

Tax Court Imposing Code Sec. 6673 Penalty

By Keith Fogg and Tyler Moses*

Keith Fogg and Tyler Moses examine the history of the Code Sec. 6673 penalty and the imposition of the penalty over the past eight years.



Introduction

Practitioners do not pay much attention to the 6673 penalty because, except in rare instances, they do not make frivolous arguments; however, the Tax Court with a docket of over 70% *pro se* taxpayers must regularly deal with petitioners who make frivolous arguments. This article examines the penalty, the history of the penalty and the imposition of the penalty over the past eight years.

In most cases in which the Tax Court imposes the 6673 penalty, it does so by order and not by a written and published opinion.¹ The manner in which the Tax Court imposes the penalty impacts the ability to track the penalty. Starting in 2011 the Tax Court introduced a feature on its web page allowing the research of orders by key word. This feature permits interesting research on some aspects of the court that previously would have required a laborious effort to uncover the court's practice.² In researching this article, we used that feature to determine the number of times the Tax Court has imposed the 6673 penalty during the past eight plus years. As with most inquiries of this type, the results provided a glimpse of the court's method for dealing with a problem that might otherwise go unnoticed.

The Penalty

This article will discuss 6673(a)(1) and the penalties imposed under the three subparagraphs thereunder.

Code Sec. 6673 provides for the imposition of several additional penalties which deserve brief mention before addressing the penalty upon which this

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article focuses. In addition to the penalties imposed by 6673(a)(1) the code section describes four other functions of the section. First, 6673(a)(2) allows the Tax Court to impose a penalty on a Tax Court practitioner who has “multiplied the proceedings in any case unreasonably and vexatiously”³ This provision imposes the liability on a private practitioner personally and on the United States if it is the Chief Counsel, IRS attorney who misbehaves. Second, 6673(b)(1) imposes a penalty for bringing a frivolous or groundless 7433 case for unauthorized collection actions.⁴ Third, 6673(b)(2) does not impose a penalty but allows for the IRS to assess and use ordinary federal tax collection procedures to collect “any monetary sanctions, penalties, or costs awarded by the court [other than the Tax Court] to the United States.”⁵ Fourth, 6673(b)(3) in a similar fashion to subparagraph (2) provides for a method of assessment and collection of penalties imposed if a United States Court of Appeals or the Supreme Court imposes monetary sanctions, penalties, or court costs to the United States.⁶

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Having described the sections of 6673 this article will not address, this sub-heading of the article will now focus on the portion of the 6673 penalty of concern herein. Code Sec. 6673(a)(1) provides:

(a) Tax court proceedings

(1) Procedures instituted primarily for delay, *etc.*

Whenever it appears to the Tax Court that—

- (A) Proceedings before it have been instituted or maintained by the taxpayer primarily for delay,
- (B) The taxpayer’s position in such proceeding is frivolous or groundless, or
- (C) The taxpayer unreasonably failed to pursue available administrative remedies; the Tax Court, in its decision, may require the

taxpayer to pay to the United States a penalty not in excess of \$25,000.

The keys to the imposition of the 6673 penalty are delay, frivolous proceeding and failure to pursue available administrative remedies. Only in rare cases of the imposition of this penalty would pursuit of administrative remedies benefit the taxpayer. In the vast majority of cases the taxpayer has a weak or non-existent case on the merits. In these situations, little benefit to the taxpayer will come from pursuing administrative remedies since the IRS will simply deny the taxpayer the administrative relief requested. So, this discussion will focus on delay and frivolous positions. The combination of the two usually precedes the imposition of the 6673 penalty.

A typical case involves a taxpayer who makes the same losing argument (or one very similar) to an argument made in a previous trip to the Tax Court or who continues to make the argument after the judge has issued a warning from the bench that the argument has no merit and that the taxpayer should move on from that argument or face sanctions. Very rarely does the Tax Court impose this penalty without warning. The court generally imposes the penalty *sua sponte* without prompting from the IRS and, generally, views this penalty as outside the scope of comment or argument by the IRS.⁷

A recent case provides a typical example of the facts regarding the imposition of the 6673 penalty although it may involve more egregious facts than most.⁸ The taxpayer filed a collection due process (CDP) case in the Tax Court. The CDP provisions seek to permit a taxpayer the opportunity to discuss with the court the collection action proposed by the IRS. Instead of discussing collection the taxpayer argued that no contract exists between himself and the IRS, that the tax was fraudulently assessed, that he objects to the U.S. financial system, that he objects to his status as a citizen of the United States, that he objects to the Social Security system, and that he desires to rescind his signature on all IRS Forms 1040 he filed because he believes he is no longer legally required to file such forms.

These types of arguments have no realistic chance of success and waste the time of the court. The court gave him a warning prior to imposition of the \$25,000 penalty in the hopes that he might reform his actions but, here, the court faced a frequent flier in frivolous arguments for whom such admonishments did not provide much of a deterrent. He had received four such penalties previously:

- In docket #7221-07L, the Tax Court imposed a \$5,000 penalty—Judge Kroupa first states, “Petitioner deserves a penalty under section 6673(a)(1), and that penalty should be substantial, if it is to have the desired deterrent effect.”

- In docket #26157-08, a \$7,500 penalty—Special Trial Judge Armen stated “The record in this case convinces us that petitioner was not interested in disputing the merits of the deficiency in income tax determined by respondent in the notice of deficiency. Rather, the record demonstrates that petitioner regards this case as a vehicle to protest the tax laws of this country and espouse his own misguided views. We are also convinced that petitioner instituted and maintained this proceeding primarily, if not exclusively, for purposes of delay.”
- In docket #8771-08L, a \$10,000 penalty—Special Trial Judge Armen basically repeats himself and imposes the penalty again in this CDP case.
- In docket #22711-09L, a maximum penalty of \$25,000—Judge Halpern in a bench opinion states “[w]e are convinced that Petitioner has no legitimate grounds for challenging the notice. Rather, Petitioner’s arguments in this case and Petitioner’s previous appearances before this Court demonstrate that Petitioner regards this case as a vehicle to protest the tax laws of this country and espouse his own misguided views. Based on well-established law, Petitioner’s position is frivolous and groundless. We are also convinced that Petitioner instituted and maintained this proceeding primarily, if not exclusively, for purposes of delay. Having to deal with this matter wasted the Court’s tie, as well as Respondent’s.” Because of the prior penalty impositions by other members of the court Judge Halpern concluded by stating “[p]etitioner has not been deterred, and we think it appropriate to penalize him to the maximum extent possible. We therefore shall impose on him a 6673(a)(1) penalty of \$25,000.”

While Mr. Hyatt’s case may provide an example of a stubborn taxpayer than most, his arguments and his method of making the arguments align nicely with typical Code Sec. 6673 cases. His persistence with frivolous arguments does raise issues of the effectiveness of the Code Sec. 6673 penalty but that is not the focus of this article.⁹

The Tax Court in the past few years has grappled with the impact of Code Sec. 6751(b) and the requirement for managerial approval prior to the imposition of a penalty.¹⁰ As a part of dealing with the scope of Code Sec. 6751(b) the Tax Court examined whether that section had any meaning with respect to its imposition of the Code Sec. 6673 penalty. In the case of *Williams*, the Tax Court stated that Code Sec. 6673(a)(1) gives the authority to impose the penalty solely to the Tax Court, and permits the Tax Court to impose it either at the request of the Commissioner or *sua sponte*.¹¹ It examined the legislative history of Code Sec. 6751(b)(1) and Code Sec. 6673(a)(1) to determine whether the two sections can coexist

or whether Code Sec. 6751(b)(1) supersedes Code Sec. 6673(a)(1). Based on the legislative history of the two sections, the Tax Court held that Code Sec. 6751(b)(1) does not apply to the Tax Court when it imposes a penalty pursuant to Code Sec. 6673(a)(1). That decision harmonizes the frivolous return penalty perfectly with the Congressional intent to keep the IRS from using penalties as a bargaining chip since the imposition of this penalty by the court has nothing to do with a bargaining chip regarding the outcome of the tax liability.

The History of the Penalty

The first version of Code Sec. 6673 was introduced in the Internal Revenue Code of 1954.¹² The title of the section was “Damages Assessable for Instituting Proceedings Before the Tax Court Merely for Delay.” It read:

Whenever it appears to the Tax Court that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of \$500 shall be awarded to the United States by the Tax Court in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the Secretary or his delegate and shall be collected as a part of the tax.

The Tax Reform Act of 1976 did not change the language of Code Sec. 6673.¹³ There were no amendments to the section until the Tax Equity and Fiscal Responsibility Act of 1982.¹⁴ When this bill was introduced to the House of Representatives in November of 1981, it was initially proposed as a means to make miscellaneous changes in the tax law.¹⁵ In addition to replacing the “Merely for Delay” language in the section title to “Primarily for Delay, Etc.,” the first sentence of the section was amended as follows:

Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer’s position in such proceedings is frivolous or groundless, damages in an amount not in excess of \$5,000 shall be awarded to the United States by the Tax Court in its decision.

This increase of the maximum damages amount reflects the changing nature of the economy as it had evolved over the last 27 years. Further, the legislature also expanded the scope of the statute to include proceedings that were deemed to be a waste of the Tax Court’s time and resources. After passing the House in early December of 1981, the bill moved to the Senate where it was referred to the Committee on Finance.¹⁶

It ultimately passed in July 1982 when it was codified as the Tax Equity and Fiscal Responsibility Act of 1982.

Congress again amended Code Sec. 6673 while working on the Tax Reform Act of 1986.¹⁷ In September 1986, Congress added an additional phrase to broaden the scope of when the Tax Court could implement the penalty which read: "... or that the taxpayer unreasonably failed to pursue available administrative remedies."¹⁸ This allowed the Tax Court further discretion for cases in which taxpayers would bring a case without attempting to resolve the discrepancy.

The creation of the Technical and Miscellaneous Revenue Act of 1988 further expanded the penalty's coverage of taxpayer claims.¹⁹ This act was brought about to make technical corrections related to the Tax Reform Act of 1986. Prior to TAMRA, Code Sec. 6673 was not broken into subsections as it is today. In August 1988, the legislature inserted subsection (a) to provide guidance for the section generally. Congress also amended the section to include subsection (b), "Claims Under Section 7433," which read:

Whenever it appears to the court that the taxpayer's position in proceedings before the court instituted or maintained by such taxpayer under section 7433 is frivolous or groundless, damages in an amount not in excess of \$10,000 shall be awarded to the United States by the court in the court's decision. Damages so awarded shall be assessed at the same time as the decision and shall be paid upon notice and demand from the Secretary.²⁰

This amendment elevated the maximum amount of damages to \$10,000 for claims brought specifically under Code Sec. 7433. In September of 1988, the Senate amended the final sentence of subsection (b) to read: "Damages so awarded shall be assessed at the same time as the deficiency, if any, and shall be paid upon notice and demand from the Secretary and shall be collected as part of the tax."²¹ This amendment specified further that these damages were to be paid at the time of determination.

The passing of the Omnibus Budget Reconciliation Act of 1989²²—initially proposed by Congress in October of 1989—amended Code Sec. 6673 as it reads today.

In 2018 the number of 6673 penalties imposed by the Tax Court reached a level that it attracted the attention of the National Taxpayer Advocate in her annual report.²³ The report on the 6673 penalties provides some background on the number and types of cases. While this article focuses on the number of 6673 penalties over a period of time, the NTA report provides background about the individuals penalized. Although the annual report has existed for almost 20 years, the inclusion of 6673 in the report for the first time provides the perfect segue from the history to the numbers.

The Study Results

The information below is an overview of cases in which the Tax Court imposed a section 6673 penalty on a taxpayer by order or opinion.²⁴

Cases by Year

— 2011: 13 cases²⁵

- Carluzzo—1 case
- Cohen—1 case
- Colvin—1 case
- Gale—1 case
- Gustafson—1 case
- Holmes—1 case
- Marvel—1 case
- Morrison—2 cases
- Ruwe—1 case
- Thornton—1 case
- Wells—2 cases

— 2012: 20 cases

- Carluzzo—1 case
- Cohen—1 case
- Gale—1 case
- Gustafson—3 cases
- Halpern—2 cases
- Marvel—3 cases
- Morrison—3 cases
- Panuthos—1 case
- Ruwe—1 case
- Thornton—3 cases
- Vazquez—1 case

— 2013: 17 cases

- Buch—2 cases
- Carluzzo—3 cases
- Cohen—1 case
- Goeke—1 case
- Gustafson—1 case
- Halpern—1 case
- Lauber—1 case
- Marvel—3 cases
- Ruwe—2 cases
- Thornton—1 case
- Wells—1 case

— 2014: 16 cases

- Buch—1 case
- Colvin—1 case
- Foley—1 case
- Gerber—1 case
- Goeke—1 case

- Guy—1 case
- Halpern—3 cases
- Holmes—1 case
- Marvel—4 cases
- Morrison—1 case
- Nega—1 case
- **2015: 18 cases**
 - Buch—2 cases
 - Carluzzo—3 cases
 - Cohen—2 cases
 - Gustafson—2 cases
 - Halpern—1 case
 - Holmes—1 case
 - Lauber—3 cases
 - Marvel—1 case
 - Pugh—2 cases
 - Ruwe—1 case
- **2016: 19 cases**
 - Buch—1 case
 - Carluzzo—2 cases
 - Cohen—1 case
 - Gustafson—2 cases
 - Guy—1 case
 - Halpern—1 case
 - Holmes—1 case
 - Lauber—3 cases
 - Marvel—1 case
 - Morrison—2 cases
 - Nega—1 case
 - Pugh—2 cases
 - Thornton—1 case
- **2017: 14 cases**
 - Ashford—1 case
 - Buch—1 case
 - Cohen—1 case
 - Foley—1 case
 - Halpern—1 case
 - Lauber—2 cases
 - Marvel—1 case
 - Morrison—1 case
 - Nega—2 cases
 - Pugh—1 case
 - Thornton—1 case
 - Vazquez—1 case
- **2018: 13 cases**
 - Buch—3 cases
 - Guy—3 cases
 - Halpern—2 cases
 - Leyden—1 case
 - Marvel—1 case
 - Panuthos—1 case

- Pugh—1 case
- Ruwe—1 case
- **2019: 22 cases²⁶**
 - Carluzzo—3 cases
 - Cohen—1 case
 - Colvin—1 case
 - Foley—2 cases
 - Gale—1 case
 - Guy—1 case
 - Halpern—2 cases
 - Lauber—2 cases
 - Marvel—2 cases
 - Panuthos—1 case
 - Paris—1 case
 - Pugh—4 cases
 - Thornton—1 case
- TOTAL: 152 cases with penalties imposed by 25 judges from January 1, 2011 – December 31, 2019

Cases by Judge

- Judge Ashford—1 case
 - Hernandez v. Commissioner – Docket No. 3601-14 (2017)
 - \$2,584 in respondent’s expenses collected in the same manner as a \$6673 penalty
- Judge Buch—10 cases
 - Polk v. Commissioner – Docket No. 7946-12L (2013)
 - \$1,000 penalty
 - Byers v. Commissioner – Docket No. 15841-11 (2013)
 - \$5,000 penalty
 - Waltner v. Commissioner – Docket No. 21953-12L (2014)
 - \$2,500 penalty
 - Sykes v. Commissioner – Docket No. 20594-13 (2015)
 - \$5,000 penalty
 - Briggs v. Commissioner – Docket No. 11940-12 (2015)
 - \$500 penalty imposed
 - Blair v. Commissioner – Docket No. 17636-14 (2016)
 - \$10,000 penalty (via opinion)
 - Jagos v. Commissioner – Docket No. 476-16 (2017)
 - \$1,000 penalty
 - Norris v. Commissioner – Docket Nos. 6997-15, 7032-15, 7033-15 (2018)
 - \$5,000 penalty

- Ebanks v. Commissioner – Docket No. 15605-14 (2018)
 - \$5,000 penalty
- Meintz v. Commissioner – Docket No. 25321-16 (2018)
 - \$1,000 penalty
- Judge Carluzzo—13 cases
 - Toussaint v. Commissioner – Docket No. 18914-10S (2011)
 - \$1,000 penalty imposed
 - Herriman v. Commissioner – Docket No. 25048-11 (2012)
 - \$2,500 penalty
 - Osterbur v. Commissioner – Docket No. 11108-12 L (2013)
 - \$1,000 penalty imposed
 - Mills v. Commissioner – Docket No. 20500-11 (2013)
 - \$5,000 penalty imposed
 - Reyes v. Commissioner – Docket No. 5881-13L (2013)
 - \$2,500 penalty imposed
 - Nelson v. Commissioner – Docket No. 26547-12 (2015)
 - \$10,000 penalty imposed
 - Ramalho v. Commissioner – Docket No. 24511-15 (2015)
 - \$7,500 penalty imposed
 - McGhan v. Commissioner – Docket No. 10989-14 (2015)
 - \$6,000 penalty imposed
 - Boysen v. Commissioner – Docket No. 24330-15 (2016)
 - \$2,500 penalty
 - Leyshon v. Commissioner – Docket No. 24310-15 (2016)
 - \$2,500 penalty
 - Nitschke v. Commissioner – Docket No. 11246-18 (2019)
 - \$2,500 penalty
 - Fujita v. Commissioner – Docket No. 296-19 (2019)
 - \$1,500 penalty
 - Brown v. Commissioner – Docket No. 12646-19 (2019)
 - \$500 penalty
- Judge Cohen—8 cases
 - Hewko v. Commissioner – Docket No. 13274-10L (2011)
 - \$10,000 penalty
 - Reno v. Commissioner – Docket No. 4147-11 (2012)
 - \$10,000 penalty
 - Spahr v. Commissioner – Docket No. 25095-11L (2013)
 - \$10,000 penalty
 - Banister v. Commissioner – Docket No. 30500-12 (2015)
 - \$25,000 penalty
 - Bennett v. Commissioner – Docket No. 15929-10 (2015)
 - \$25,000 penalty
 - Foryan v. Commissioner – Docket No. 848-15 (2016)
 - \$10,000 penalty
 - Ferguson v. Commissioner – Docket No. 11004-16 (2017)
 - \$5,000 penalty
 - Calpino v. Commissioner – Docket No. 11368-18L (2019)
 - \$25,000 penalty
- Judge Colvin—3 cases
 - Ramalho v. Commissioner – Docket No. 10927-11 (2011)
 - \$5,000 penalty
 - Sykes v. Commissioner – Docket No. 9793-13 (2014)
 - \$25,000 penalty
 - Worsham v. Commissioner – Docket No. 26210-16 (2019)
 - \$3,000 penalty (via opinion)
- Judge Foley—4 cases
 - Winterroth v. Commissioner – Docket No. 13833-12 (2014)
 - \$10,000 penalty (via opinion)
 - Blair v. Commissioner – Docket No. 21728-14 (2017)
 - \$5,000 penalty imposed
 - Ramer & Ramer v. Commissioner – Docket No. 22587-18 (2019)
 - \$10,000 penalty imposed
 - Nabaya v. Commissioner – Docket No. 7207-19 (2019)
 - \$1,000 penalty imposed
- Judge Gale—3 cases
 - Klein v. Commissioner – Docket No. 1382-10 (2011)
 - \$1,000 penalty
 - Wolfe v. Commissioner – Docket No. 6915-02 (2012)
 - \$5,000 penalty

- Hyatt v. Commissioner – Docket No. 17872-18L (2019)
 - \$25,000 penalty
- Judge Gerber—1 case
 - Duggan v. Commissioner – Docket No. 3771-12 (2014)
 - \$5,000 penalty
- Judge Goeke—2 cases
 - Riezinger-Von Reitz v. Commissioner – Docket No. 1984-12 (2013)
 - \$15,000 penalty
 - Gieser v. Commissioner – Docket No. 9863-13 (2014)
 - \$5,000 penalty
- Judge Gustafson—9 cases
 - Wnuck v. Commissioner – Docket No. 26068-09 (2011)
 - \$5,000 penalty (via opinion)
 - Smalley v. Commissioner – Docket No. 13625-11 (2012)
 - \$2,500 penalty
 - Skarbinski v. Commissioner – Docket No. 18189-11 (2012)
 - \$1,000 penalty
 - Ali v. Commissioner – Docket No. 11866-11 (2012)
 - \$2,228 penalty imposed
 - Roe v. Commissioner – Docket No. 19423-12 (2013)
 - \$40,000 penalty imposed (two of \$20,000 for each petitioner)
 - Ramalho v. Commissioner – Docket Nos. 18058-14L, 18987-14 (2015)
 - \$10,000 (\$5,000 for each case)
 - Leyshon v. Commissioner – Docket No. 20983-13 (2015)
 - \$2,000 penalty (via opinion)
 - Scott v. Commissioner – Docket No. 26717-14 (2016)
 - \$6,000 penalty
 - Gattie v. Commissioner – Docket No. 7077-15 (2016)
 - \$12,500 penalty
- Judge Guy—6 cases
 - Leyva v. Commissioner – Docket No. 3223-13 (2014)
 - \$15,000 penalty imposed
 - Sykes v. Commissioner – Docket No. 24394-15 (2016)
 - \$15,000 penalty
- Chapman v. Commissioner – Docket No. 3007-18 (2018)
 - \$3,000 penalty
- Ryskamp v. Commissioner – Docket No. 3899-18 (2018)
 - \$1,000 penalty imposed
- Marvin v. Commissioner – Docket No. 23092-17 L (2018)
 - \$500 penalty imposed
- Walquist v. Commissioner – Docket No. 12890-19S (2019)
 - \$5,000 penalty
- Judge Halpern—13 cases
 - Roye v. Commissioner – Docket No. 9913-10 (2012)
 - \$15,000 penalty
 - Winslow v. Commissioner – Docket No. 18177-11 (2012)
 - \$2,500 penalty
 - Gieser v. Commissioner – Docket No. 10961-12L (2013)
 - \$5,000 penalty
 - Rader v. Commissioner – Docket No. 11409-11, 11476-11, 27722-11 (2014)
 - \$10,000 penalty (via opinion)
 - Jones v. Commissioner – Docket No. 29579-09, 23503-10 (2014)
 - \$50,000 penalty (\$25,000 each)
 - Davis v. Commissioner – Docket No. 2257-13 (2014)
 - \$2,500 penalty
 - Wesley v. Commissioner – Docket No. 6560-14L (2015)
 - \$7,500 penalty
 - Best v. Commissioner – Docket No. 26662-10L (2016)
 - \$5,000 penalty
 - \$19,837.50 penalty against petitioners counsel
 - Gardner v. Commissioner – Docket No. 22795-16 L (2017)
 - \$25,000 penalty imposed
 - Lange v. Commissioner – Docket No. 11492-17L (2018)
 - \$2,500 penalty
 - Walker v. Commissioner – Docket Nos. 16108-14L, 9435-15L (2018)
 - \$10,000 penalty (\$5,000 for each case)
 - Harris v. Commissioner – Docket No. 3596-18L (2019)
 - \$15,000 penalty

- Smith v. Commissioner – Docket No. 6105-16 (2019)
 - \$2,500 penalty (via opinion)
- Judge Holmes—4 cases
 - Macdougall v. Commissioner – Docket No. 1754-11 (2011)
 - \$500 penalty
 - Gieser v. Commissioner – Docket No. 1697-13 (2014)
 - \$5,000 penalty
 - Klingenberg v. Commissioner – Docket No. 17632-13L (2015)
 - \$10,000 penalty imposed
 - Wright v. Commissioner – Docket No. 18508-14 (2016)
 - \$100 penalty
- Judge Lauber—11 cases
 - Golub v. Commissioner – Docket No. 8431-12L (2013)
 - \$10,000 penalty (note: opinion originally assessed \$15k but order reduced to \$10k)
 - Balice v. Commissioner – Docket No. 22235-13 (2015)
 - \$25,000 penalty
 - Kanofsky v. Commissioner – Docket No. 21821-13L (2015)
 - \$20,000 penalty
 - Patton v. Commissioner – Docket No. 16365-12L (2015)
 - \$3,500 penalty
 - May v. Commissioner – Docket No. 14545-12L (2016)
 - \$500 penalty
 - \$7,188 penalty for petitioners counsel
 - Briggs v. Commissioner – Docket No. 3845-14 (2016)
 - \$3,000 penalty
 - Bruhwiler v. Commissioner – Docket No. 26467-14 (2016)
 - \$3,500 penalty
 - Gardner v. Commissioner – Docket No. 11669-16L (2017)
 - \$10,000 penalty
 - Murray v. Commissioner – Docket No. 23464-15 (2017)
 - \$1,500 penalty
 - Wesley v. Commissioner – Docket No. 18174-17L (2019)
 - \$10,000 penalty
- Walquist v. Commissioner – Docket No. 25257-17 (2019)
 - \$12,500 penalty
- Judge Leyden—1 case
 - Herndon v. Commissioner – Docket No. 21071-17L (2018)
 - \$1,000 penalty
- Judge Marvel—17 cases
 - Holmes v. Commissioner – Docket Nos. 10381-09, 14995-09, 17840-09 (2011)
 - \$75,000 (\$25,000 for each case, via opinion)
 - Barash v. Commissioner – Docket Nos. 25606-10, 11176-11 (2012)
 - \$5,000 penalty (\$2,500 for each case)
 - Southwell v. Commissioner – Docket No. 21117-11 (2012)
 - \$3,000 penalty
 - Nelson v. Commissioner – Docket No. 21102-10 (2012)
 - \$2,000 penalty (via opinion)
 - Hill v. Commissioner – Docket No. 15452-10 L (2013)
 - \$5,000 penalty imposed
 - Hill v. Commissioner – Docket Nos. 221-10, 15501-10 (2013)
 - \$20,000 penalty (\$10,000 for each case, via opinion)
 - Hill v. Commissioner – Docket No. 1465-12 (2013)
 - \$10,000 penalty (via opinion)
 - Bigley v. Commissioner – Docket Nos. 17747-12 L, 17529-12L, 17600-12L (2014)
 - \$10,000 penalty imposed
 - Jutkowitz v. Commissioner – Docket No. 9897-13 (2014)
 - \$10,000 penalty imposed
 - Taylor v. Commissioner – Docket No. 10253-13 (2014)
 - \$10,000 penalty
 - Mangan v. Commissioner – Docket No. 19000-13 (2014)
 - \$5,600 penalty for petitioners counsel
 - Norris v. Commissioner – Docket No. 7682-14L (2015)
 - \$1,000 penalty
 - Foryan v. Commissioner – Docket No. 14909-14 (2016)
 - \$10,000 penalty

- Waltner v. Commissioner – Docket No. 1729-13 (2017)
 - \$10,000 penalty
 - \$15,500 penalty for petitioners counsel
- Schneider v. Commissioner – Docket No. 10660-17L (2018)
 - \$15,000 penalty
- Eldridge v. Commissioner – Docket No. 14744-18 (2019)
 - \$3,000 penalty
- Gilmore v. Commissioner – Docket No. 6341-18 (2019)
 - \$5,000 penalty
- Judge Morrison—9 cases
 - Burchfield v. Commissioner – Docket No. 16676-09 (2011)
 - \$5,000 penalty (via opinion)
 - Covington v. Commissioner – Docket No. 17624-09L (2011)
 - \$5,000 penalty (via opinion)
 - Fleming v. Commissioner – Docket No. 14357-10L (2012)
 - \$1,500 penalty imposed
 - Buchanan v. Commissioner – Docket No. 11735-11L (2012)
 - \$5,000 penalty
 - Alderman v. Commissioner – Docket No. 28696-10 (2012)
 - \$4,000 penalty
 - Streiffert v. Commissioner – Docket No. 24162-10L (2014)
 - \$15,000 penalty
 - Lovely v. Commissioner – Docket No. 6570-15 L (2016)
 - \$2,500 penalty imposed
 - Schneider v. Commissioner – Docket Nos. 17566-14, 29122-14 (2016)
 - \$5,000 penalty (\$2,500 each)
 - Amnesty National v. Commissioner – Docket No. 13961-15 L (2017)
 - \$200 penalty imposed
- Judge Nega—4 cases
 - Bowers v. Commissioner – Docket No. 10137-13 (2014)
 - \$2,500 penalty
 - Berglund v. Commissioner – Docket No. 20782-15 L (2016)
 - \$2,500 penalty imposed
 - McBride v. Commissioner – Docket No. 15477-15 (2017)
 - \$3,000 penalty imposed
 - Byers v. Commissioner – Docket No. 24354-14L (2017)
 - \$10,000 penalty (via opinion)
- Judge Panuthos—3 cases
 - Steele v. Commissioner – Docket No. 17903-11 (2012)
 - \$2,000 penalty
 - Rader v. Commissioner – Docket No. 12507-17 L (2018)
 - \$5,000 penalty imposed
 - Ryskamp v. Commissioner – Docket No. 6595-19 (2019)
 - \$2,000 penalty
- Judge Paris—1 case
 - Schneider v. Commissioner – Docket No. 15652-17 (2019)
 - \$5,849 penalty imposed
- Judge Pugh—10 cases
 - Myers v. Commissioner – Docket No. 30321-13L (2015)
 - \$5,000 penalty imposed
 - Foryan v. Commissioner – Docket No. 10732-13 (2015)
 - \$1,000 penalty
 - Stanley v. Commissioner – Docket No. 7238-13L (2016)
 - \$10,000 penalty
 - Nitschke v. Commissioner – Docket No. 23164-14 (2016)
 - \$10,000 penalty
 - Fleming v. Commissioner – Docket No. 4925-12L (2017)
 - \$5,000 penalty
 - MacDonald v. Commissioner – Docket Nos. 5503-16, 17660-16. (2018)
 - \$20,000 penalty imposed (\$10,000 each)
 - Sykes v. Commissioner – Docket No. 19706-17 L (2019)
 - \$25,000 penalty imposed
 - Staples v. Commissioner – Docket No. 24524-15 (2019)
 - \$1,000 penalty
 - Gonsoulin v. Commissioner – Docket No. 18429-17L (2019)
 - \$5,000 penalty
 - Wells v. Commissioner – Docket No. 22852-17 (2019)
 - \$10,000 penalty (via opinion)

- Judge Ruwe—6 cases
 - Byrd v. Commissioner – Docket No. 12885-09L (2011)
 - 2,000 penalty (via opinion)
 - Garber v. Commissioner – Docket No. 2863-11 (2012)
 - \$1,000 penalty
 - Snow v. Commissioner – Docket No. 24783-09 (2013)
 - \$8,000 penalty
 - Zook v. Commissioner – Docket No. 9773-12L (2013)
 - \$2,000 penalty (via opinion)
 - Kanofsky v. Commissioner – Docket No. 22008-13L (2015)
 - \$20,000 penalty
 - Williams v. Commissioner – Docket No. 30487-15 (2018)
 - \$2,000 penalty
- Judge Thornton—8 cases
 - Pappert v. Commissioner – Docket No. 18010-10 (2011)
 - \$3,000 penalty
 - McGhan v. Commissioner – Docket No. 22880-11 (2012)
 - \$25,000 penalty imposed
 - Jackson v. Commissioner – Docket No. 17268-08L (2012)
 - \$15,000 penalty (via opinion)
 - Parker v. Commissioner – Docket No. 3743-10 (2012)
 - \$3,000 penalty (via opinion)
 - Curtis v. Commissioner – Docket No. 5657-10 (2013)
 - \$25,000 penalty
 - Kanofsky v. Commissioner – Docket Nos. 18182-15, 18162-15, 18163-15 (2016)
 - \$24,000 penalty (\$8,000 each)
 - Ertelt v. Commissioner – Docket No. 10739-14L (2017)
 - \$1,000 penalty
 - Combs v. Commissioner – Docket No. 22748-14 (2019)
 - \$2,500 penalty
- Judge Vazquez—2 cases
 - Caton v. Commissioner – Docket No. 5071-10 (2012)
 - \$5,000 penalty
 - Williams v. Commissioner – Docket No. 13829-15L (2017)
 - \$5,000 penalty

- Judge Wells—3 cases
 - Mooney v. Commissioner – Docket No. 8128-09 (2011)
 - \$2,000 penalty (via opinion)
 - Barry v. Commissioner – Docket No. 4754-07L, 25882-08L, 5026-07L (2011)
 - \$40,000 penalty (\$20k & then \$10k each, respectively)
 - Campbell v. Commissioner – Docket No. 13687-11L (2013)
 - \$10,000 penalty

Two things jump out about the imposition of the penalty that deserve mention. First, although 21 Tax Court judges imposed the penalty in an order and six additional judges imposed the penalty in an opinion, the number of judges imposing the penalty during this period represents about two thirds of the total number of Tax Court judges during that period. At full strength the Tax Court has 19 Presidentially appointed judges.²⁷ It also has several senior judges and several special trial judges.²⁸ At any given point during this period there may have been 30 or more judges on the court with the power to impose this penalty.²⁹ Over the arc of years there were more than 40 judges sitting on the court who could have imposed the 6673 penalty. So, it is interesting that about one third of the Tax Court judges never impose this penalty and many of the judges who imposed it only did so sparingly during the study period.³⁰ This indicates that to provoke a Tax Court judge into imposing this penalty the taxpayer must really try. That is consistent with my non-empirical observations from attending Tax Court trials and calendar calls over four decades.

The second observation from these data concerns the relative consistency of the imposition of the 6673 penalty from the beginning of the observation period until 2018. The variation in the number of cases in which the court imposed the penalty was relatively small during the first six years of the study. During those years taxpayers filed approximately 30,000 new Tax Court petitions each year.³¹

Conclusion

For a court that has a docket in which 70% of the petitioners represent themselves and handling a subject matter deeply rooted in protest against the system, the number of 6673 penalties imposed by the Tax Court remains remarkably low.³² Even the recent uptick in imposition of the penalty does not reflect a high number of penalty cases given the overall number of cases at the Tax Court and the number of times the judges must

deal with individuals who have an agenda for resolving the case not rooted in tax jurisprudence norms. The relatively low number of 6673 penalties results because of the patience of the Tax Court judges and their efforts to work with difficult taxpayers without resorting to extraordinary efforts. The statistics here demonstrate

again the welcoming nature of the Tax Court and its willingness to work with unrepresented petitioners.³³ Over the decades in which I have observed the court, I would have imposed the 6673 penalty and dismissed the taxpayer on many occasions in which the Tax Court judge displayed remarkable patience.

ENDNOTES

* Fogg is also a founder of the tax procedure blog procedurallytaxing.com. Fogg and Tyler met this summer while Tyler was interning at the Community Tax Law Project in Richmond, Virginia and Keith was researching a paper about Nina Olson the founder of CTLP. This paper was also assisted by William Schmidt who found the 6673 case discussed in this article while writing about designated orders issued by the Tax Court for procedurallytaxing.com.

¹ This article examines the imposition of the 6673 penalty in orders and in opinions. Sometimes the two overlap when a Tax Court judge decides to publish an order as an opinion. Orders have no precedential value and opinions have varying levels of precedential value depending on the type of opinion.

² For another article based on this function see T. Keith Fogg, *Tax Decisions Shall Be Made as Quickly as Practicable—A Discussion of Bench Opinions*, J. TAX PRAC. & PROC., 2015, at 49, available online at https://works.bepress.com/t_keith_fogg/29/. As with this article, the one on bench opinions showed some interesting trends in the Tax Court. Only a few of the judges used bench opinions. Almost a third of all bench opinions during the studied period were issued by one judge. Some similarities exist with this study as not all judges impose 6673 penalties even though one would suspect that all see at least some frivolous arguments and a few judges impose the lion's share of this penalty.

³ See *D. MacPherson v. Commissioner of Internal Revenue*, CA-9, 2018-2 USTC ¶150,304, 702 FedAppx 621. See also *J.A. Grimes v. CIR*, CA-9, 87-1 USTC ¶9106, 806 F2d 1451, 1454 (standard of review); *Moore v. Keegan Mgmt. Co. (In re Keegan Mgmt. Co. Sec. Litig.)*, CA-9, 78 F3d 431, 436 (1996).

⁴ See *Hines*, 658 FSupp2d 139 (D.D.C. 2009). The same taxpayers who might make a frivolous argument in the Tax Court find suing the IRS over the collection of their taxes an appropriate means of dealing with the problem. This subparagraph permits the district court to impose a penalty of up to \$10,000 upon such a taxpayer.

⁵ A conclusory statement in *Heger*, 114 FedCl 204 (2014) mentions the government may collect it but does not provide analysis. In many ways this provision creates a collection mechanism similar to the one created for restitution payments in 2010. This allows the IRS to collect these liabilities much more easily and

avoids cumbersome collection procedures necessary under the general rules governing the collection of debts to the government. See Keith Fogg, *Interest and Penalties on Restitution Based Assessments* on July 31, 2019, at <https://procedurallytaxing.com/interest-and-penalties-on-restitution-based-assessments/> for a discussion of restitution collection provisions and links to other posts concerning the collection of restitution based assessments.

⁶ A search did not turn up any useful cases in which this subsection was applied.

⁷ Chief Counsel, IRS attorneys decide to seek sanctions under Code Sec. 6673(a)(1) based on CCDM 35.10.2 (Aug. 11, 2004). If the Chief Counsel attorney seeks sanctions against any attorney or other person authorized to practice before the Tax Court, under Code Sec. 6673(a)(2), the Chief Counsel attorney's request for sanctions must be reviewed by the designated agency sanctions officer (currently the Associate Chief Counsel (Procedure & Administration)). This review seeks to ensure uniformity on a national basis. In my experience it ensured that sanctions were rarely sought. Trying to get approval was too much trouble. It was easier and better to let the Tax Court decide when it had experienced enough rather than to make a push to sanction a representative. That may be one of the reasons that so few Code Sec. 6673(a)(2) cases exist along with the fact that most representatives do not take sanctionable actions.

⁸ *A.H. Hyatt*, Docket No. 17872-18L (Order dtd Sept. 4, 2019), available online at www.ustax-court.gov/USTcDocketInq/DocumentViewer.aspx?IndexID=7658331. In this case the court imposed a penalty of \$25,000. Judge Gale imposed the penalty for the first and only time during the period of this study that he imposed the 6673 penalty.

⁹ The amount and frequency of the penalties here suggests that either Mr. Hyatt has significant means or he has no money with which to pay the penalties and, therefore, does not care that the court keeps imposing the penalty upon him. It certainly detracts from the effectiveness of the penalty if the taxpayer never pays it.

¹⁰ See *J. Chai*, CA-2, 2017-1 USTC ¶150,180, 851 F3d 190, *aff'g in part, rev'g in part* 109 TCM 1206, Dec. 60,250(M), TC Memo. 2015-42; and *Graev (Graev III)*, 149 TC 485 (Dec. 20, 2017), *supplementing and overruling in part* 147 TC 460 (2016).

¹¹ *B. Williams, Jr.*, 151 TC No. 1, Dec. 61,211 (2018).

¹² Code Sec. 6673 (1954).

¹³ Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520.

¹⁴ Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248, 96 Stat. 324.

¹⁵ H.R. 4961, 97th Cong. (1st Sess. 1981).

¹⁶ H.R. REP. NO. 97-404, at 10 (1981).

¹⁷ Tax Reform Act of 1986, P.L. 99-514, 100 Stat. 2085.

¹⁸ H.R. REP. NO. 99-841, at 705 (1986).

¹⁹ Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647, 102 Stat. 3342.

²⁰ H.R. 4333, 100th Cong. (2nd Sess. 1988).

²¹ S. 2238, 100th Cong. (2nd Sess. 1988).

²² Omnibus Budget Reconciliation Act of 1989, P.L. 101-239, 103 Stat. 2106.

²³ Taxpayer Advocate Service, 2018 Annual Report to Congress, most Litigated Issues #10 "Frivolous Penalty Under IRC 6673 and Related Appellate Sanctions," Vol. 1, at 547.

²⁴ The search was conducted through the U.S. Tax Court website. The search was conducted with the Tax Court's order function using 6673 as the key word. Each search was conducted with the name of a different Tax Court Justice.

²⁵ In 2011 the search function of the order database did not become available until June. So, the results for this year reflect only a partial year.

²⁶ The search includes all cases in 2019.

²⁷ See generally Code Secs. 7443(a), 7443(b).

²⁸ Under Code Sec. 7447(b) (Retirement), judges who retire shall be designated "senior judge." Code Sec. 7443A discusses special trial judges, which may be appointed by the chief judge from time to time under Code Sec. 7443A(a). At present there are 17 Presidentially appointed judges, nine judges serving in senior status and four special trial judges. Over the past eight years several judges have left the bench making the total number of judges who could have imposed the 6673 penalty in excess of 40. For a more detailed explanation of the number and types of Tax Court judges see generally Harold Dubroff & Brant J. Hellwig, *THE UNITED STATES TAX COURT—AN HISTORICAL ANALYSIS* (2nd ed. 2014).

²⁹ While some limitations exist on the power of Special Trial Judges, these judges do have the power to impose the 6673 penalty and all current special trial judges have done so.

³⁰ There were numerous opinions picked up in the opinion search in which the court warned the petitioner that their behavior could subject them to the 6673 penalty but declined to impose the penalty for various reasons the most common

of which was that the petitioner was a first time visitor to the court. There were also several petitioners upon whom the penalty was imposed who, like Mr. Hyatt discussed above, had the penalty imposed on more than one occasion.

³¹ See Fogg, *Statistics on Cases in Litigation from ABA Tax Section Meeting in May*, August 14, 2019, at <https://procedurallytaxing.com/statistics-on-cases-in-litigation-from-aba-tax-section->

meeting-in-may/. See also Harold Dubroff & Brant J. Hellwig, *THE UNITED STATES TAX COURT—AN HISTORICAL ANALYSIS*, at 908 (2nd ed. 2014).

³² Over the more than eight-year period of this study, the Tax Court imposed the 6673 penalty slightly more than 19 times per year. For more details on the total number of cases going through the Tax Court during these years see Fogg, *Statistics on Cases in Litigation from ABA*

Tax Section Meeting in May, August 14, 2019, at <https://procedurallytaxing.com/statistics-on-cases-in-litigation-from-aba-tax-section-meeting-in-may/>.

³³ T. Keith Fogg, *The United States Tax Court: A Court for All Parties*, 70 BULL. INT'L TAX'N 75 (2016), available online at www.ibfd.org/sites/ibfd.org/files/content/pdf/PPV1%20-%20bit_2016_01_us_1.pdf.

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