

**Legislative Recommendation #15****Amend IRC § 6212 to Provide That the Assessment of Foreign Information Reporting Penalties Under IRC §§ 6038, 6038A, 6038B, 6038C, and 6038D Is Subject to Deficiency Procedures****PRESENT LAW**

IRC § 6212 requires the IRS to issue a “notice of deficiency” before assessing certain liabilities. When the IRS issues a notice of deficiency, IRC § 6213 authorizes the taxpayer to petition the U.S. Tax Court within 90 days (or 150 days for notices addressed to a person outside the U.S.) to review the IRS determination.

IRC § 6671(a) authorizes the IRS to assess some penalties without first issuing a notice of deficiency.<sup>1</sup> These penalties are generally subject to judicial oversight only if taxpayers first pay the penalty and then incur the cost of taking the case to a U.S. district court or the U.S. Court of Federal Claims.<sup>2</sup> Although IRC § 6671(a) specifically references only the “penalties and liabilities provided by this subchapter” (*i.e.*, Chapter 68, Subchapter B of the IRC), the IRS takes the position that various international information reporting penalties in Chapter 61 are also immediately assessable without the issuance of a notice of deficiency, including the penalty under IRC § 6038 for failure to file Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations.<sup>3</sup>

**REASONS FOR CHANGE**

Taxpayers who are savvy enough to request an abatement based on reasonable cause or to request a conference with the IRS Independent Office of Appeals frequently obtain relief from assessable penalties, particularly where the IRS systemically imposes a penalty (rather than imposing it manually during an audit).<sup>4</sup> TAS has previously reported that the IRS abated between 71 percent and 88 percent of dollars systemically assessed under IRC §§ 6038 and 6038A. Specifying that deficiency procedures apply would prevent the systemic assessments the IRS so often abates, a process that unnecessarily consumes resources for the IRS and imposes undue burdens on taxpayers. Moreover, allowing taxpayers to seek judicial review without the necessity of prepayment would remove a restriction that Congress did not impose and that disproportionately affects taxpayers with limited resources.

The National Taxpayer Advocate does not agree with the IRS’s legal position that foreign information reporting penalties in Chapter 61 may be assessed without the issuance of a notice of deficiency under current

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- 1 These “assessable” penalties are generally those that are due and payable upon notice and demand. Unlike penalties subject to deficiency procedures, assessable penalties carry no rights to a 30-day letter, agreement form, or notice requirements prior to assessment. Internal Revenue Manual (IRM) 20.1.9.1.5, Common Terms and Acronyms (Jan. 29, 2021).
  - 2 See IRC § 7422 for requirements relating to refund suits. For legislative recommendations to address the issue of “pay to play” judicial review, see Legislative Recommendation: *Repeal Flora: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*, *infra*, and Legislative Recommendation: *Expand the Tax Court’s Jurisdiction to Hear Refund Cases and Assessable Penalties*, *infra*. See also National Taxpayer Advocate 2021 Purple Book, Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 94-97 (*Repeal Flora and Expand the Tax Court’s Jurisdiction, Giving Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*).
  - 3 The IRS also treats the penalties imposed under IRC §§ 6038A, 6038B, 6038C, and 6038D for failing to file various international information returns as assessable penalties. IRM 20.1.9.2 (Jan. 29, 2021); IRM 20.1.9.7.3 (Jan. 29, 2021).
  - 4 See National Taxpayer Advocate 2020 Annual Report to Congress 119, 124-125 (Most Serious Problem: *International: The IRS’s Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*) (reporting that when penalties under IRC §§ 6038 and 6038A are applied systemically, the abatement percentage, measured by number of penalties, ranges from 55 to 72 percent, and by dollar value of penalties ranges from 71 to 88 percent). The IRS abates manual assessments at rates ranging from 17 percent to about 39 percent by number, and from eight percent to about 66 percent by dollar.

law. In light of its position, however, the proposed legislative change would eliminate future litigation and enhance the taxpayers' *right to a fair and just tax system*.<sup>5</sup>

## RECOMMENDATION

- Amend IRC § 6212 to require the IRS to issue a notice of deficiency before assessing penalties under IRC §§ 6038, 6038A, 6038B, 6038C, and 6038D.

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5 See National Taxpayer Advocate 2020 Annual Report to Congress 119-131 (Most Serious Problem: *International: The IRS's Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*).