cited the language set forth in *Crain v. Commissioner*:

We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit. The constitutionality of our income tax system — including the role played within that system by the Internal Revenue Service and the Tax Court — has long been established.¹⁷

In the cases we reviewed, taxpayers raised the following issues that the courts deemed frivolous. Consequently, the taxpayers were subject to a penalty under IRC § 6673(a)(1) or other appellate level sanctions (or, in some cases, the court warned that such arguments were frivolous and could lead to a penalty in the future if the taxpayers maintained the same positions):

- **Taxpayers are not taxpayers, are exempt from the income tax, are not required to file a return, or wages are not income:** Taxpayers in at least nine cases presented arguments that they are not taxpayers, they are exempt from tax for various reasons, or that wage income is not taxable.¹⁸ In one case, a taxpayer argued that only federal employees must pay income tax, and the court imposed a penalty of \$1,000.¹⁹
- **The Tax Court should garnish the Secretary of Treasury's Salary:** In an argument the Tax Court deemed “novel (but equally frivolous),” the taxpayers (married filing jointly) argued the court should garnish the salary of the Secretary of the Treasury in an amount equal to the taxpayers' unpaid taxes.²⁰ The taxpayers in this case further argued that U.S. currency is not lawful money and they have no obligation to file a return.

15 We identified one decision in which the Court of Appeals addressed both the Tax Court's imposition of the IRC § 6673 penalty and an analogous appellate level penalty. *Lange v. Comm'r*, 748 F. App'x. 635 (5th Cir. 2019) *aff'g* No.11492-17 (T.C. Apr. 27, 2018), *petition for cert. filed*, No. 19-366 (U.S. Sept. 19, 2019) (affirming § 6673 penalty of \$2,500 and imposing an additional \$8,000 penalty). For purposes of the total number of cases reviewed for this report, we counted this case once. We reviewed a total of 16 cases for this reporting cycle.

16 See, e.g., *Burnett v. Comm'r*, T.C. Memo. 2018-204. In declining to impose a penalty, the Tax Court noted that the taxpayer had not previously made frivolous claims before the Tax Court. Interestingly, the taxpayer had a second case decided on the same day in which he made similar arguments, and the Tax Court again declined to impose the penalty. *Burnett v. Comm'r*, T.C. Memo. 2018-205, *aff'd*, 2019 WL 4233804 (4th Cir. Sept. 6, 2019).

17 See, e.g., *Williams v. Comm'r*, 2018 WL 3301501 (T.C. July 3, 2018) (citing *Crain v. Comm'r*, 737 F.2d 1417, 1417-18 (5th Cir. 1984)).

18 See, e.g., *MacDonald v. Comm'r*, T.C. Memo. 2018-138.

19 *Weiler v. IRS*, 2019 WL 2346915 (N.D. Ohio May 31, 2019), *appeal docketed*, No. 19-3729 (6th Cir. Aug. 1, 2019).

20 See *Walquist v. Comm'r*, 2019 WL 962901 (T.C. Feb. 25, 2019).

CONCLUSION

Taxpayers in the cases analyzed this year presented the same arguments raised and repeated year after year, which the courts routinely and universally reject.²¹ Taxpayers avoided the IRC § 6673 penalty in only three cases we identified where the IRS requested it and often warned the taxpayers in these cases not to bring similar arguments in the future, demonstrating the willingness of the courts to penalize taxpayers when they offer frivolous arguments or institute a case merely for delay. Where the IRS has not requested the penalty, the court may nonetheless raise the issue *sua sponte*,²² and in all but one case, the court either imposed the penalty or cautioned the taxpayer that similar future behavior will result in a penalty.²³

As indicated by the accompanying Case Table 10 in Appendix 5, the penalty amount varies, regardless of the type of frivolous argument being raised. The Tax Court has indicated, however, that it can be lenient when it is the taxpayer's first court appearance.²⁴ Moreover, if the taxpayer has previously been sanctioned, the Tax Court may impose a higher penalty, but not necessarily anything close to the maximum.²⁵

Finally, the U.S. Courts of Appeals have shown their willingness to uphold the penalties imposed by the Tax Court without fail in the cases analyzed for the period between June 1, 2018, and May 31, 2019, continuing a trend of upholding all penalties in cases we have analyzed since June 1, 2005.

21 See, e.g., National Taxpayer Advocate 2016 Annual Report to Congress 503-506 (Most Litigated Issue: *Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions*).

22 See, e.g., *Venable v. Comm'r*, T.C. Memo. 2018-144 (court raised the issue *sua sponte* and warned the taxpayer not to assert similar arguments in the future).

23 The only case where this did not occur was in *Hartmann v. Comm'r*, T.C. Memo. 2018-154, *aff'd*, 2019 WL 4447378 (3d Cir. Sept. 17, 2019).

24 See, e.g., *Burnett v. Comm'r*, T.C. Memo. 2018-204.

25 See, e.g., *Wesley v. Comm'r*, T.C. Memo. 2019-18 (court imposed \$10,000 penalty after imposing \$7,500 and \$2,500 in earlier cases).