

A Case for Bringing an APA Challenge to an IRS International Penalty Assessment

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In certain cases, the Administrative Procedure Act (APA) may provide judicial review of an IRS assessment of a penalty associated with a foreign information return. This article discusses the requirements for bringing an APA action to challenge an international penalty.

The Internal Revenue Code ("IRC") contains countless reporting requirements regarding foreign filing obligations. The failure to timely or correctly file foreign information returns with the Internal Revenue Service ("IRS") can result in the assessment of penalties ranging from \$10,000 to several million dollars annually. As a result of the IRS's overzealous approach in assessing foreign information return penalties, taxpayers have begun challenging international penalties in a number of courts based on various legal theories. Recently, some of these challenges have been based on the Administrative Procedure Act ("APA"). In certain cases, the APA may provide judicial review of an IRS assessment of a penalty associated with a foreign information return.

This article discusses the requirements for bringing an APA action to challenge an international penalty.

OVERVIEW OF INTERNATIONAL FILING REQUIREMENTS AND FOREIGN INFORMATION RETURN PENALTIES

Chapter 61 of the IRC contains countless reporting requirements regarding foreign information filing obligations. Many of the sections under Chapter 61 impose significant penalties for the failure to comply with the reporting requirements. The more well-known reporting requirements and penalties are found in Chapter 61 and are as follows.

The IRC requires certain persons to provide the IRS with information regarding foreign corporations. This information is typically provided on Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations). Form 5471 and schedules are used to

satisfy the reporting requirements of IRC §§6038 and 6046 along with the applicable regulations. Form 5471 is ordinarily attached to a U.S. person's federal income tax return. Under IRC §6038(a), the penalty for failure to file, or for delinquent, incomplete or materially incorrect filing is a reduction of foreign tax credits by ten percent and a penalty of \$10,000. An additional \$10,000 continuation penalty may be assessed for each 30-day period that noncompliance continues, up to \$60,000 per return, per year.

Similarly, IRC §6038A requires 25 percent foreign-owned domestic corporations and limited liability companies to report specified information as an attachment to a corporate tax return. This is done on Form 5472 "Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business." In filing a Form 5472, the filer must provide information regarding its foreign shareholders, certain other related parties, and the dollar amounts of transactions entered into during the taxable year with foreign related parties. A separate Form 5472 is filed for each foreign or domestic related party with which the reporting entity engaged in reportable transactions during the year. Any reporting corporation or limited liability company that fails to file Form 5472 may be

subject to a penalty of \$25,000. If the failure continues for more than 90 days after notification by the IRS, there is an additional penalty of \$25,000 for each 30-day period or fraction. There is no upper limit on this penalty.

Another well-known provision in Chapter 61 is IRC §6039F. Section 1905 of the 1996 Tax Act created new reporting requirements under IRC §6039F for U.S. persons (other than certain exempt organizations) that receive large gifts (including bequests) from foreign persons. The information reporting provisions require U.S. donees to provide information concerning the receipt of large amounts that the donees treat as foreign gifts, giving the IRS an opportunity to review the characterization of these payments and determine whether they are properly treated as gifts. Donees are currently required to report certain information about such foreign gifts on Part IV of Form 3520 (Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts).

IRC §6039F(b) generally defines the term foreign gift as any amount received from a person other than a U.S. person that the recipient treats as a gift or bequest. However, a foreign gift does not include a qualified transfer (within the meaning of IRC §2503(e)(2)) or

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any distribution from a foreign trust. A distribution from a foreign trust must be reported as a distribution under IRC §6048(c)(discussed below) and not as a gift under IRC §6039F.

IRC §6039F(c) provides that if a U.S. person fails, without reasonable cause, to report a foreign gift as required by IRC §6039F, then: (1) the tax consequences of the receipt of the gift will be determined by the Secretary and (2) the U.S. person will be subject to a penalty equal to 5 percent of the amount for the gift for each month the failure to report the foreign gift continues, with the total penalty not to exceed 25 percent of such amount. Under IRC §§6039F(a) and (b), reporting is required for aggregate foreign gifts exceeding \$100,000 during a taxable year. Once the \$100,000 threshold has been met, the U.S. donee is required to file a Form 3520 with the IRS.

(1) \$10,000; (2) 35% of the gross value of any property transferred to the foreign trust; (3) 35% of the gross value of the distributions received from the foreign trust; or (4) 5% of the gross value of the portion of the foreign trust's assets treated as owned by a U.S. person under the grantor trust rules. In addition to Form 3520, U.S. persons that are treated as owners of foreign trusts under the grantor trust rules must timely file a Form 3520-A (Annual Information Return of Foreign Trust With a U.S. Owner) with the IRS. Under §6677, the penalty for failing to timely file a Form 3520-A with the IRS is the greater of \$10,000 or 5% of the gross value of the portion of the trust's assets treated as owned by the U.S. person at the close of the year.

IRC §§6038 and 6046A require U.S. persons with at least a 10 percent interest in foreign partnership to disclose

requirements for Form 926 vary depending on the type of property transferred to a foreign corporation. This reporting requirement applies to outbound transfers of both tangible and intangible property. For cash transfers to a foreign corporation, if a U.S. person owns at least 10% of the foreign corporation immediately after the transfer, or if the total cash transferred within a 12-month period exceeds \$100,000, a Form 926 must be filed with the IRS. The penalty for failure of a U.S. person to properly report a transfer to a foreign corporation equals 10% of the fair market value of the property transferred. The total penalty cannot exceed \$100,000 unless the failure was due to intentional disregard of the reporting requirements.¹

Finally, U.S. persons must timely disclose interests in specified foreign financial assets to the IRS on Form 8938. Specified foreign financial assets can be classified as the following: (1) financial accounts maintained by a foreign financial institution; (2) stock or securities issued by a non-U.S. person; (3) interest in a foreign entity; and (4) a financial instrument or contract that has an issuer or counterparty that is not a U.S. person. The reporting thresholds for a Form 8938 depends on whether the U.S. person resides inside or outside the United States and whether or not he or she is married. IRC §6038D authorizes the IRS to assess a penalty of \$10,000 annually for failing to timely file a Form 8938. The penalty can be increased to a maximum of \$60,000 if a taxpayer fails to file the Form 8938 after an IRS request.

FLAWED IRS INTERNATIONAL PENALTY ASSESSMENT AND APPEALS PROCESS

The IRS treats penalties associated with foreign information returns (hereinafter "international penalties") as summarily assessable, as they are not subject to deficiency procedures. In the IRS's view, international penalties can be assessed "in the same manner as taxes" and taxpayers cannot generally contest an international penalty in the Tax Court. A number of years ago, the IRS began a systemic assessment of international penalties. When we talk about the systematic assessment of international

The combination of the IRS's systemic assessments of international penalties and poorly trained Appeals Officers likely resulted in a number of unlawful, arbitrary, and invalid international penalty assessments that may be ripe for APA litigation.

U.S. persons must also file a Form 3520 with the IRS to report certain transactions with foreign trusts. For example, a U.S. person must file a Form 3520 with the IRS if: (1) a reportable event occurred during the tax year; (2) a U.S. person transferred property to a related foreign trust in exchange for an obligation; (3) the person is an owner of the trust based on the grantor trust rules; (4) the person is a U.S. owner or beneficiary of a foreign trust in the current year; (5) a U.S. person related to the person received a loan of cash or securities directly or indirectly from the trust, or the uncompensated use of trust property; or (6) the person is a U.S. person who is a U.S. owner or beneficiary of a foreign trust and in the current year such foreign person holds an outstanding qualified obligation of the U.S. person.

Under IRC §6677, the penalty for failing to timely file Form 3520 with regard to a foreign trust can result in a penalty which is the greater of the following:

their partnership interest to the IRS on Form 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships). The Internal Revenue Code authorizes the IRS to assess a penalty of \$10,000 annually for failing to timely file a Form 8938. Section 6038D authorizes the IRS to increase the penalty to a maximum of \$60,000 if a taxpayer fails to file the Form 8865 after an IRS request. Summarily, for U.S. persons who own a foreign disregarded entity or foreign branch, the Internal Revenue Code requires the U.S. person to disclose that interest to the IRS on a Form 8858. The Internal Revenue Code authorizes the IRS to assess a penalty of \$10,000 annually for failing to timely file a Form 8858. Section 6038D authorizes the IRS to increase the penalty to a maximum of \$60,000 if a taxpayer fails to file the Form 8858 after an IRS request.

To help the IRS better police outbound transfers, a U.S. person who transfers property to a foreign corporation must file a Form 926 with the IRS. Filing

penalties, in the context of the IRS, it refers to the automatic imposition of penalties for late or incorrect filing of international information returns, often done without prior human review or the opportunity to provide a defense before the penalty is assessed. The systematic assessment of international penalties streamlines the process for the IRS, but it raises significant concerns about fairness and taxpayer rights, particularly when large penalties are assessed without an upfront opportunity for taxpayers to present a defense or have an administrative review before incurring the financial burden of the penalty.

Previously, international penalties were assessed manually on individuals and entities whose missing filings were discovered during an audit. The IRS is still assessing international penalties during audits. However, most international penalties are now systemically assessed against taxpayers. This typically happens when a taxpayer voluntarily amends their tax returns to attach a previously omitted international information return. Some taxpayers believed they could avoid international penalties through an IRS procedure known as the Delinquent International Information Return Submission Procedure or "DIIRSP." The DIIRSP was supposed to permit taxpayers to file late international information returns without penalties so long as the taxpayer can establish reasonable cause for the failure to file timely. The DIIRSP required participants to attach a reasonable cause statement to the submission. The IRS has a history of neglecting to review reasonable cause statements and automatically assessing international penalties.²

The IRS established an appeals process in which the Independent Office of Appeals considers defenses to international penalties such as reasonable cause. According to the IRS website and IRS Publication 5484, the mission of the IRS Office of Appeals is to resolve federal tax disputes without litigation. Apparently, the goal of the IRS Office of Appeals is also to reach fair and impartial resolutions that encourage voluntary compliance and build public trust in the IRS. Information received in response to a Freedom of Information Act ("FOIA")

says otherwise. According to information obtained through a FOIA request from the IRS, the IRS has failed to properly train its Appeals Officers on disputes involving international penalties.

The IRS provided its Appeals Officers "training materials" regarding international penalties including examples and Internal Revenue Manual ("IRM") cites in the context of international penalty disputes.³ The combination of the IRS's systemic assessments of international penalties and poorly trained Appeals Officers likely resulted in a number of unlawful, arbitrary, and invalid international penalty assessments that may be ripe for APA litigation. In those cases, the aggrieved taxpayer may consider asking a federal court to judicially review the international penalty under the APA.

In the next section of this article, we will discuss the APA and its limitations.

PURPOSE OF APA AND STANDARDS OF APA JUDICIAL REVIEW

Administrative agencies such as the IRS are created by Congress to carry out certain statutorily defined duties, goals, and functions. A key purpose of APA judicial review is to ensure that agencies do not go beyond their statutory powers in carrying out their tasks. If an agency could freely take actions that were *ultra vires*, that is, beyond its statutory authority, its decisions would completely undermine the separation of powers principles upon which the Constitution is based. APA judicial review thus serves as an important check on the legality of the action that agencies may undertake. It also serves as an important check on Congress as well. An agency must act within the statutory authority provided by Congress and that authority must be in accord with the Constitution.

U.S.C. §706(2)(C) gives federal district courts the power to focus on what agencies actually do and to set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." In addition to providing protection against occasions when an agency's failure to act may be unlawful, U.S.C. §706 permits a federal court to "compel action unlawfully withheld or unreasonably delayed."⁴ The APA

also authorizes a federal court to hold unlawful or set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity."⁵

Finally, U.S.C. §706 provides for judicial review of how agencies exercise their power. The APA provides certain procedural requirements when agencies make rules, formally adjudicate a dispute or take informal action. Pursuant to the APA, federal courts can set aside agency action that is "without observance of procedure required by law."⁶

Agencies often make a variety of other discretionary judgments such as deciding the policies they will pursue to carry out their statutory goals. Such policies are usually reviewable in court to determine why the agency exercised its powers the way it did. Such policy decisions may be set aside only if they are found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."⁷ In engaging in this kind of review, federal courts review the component parts of the discretionary decisions that agencies make. For example, in carrying out their adjudicatory duties, agencies make findings of fact. The APA provides that courts can set aside agency action in an adjudicatory case if it is premised on facts "unsupported by substantial evidence" and in limited circumstances, U.S.C. §706 allows for *de novo* judicial review of facts.

BRINGING APA CASE FOR JUDICIAL REVIEW OF INTERNATIONAL PENALTY

The various legal standards set forth in U.S.C. §706 of the APA provides taxpayers aggrieved by the IRS international penalty process with remedies. However, before bringing an APA action, the taxpayer will need to overcome certain hurdles. The first hurdle to bringing an APA in connection with an international penalty is overcoming sovereign immunity. Sovereign immunity protects the IRS, as an agency of the federal government, from being sued by taxpayers unless Congress has explicitly passed a law to waive that immunity. This means a taxpayer cannot simply sue the IRS for any perceived grievances; they must base their claim on a specific law that grants them the right to do so.

The APA contains a limited waiver of sovereign immunity in 5 U.S.C. §702 that permits taxpayers to sue the federal government and its agencies such as the IRS. APA provides a waiver of sovereign immunity when two prerequisites are met. First, the action in question must “seek relief other than money and state a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.”⁸ Second, it must be demonstrated that: (1) review of the agency action in question is authorized by a substantive statute or (2) review is made of a “final agency action for which there is no other adequate remedy in a court.”⁹

APA CLAIM AGAINST IRS CANNOT SEEK MONEY DAMAGES

A lawsuit filed under the APA cannot be for money damages because the act only allows for review of final agency actions seeking “relief other than money damages.”¹⁰ The term “money damages” can be defined as a form of monetary compensation awarded by the court to compensate for a loss or injury caused by the Government’s wrongful conduct. To avoid having an APA claim characterized as a claim seeking “money damages,” in the context of an international penalty, the complaint should not be drafted as it were seeking a refund of an international penalty. Instead, a complaint in an APA case should seek a remand of the penalty determination back to the IRS and allow the IRS to correct any procedural or substantive errors in assessing the international penalty. By asking the court to remand the case back to the IRS, the Government cannot automatically seek a dismissal of the case on the grounds that the APA action seeks money damages. Although an APA claim cannot seek money damages, it should be noted that a taxpayer can seek other forms of damages from the IRS even if such damages require a payment from the Government such as attorney fees and costs associated with litigation.

INTERNATIONAL PENALTY ASSESSMENT MUST BE FINAL AGENCY ACTION

Anyone considering bringing an APA action seeking judicial review of an

international penalty must understand that judicial review is ordinarily available only for final action.¹¹ In *Federal Trade Commission v. Standard Oil Co.*,¹² the U.S. Supreme Court explained that this requirement gave “the agency an opportunity to correct its own mistakes and to apply its expertise.” Letting the agency correct its own mistakes should in turn avoid: (1) inefficient and perhaps unnecessary “piecemeal review” and (2) “delay in resolution of the ultimate question.”

Under the financial agency action rules, a taxpayer cannot bring an APA action seeking judicial review of an international penalty until the IRS has finalized its determination regarding the penalty. A final agency action for an international penalty is a definitive and enforceable decision by the IRS that the taxpayer has exhausted its administrative appeal options. Thus, before an APA suit can be filed seeking judicial review of an international penalty, the IRS Office of Appeals must have made a final decision regarding an appeal of an international penalty.

APA JUDICIAL REVIEW OF QUESTIONS OF FACT

An APA suit of an international penalty will often undoubtedly seek a review of the IRS administrative appeals conference. The Appeals Officer should consider all factual information and supporting documentation provided by a taxpayer to support his or her position regarding the international penalty at issue. A taxpayer may allege in an APA case that IRS Appeals failed to properly fact find when it decided to uphold an international penalty.

In an APA action, a district court has the authority to review the IRS’s fact-finding methodology used to assess and uphold an international penalty. However, judicial review of agency action under the APA is generally limited to the “administrative record” – the materials before the agency decision-maker at the time the decision was made. The APA provides different standards of judicial review applicable to agency findings of fact. Although the APA creates more than one standard of review, all agency action is subject to review to

determine if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”¹³ Similarly, all agency action must meet applicable statutory, procedural, and constitutional requirements.¹⁴ In certain circumstances, a court reviews an agency action for “substantial evidence.” Review under the substantial evidence test is authorized only when an agency action is rulemaking or when the agency action is based on a public adjudicatory hearing. In most cases, an argument regarding the assessment of an international penalty does not involve rulemaking or agency action and as a result, the substantial evidence test is typically not applicable.

In addition to the substantial evidence standards of review to agency factfinding, the drafters of 5 U.S.C. §706 also contemplated *de novo* judicial trial of facts in an unspecified, but potentially broad, range of circumstances. 5 U.S.C. §706(2) (f) provides that courts may invalidate agency action that is “unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.” When engaging in *de novo* review, a court can make its own independent findings of fact in addition to examining the record developed by the agency.

De novo judicial review of agency factfinding was a common practice at the time the APA was enacted. However, there has been a trend away from such judicial trials since the Supreme Court’s decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). In *Volpe*, the Supreme Court agreed to review the Secretary of Transportation’s decision to authorize federal funding for a highway whose route was chosen arguably in a manner that violated the relevant environmental statutes involved. The Court rejected the application of *de novo* judicial review of the facts involved in favor of application of the arbitrary and capricious standard of review to the record that existed at the time the Secretary of Transportation made his decision.

In so doing, the Court narrowly construed 5 U.S.C. §706(2)(f), holding that it applied in only two circumstances: (1) when “the action is adjudicatory in nature and the agency factfinding

procedures are inadequate,” or (2) when “issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.”¹⁵ Consequently, *de novo* judicial review under Section 706(2)(f) is, therefore, now reserved for extraordinary cases. *De novo* review of facts by courts has been largely confined to collateral matters such as the agency’s rationale, or the materials the agency relied on in reaching its decision.

To determine whether the IRS acted arbitrarily or capriciously or abused its discretion in an international penalty assessment, a court should conduct a “thorough, probing, in-depth review of the administrative record.”¹⁶ However, a federal court will presume that the IRS acted correctly and is not permitted to substitute its judgment for the agency’s.¹⁷ A court must nevertheless be certain that the IRS acted within the scope of its authority, and it must determine whether the “decision was based on a consideration of relevant factors and whether there has been a clear error of judgment.”¹⁸

As indicated above, international penalties are automatically assessed against taxpayers. An international penalty assessment typically takes place when a taxpayer files an amended return disclosing a foreign asset or foreign gift on an international information return. Since international penalties are automatically assessed, the IRS administrative record will contain little information regarding the initial penalty assessment. On the other hand, an IRS Appeals Officer is tasked with determining whether to reduce or remove international penalties by considering factors like reasonable cause. At a minimum, the administrative record from IRS Appeals should contain a rational connection between the facts found and the choice the IRS made to assess and uphold the international penalty.¹⁹ If the administrative record does not provide the reasons for upholding the penalty or the administrative record does not provide adequate reasoning as to why the penalty was sustained, the court may conclude that the IRS acted arbitrarily, capriciously, or abused its discretion in assessing an international penalty.

If it is determined that the IRS acted arbitrarily, capriciously, or abused its discretion in

assessing an international penalty, the proper course of action for a reviewing court would be to remand the penalty determination to the IRS for additional investigation or explanation.²⁰

JUDICIAL REVIEW OF QUESTIONS OF LAW

In the previous section of this article, we examined the procedural standards of review for questions of fact by a court. We shall now examine judicial review questions of law. U.S.C. §706 provides a reviewing court with the authority to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” In the context of an international penalty, the APA permits a reviewing court to “hold unlawful and set aside agency action that it finds to be unconstitutional, in excess of the agency’s statutory powers, made contrary to required procedures, an abuse of discretion, or otherwise not in accordance with law.”²¹

Generally, federal agencies such as the IRS are given broad discretion to interpret the law. This deference is consistent with the Report of the Attorney General’s Committee on Administrative Procedure issued in 1941:

“To state the matter very broadly, judicial review is generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are said to be matters of administrative judgment to be determined exclusively by the agency. But the narrow inquiry into the agency’s authority to act as it did covers a wide field. The question whether Congress had the constitutional authority to authorize the administrative action is, of course, always in the background. Short of the constitutional issues are questions of interpretation of the statutes conferring the authority. Whether the factors upon which the administrative decision was based are such as the agency is permitted to consider and whether the factors which it rejected are such as it is permitted to reject, and what weight is required to be attached to various factors are all questions which the courts can review as questions of law.”²²

As the Attorney General’s Report above suggests, there are situations in

which a court will be asked to review agency actions that involve questions of law. In interpreting the law, an agency will, along with constitutional issues, take into account relevant statutory factors, weigh them appropriately and avoid relying on factors the law sought to exclude from consideration.²³ The interpretation of a statute whose text clearly sets forth those factors presents the kind of question of law that courts will usually always examine independently. If the text of the statute is, in the court’s view, clear, and the agency’s interpretation is at odds with the court’s, the court will then freely disregard what it considers to be an erroneous agency view. For example, if a court disagreed with the IRS on whether the latter correctly applied a reasonable cause defense to an international penalty, a court may make such a finding. Such an approach is fully in accord with one of the most fundamental purposes of judicial review.

Not all statutes or legal principles such as the definition of “reasonable cause” for penalty abatement purposes, however, are clear. The provisions of a statute may be ambiguously drafted and capable of various interpretations. For example, there currently is a dispute of whether or not the IRS can administratively assess penalties under IRC §6038(b). Congress may not have foreseen the circumstances that give rise to a particular application of the statute and, in those unforeseen circumstances, the statute may be capable of two or more reasonable interpretations and the statute itself may be entirely silent on those issues. In cases involving ambiguous or non-existing statutory guidance for certain agency actions, the legality of those actions tends to be assessed more in terms of the reasonableness of the policy undertaken than the correctness of the statutory interpretation involved.

Congress enacted the APA “as a check upon administrators whose zeal might otherwise have carried them to excess not contemplated in legislation creating their offices.” The APA prescribes procedures for federal agency action and delineated the basic contours of judicial review of such action. It also codifies for agency cases the unremarkable, yet elemental proposition reflected by

judicial practice dating back to *Marbury v. Madison*, 5 U.S. 137 (1803): that courts decide legal questions by applying their own judgment. The APA specifies that courts, not federal agencies, such as the IRS, will decide “all relevant questions of law” arising on review of agency action, even those involving administrative law.²⁴ It prescribes no deferential standard for courts to employ in answering those legal questions despite mandating deferential judicial review of agency policy-making and factfinding.²⁵

Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA may seek aid from the interpretation of those responsible for implementing particular statutes. When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. With the recent landmark decision in *Loper Bright*,²⁶ it is unclear just how much deference a court will give to the IRS when examining a statute that could have various interpretations.

CHEVRON V. NRDC

*Chevron, U.S.A. Inc. v. NRDC*²⁷ was decided in 1984 by a bare quorum of six Justices. *Chevron* set forth a deferential judicial approach to federal agency interpretation of law, one which we shall examine in detail. *Chevron* began as a challenge to EPA rules defining the phrase “stationary source” in the “new source review” program established by the 1977 amendments to the Clean Air Act.²⁸ The 1977 amendments imposed more stringent air quality requirements on states that had not yet reduced pollution to levels below certain ambient standards in what the statute called non-attainment areas. These provisions required permits “for the construction and operation of new or modified stationary sources” of air pollution.²⁹ A state could issue a permit for construction of a new or modified major source in a non-attainment area only if the proposed source met these stringent requirements. The EPA initially interpreted “stationary source” to include all individual pieces of pollution-emitting

equipment within a plant. The EPA, however, conducted a subsequent rulemaking proceeding, the end result of which was to repeal these earlier rules and to replace them with the so-called “bubble” approach. Under the “bubble” approach, the EPA defined a major stationary source as the entire plant rather than the individual facilities within the plant.

On appeal, the D.C. Circuit Court of Appeals overturned the EPA’s new interpretation of “stationary source.” The court found that Congress had no specific intent concerning the term “stationary source,” particularly as it applied to the bubble concept. Nevertheless, the court reversed the agency based on its own interpretation of that term in light of the overall purposes of the amended Clean Air Act.

With the recent landmark decision in *Loper Bright*, it is unclear just how much deference a court will give to the IRS when examining a statute that could have various interpretations.

The Supreme Court reversed the Court of Appeals, and in doing so, appears to have narrowed the range of legal issues in which courts are expected to have the final say. The Supreme Court disagreed with the D.C. Circuit’s willingness to substitute its legal interpretation for that of the federal agency when the statute in question was ambiguous and was being applied to a policy approach to pollution on which Congress provided no express direction. “If Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”³⁰ To uphold the agency’s interpretation, the court need not conclude “that the agency construction was

the only one it permissibly could have adopted, or even the reading the court would have reached if the question had arisen in a judicial proceeding.” It need only conclude that the agency’s interpretation was a “permissible” one.

Buttressing the *Chevron* court’s deferential approach to agency interpretations was the fact that certain agencies are connected to an electorally accountable branch of government—the Executive. Justice Stevens thus spoke in terms of presidential deference:

“Judges are not experts in the field and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preference. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make much policy choices—resolving the competing interest which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”³¹

Chevron’s two-step approach to judicial review has clearly changed the “mood” of reviewing courts when dealing with questions of statutory interpretation and to some extent it has changed the law of judicial review of agency interpretation as well. By asking first whether Congress spoke “precisely” to the statutory issue in question, and second, whether or not Congress’ intent was “unambiguously clear” on that issue, the Supreme Court has narrowed the category of issues involving the kinds of questions of law that a court is willing to examine closely, and has expanded the number of agency decisions to which it will defer.

If a reviewing court is satisfied that there is no clear congressional intent respecting the precise question at issue, a reasonableness test applies to the agency’s interpretation of the statute involved. As the *Chevron* court noted, “the court may not substitute its own construction for a reasonable interpretation” by the

agency. This is the case even if the court would have reached a different conclusion in a judicial setting. Reasonableness review usually involves “the agency’s textual analysis (broadly defined, including where appropriate resort to legislative history) and the compatibility of the inquiry with the congressional purpose informing the measure.

LOPER BRIGHT DECISION AND ITS IMPACT ON THE APA

In *Loper Bright*,³² the Supreme Court overruled *Chevron*. Under *Chevron*’s first step, the Court asked whether Congress spoke to the issue at hand. If yes, the Court followed Congress’ wishes. If the statute was silent or ambiguous, under the second step, the Court asked whether the regulation was a “permissible construction” of the statute. Under *Chevron*, the Court was not to enforce its own view but instead was supposed to defer to the expertise of the agency that had issued the regulation, as long as the regulation was reasonable—commonly referred to as *Chevron* deference. Now, under *Loper Bright*, courts are required to “exercise their independent judgment in deciding whether an agency has acted within its statutory authority.” Under *Loper-Bright*, questions of statutory interpretation should be answered by judges and not federal agencies.

Under *Loper Bright*, statutory interpretation should be left to the courts and not federal agencies. The Supreme Court in *Loper Bright* identified one exception to this general rule: When Congress expressly delegates authority to a federal agency, the court’s role is simply to “effectuate the will of Congress.”

The Department of Treasury and one of its divisions, the IRS, are the federal administrative agencies responsible for overseeing the tax laws promulgated and enacted by Congress. IRC §7805 authorizes Treasury and the IRS to issue regulations to provide guidance in applying new legislation and to address uncertainty that arises with existing IRC provisions. Such regulations are intended to interpret and provide directions on complying with the tax law enacted by Congress. Treasury Regulations are referred to as either legislative or interpretative.

Legislative regulations establish substantive law and are issued pursuant to specific grant of authority from Congress. Normally, when such authority is granted, the statute provides that “the Secretary shall provide such regulations as may be necessary or appropriate to carry out the provisions of this section.” Before Treasury can issue regulations, the APA requires that certain rulemaking procedures be conducted, such as giving public notice and a period during which the public can comment on the regulation.

Interpretative regulations do not establish substantive law. Instead, they clarify previously enacted law. These regulations are issued under the general authority of IRC §7805(a), which empowers the Treasury Secretary to “prescribe all needful rules and regulations” to enforce the IRC. Treasury and the IRS will argue that IRC §7805 makes it clear that Congress wants it to be the primary interpreter of the IRC and the tax law in general. It is clear that even under *Loper Bright*, Congress can, in effect, designate a federal agency as a primary interpreter of an area of law. This does not, however, mean that the agency’s power in this regard is unlimited. It can be overturned, but only if the Secretary exceeded his statutory authority or if the regulation is “arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law.”³³

For many years, *Chevron* set forth a deferential judicial approach to an agency interpretation of the law in APA cases. Given the role that IRC §7805 will still have in cases involving the IRC, it is unclear what if any impact *Loper Bright* will have on statutes such as IRC §6038(b) that are ambiguously drafted and capable of various interpretations in APA litigation.

TO MAKE AN APA CLAIM, THERE MUST BE NO OTHER ADEQUATE REMEDIES AVAILABLE TO THE TAXPAYER

Since we discussed how judicial review may apply to factfinding and questions of law, we will now discuss jurisdictional limitations on the APA in international penalty cases. The APA does not apply, and sovereign immunity is not waived,

if the challenged agency action could be challenged by another “adequate remedy in court.”³⁴ This is because “Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.”³⁵ Thus, federal courts have routinely held that the APA is inapplicable when challenging the IRS’s tax determination because Congress has established separate specific statutory schemes for making such challenges.³⁶

In APA cases requesting judicial review of an international penalty, a taxpayer must be able to demonstrate that they do not have adequate remedies in a tax-refund suit under IRC §7422 or through an IRS Collection Due Process Hearing under IRC §§6330 and 6320.

ARE TAX-REFUND SUITS UNDER IRC §7422 ADEQUATE REMEDIES?

IRC §7422(a) provides a cause of action in federal district court for the recovery of a tax “alleged to have been erroneously or illegally assessed or collected. This section does not only apply to taxes, but to penalties.”³⁷ Before a tax-refund suit can be filed in federal court, the taxpayer must satisfy certain administrative prerequisites including filing a claim for refund with the IRS and paying the contested liability.³⁸ Individuals bringing an APA case requesting judicial review of an international penalty must be prepared to establish that the APA case could not have been brought as a tax-refund claim, followed by suit. If there is an “adequate remedy” available to a taxpayer to raise challenges to an international penalty, then that taxpayer cannot rely on the APA to grant federal court jurisdiction.

The Federal District Court for the Northern District of California exercised APA jurisdiction over a tax-related case in *Scholl v. Mnuchin*.³⁹ In *Scholl*, incarcerated persons brought a class action against the IRS challenging a decision in which incarcerated people were not eligible for Economic Impact Payments passed in the CARES Act. These were also known as COVID stimulus payments. The plaintiffs brought the action under the APA, and the IRS responded by challenging the court’s jurisdiction, claiming that the tax-refund claim

provisions of 26 U.S.C. §7422 were adequate alternative remedies to preclude waiver of sovereign immunity under the APA. The court in *Scholl* found that the case “question[ed] the administrative procedures by which the IRS arrived at its decision and whether that decision is unlawful” even if the remedy was the payment of money.

The same can be said for individuals seeking judicial review of international penalties.

The unique circumstances of *Scholl* in which the court found gave it APA jurisdiction may also be present in international penalty cases in that inadequately trained Appeals Officers have resulted in IRS decisions that were both contrary to law and arbitrary and capricious. As in *Scholl*, the administrative procedures of the IRS and IRS Appeals in connection with an international penalty is flawed and the payment of money will not correct the unlawful process.

To understand why the process is unlawful, it is important to review the international penalty assessment and appeals process. Taxpayers are typically informed of an international penalty assessment on a CP 15 Notice. Taxpayers are required to respond to the CP 15 Notice in writing within 30 days if they wish to contest an international penalty. Taxpayers often respond to the CP 15 Notice with a detailed well drafted protest letter. Regardless how well the protest letter was drafted, the IRS has a history of rejecting protest letters with a generic written statement which states as follows: “ordinary business care and prudence requires taxpayers to make themselves aware of their duties and that ignorance of tax laws could not serve as a basis for reasonable cause.”⁴⁰

After receiving the generic statement of denial, taxpayers are offered an opportunity to appeal the IRS’s decision to the IRS Office of Appeals. Once again, forced to forward to the IRS a detailed protest letter. It is the experience of this author that the IRS Office of Appeals sometimes will agree to remove the international penalty. It is also the experience of this author that on other occasions the IRS will decide to uphold some

random percentage without providing a written statement.

These procedures violate the Due Process Clause of the Constitution and §555 of the APA. Although there are no codified procedures that bind the IRS when it assesses an international penalty, the Due Process Clause sets the constitutional baseline for fair procedure in administrative law, while §555 of the APA establishes the statutory minimums. In order to satisfy the requirements of the Due Process Clause and §555, at a minimum, an agency must provide the grounds for denial.⁴¹ Courts have held that statements need not be exhaustive and that general reasons for denial often are sufficient.⁴² Courts that find the statement of reasons insufficient will require the agency to provide an adequate statement, or, especially if it appears that the agency’s decision was an arbitrary and capricious one, courts may also require a new hearing.⁴³

It is hard to imagine that a generic statement provided to a significant number of taxpayers (“ordinary business care and prudence requires taxpayers to make themselves aware of their duties and that ignorance of tax laws could not serve as a basis for reasonable cause”) is an “adequate statement” for purposes of Due Process and the APA. The same can be said for the lack of any written statement from the IRS Independent Office of Appeals when a random percentage of an international penalty is upheld. Refund litigation cannot address an entire agency process that violates the law. Under these unique circumstances, a compelling argument can be made for APA jurisdiction.

ARE CDP PROCEDURES IN TAX COURT §§6320 AND 6330 ADEQUATE REMEDIES?

Individuals seeking APA judicial review of an international penalty assessment may also need to demonstrate why procedures available under IRC §§6320 and 6330 are not adequate remedies. IRC §§6330 (relating to levies) and 6320 (relating to liens) provide that before the IRS may levy or file a notice of lien to collect an assessment made against a taxpayer, the IRS must provide notice to the taxpayer and provide an opportunity

to request a hearing with the IRS Office of Appeals. This is known as a Collection Due Process or (“CDP”) proceeding. As part of the CDP proceeding, a taxpayer can raise challenges to the underlying liability when they did not previously have an opportunity to dispute it.⁴⁴ Taxpayers also have the right to petition the Tax Court to review any determination by the IRS Office of Appeals and, eventually, have the right to seek review by a federal court of appeals.

It has been this author’s experience that in the vast majority of cases involving international penalties, the IRS has refused to issue “Final Intent to Levy” or “Final Intent to Lien” notices. Since the IRS has generally not been providing taxpayers the opportunity to contest international penalties in CDP hearings, it is unclear if a CDP hearing is truly an adequate remedy for APA purposes. Even if the IRS were to grant taxpayers a CDP hearing to challenge an international penalty, taxpayers would be legally foreclosed from contesting an international penalty through a CDP and in Tax Court. This is because once a taxpayer participates in an IRS Appeals hearing to contest an international penalty, he or she will likely be legally barred from challenging the international penalty in a CDP hearing and a subsequent Tax Court case.

Where the validity of a taxpayer’s underlying tax or penalty liability is properly at issue in a CDP case, the United States Tax Court reviews the IRS’s determination *de novo*.⁴⁵ On the other hand, where a taxpayer’s underlying liability or penalty is not properly at issue, the Tax Court only reviews IRS assessment for abuse of discretion.⁴⁶

An individual may raise a CDP challenge to the existence or amount of her underlying liability only if she “did not receive any statutory notice of deficiency for such tax liability.”⁴⁷ In determining whether an individual had a prior opportunity to dispute her liability, the income tax regulations distinguish between liabilities that are subject to deficiency procedures and those that are not. For liabilities subject to deficiency procedures, an opportunity for a post-examination conference with IRS Appeals

does not bar an individual (in appropriate circumstances) from contesting her liability in a later CDP proceeding.⁴⁸ On the other hand, where a liability is not subject to deficiency procedures, “[a]n opportunity to dispute the underlying liability includes a prior opportunity for a conference with IRS Appeals that was offered either before or after the assessment of the liabilities.”⁴⁹ As assessable penalties, international penalties are not subject to deficiency procedures.⁵⁰

Notwithstanding the absence of a notice of deficiency, an individual may be able to dispute her liability for such penalties (without paying them first) by resisting collection efforts through the CDP process and then seeking review before the Tax Court.⁵¹ But this route to repayment judicial review is available only if the individual “did not otherwise have an opportunity to dispute such tax or penalty liability.”⁵² For example, in *Yari v. Commissioner*,⁵³ the IRS assessed a penalty against the individual and issued him a notice of intent to levy. After receiving a notice of determination sustaining the levy, the individual petitioned the Tax Court. There was no evidence in the record that the individual had received a notice of assessment, or (if so) that he had taken advantage of that opportunity. Under these circumstances, the Tax Court permitted the individual to contest the amount of the penalty because he had not had a prior opportunity to dispute it.

Under this framework, an individual in a CDP case is entitled to challenge her underlying liability for an assessable penalty only if she did not have a prior opportunity to dispute it. For this purpose, a prior opportunity includes “a prior opportunity for a conference with Appeals.”⁵⁴ The Tax Court has sustained the validity of this regulation even though an individual (as was also true here) had no right to judicial review of the prior Appeals Office determination.⁵⁵ Since *Lewis*,⁵⁶ the Tax Court has consistently precluded an individual from raising a liability challenge in a non-deficiency CDP case when she had an opportunity to present that challenge to the Appeals Office before the IRS commenced collection action.⁵⁷ Federal district courts have reached similar conclusions in CDP

cases over which they had jurisdiction to former IRC §6330(d)(1)(B).⁵⁸

In cases involving international penalties, if the taxpayer had availed herself of a prior opportunity to challenge the international penalty by filing a protest with the IRS Appeals and disputed the international penalty with IRS Appeals, the taxpayer will be legally forever barred from challenging the international penalty in a CDP hearing or before the Tax Court regardless of why the Office of IRS Appeals sustained the international penalty. Consequently, individuals assessed an international penalty and who were provided an opportunity to challenge the penalty before IRS Appeals, do not have an adequate remedy under IRC §§6330 or 6320 for purposes of an APA claim.

ARE APA SUITS SEEKING JUDICIAL REVIEW OF AN INTERNATIONAL PENALTY BARRED BY THE ANTI-INJUNCTION ACT AND DECLARATORY JUDGEMENT ACT?

In addition to demonstrating that a taxpayer did not have an adequate remedy in refund litigation or a CDP hearing, an APA litigant will need to survive an attack under the Anti-Injunction Act (“AIA”) and Declaratory Judgment Act (“DJA”). The AIA and DJA reinforce the refund-suit statutory framework Congress adopted by ensuring that “taxes can ordinarily be challenged only after they are paid, by suing for a refund.”⁵⁹ The AIA provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”⁶⁰ For its part, the DJA prohibition is broader on its face than the AIA’s, the analysis for both is identical, as the Ninth Circuit has held that the DJA’s tax exception is “coextensive” with the AIA’s, meaning to the extent suit is barred by the AIA, declaratory relief under the DJA is also barred.⁶¹

In an APA case involving an international penalty, the IRS will take the position that the AIA and DJA bars this type of suit from being litigated unless the taxpayer satisfies the international penalty in full. The question in APA litigation involving an international penalty will be whether the review of a penalty

appeal procedure that may result in the granting of a new administrative hearing constitutes the “restraint on the assessment or collection of a tax.”

The Supreme Court in *Direct Marketing Association v. Brohl*⁶² defined the term “restrain” in the context of the assessment and collection of tax. The Court held that the term means that a suit is barred if it would “limit, restrict, or hold back” the assessment, levy, or collection of a tax. The Court noted that the term “restrain” can have two meanings: a broad meaning under which the term means “inhibit” and a narrow meaning under which the term means “prohibit” or “stop.”⁶³ The Court noted “that the words ‘enjoin’ and ‘suspend’ are terms of art in equity” that “refer to different equitable remedies that restrict or stop official action to varying degrees, strongly suggesting that ‘restrain’ does the same.”⁶⁴

After an APA suit is filed seeking judicial review of an international penalty, a district court will not typically order the IRS to limit, hold back, prohibit, or stop the collection of the penalty. Since the IRS is free to collect an international penalty during the pendency of an APA action, it does not appear that APA litigation will violate the AIA and DJA rules.

Assuming that APA judicial review of an international penalty could somehow run contrary to the AIA and DJA rules, there is a compelling argument that international penalties cannot be characterized as “taxes” for purposes of the AIA and DJA and therefore these doctrines do not apply to international penalties. In *National Federation of Independent Business v. Sebelius*,⁶⁵ the Supreme Court upheld the Affordable Care Act (“ACA”). To reach the merits, the Court had to clear the hurdle of prohibition against injunctive relief in tax cases under the AIA. It did so by noting that unlike the penalties in IRC subchapters 68A and 68B, the ACA individual mandate penalty is not designated a tax. Thus, it was not a tax, even though it was to be assessed and collected like a tax.⁶⁶ Chapter 61 of the IRC contains various reporting requirements.

The IRC contains many provisions treating taxes and assessable penalties as

distinct terms.⁶⁷ There would, for example, be no need for IRC §6671(a) to deem “tax” to refer to certain assessable penalties if the IRC already included all such penalties in the term “tax.” In light of the IRC’s consistent distinction between the terms “tax” and “assessable penalty,” we must accept the Government’s interpretation: IRC §6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes.

The ACA does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the AIA. The AIA therefore does not apply to this suit, and we may proceed to the merits.⁶⁸

The reasoning of the Supreme Court in *National Federation of Independent Business* seems to indicate that penalties such as international penalties cannot be classified as taxes for purposes of the AIA and DJA. Given the Supreme Court’s characterization of penalties, it is unlikely that the AIA or DJA will prevent APA judicial review of an international penalty.

CONCLUSION

This article is intended to provide the reader with a basic understanding of utilizing the APA to challenge an IRS international penalty assessment. It should be evident from this article that the APA is not a substitute for refund litigation. There are also significant hurdles that come with APA litigation which includes meeting judicial requirements, overcoming deferential standards of review for IRS decisions, and navigating the limitations of the administrative record. However, in limited circumstances where an IRS international penalty assessment was arbitrary and capricious or an abuse of discretion, an APA action may potentially offer relief in the form of a new administrative hearing.

End Notes

¹ IRC §6038B(c); Treas. Reg. 1.6038B-1(f).

² See “Ex-Official Confirms IRS Ignores Some Reasonable Cause Statements,” Tax Notes Int’l. Fed. 14, 2022, pp. 839–40.

³ See “IRS Appeals Training Materials on Reasonable Cause Worry Practitioners,” Tax Notes Int’l, Oct. 2022, pp. 144–47.

⁴ 5 U.S.C. §706(f).

⁵ 5 U.S.C. §706(2)(D).

⁶ *Id.*

⁷ 5 U.S.C. §706(2)(A).

⁸ See 5 U.S.C. §702.

⁹ *Id.* 5 U.S.C. §704.

¹⁰ See 5 U.S.C. §702.

¹¹ See 5 U.S.C. §704.

¹² 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980).

¹³ 5 U.S.C. §706(2)(A).

¹⁴ 5 U.S.C. §706(2)(B)–(D).

¹⁵ *Volpe*, 401 U.S. at 415, 91 S.Ct. at 823.

¹⁶ *Volpe*, 401 U.S. at 415.

¹⁷ *Volpe*, 401 U.S. at 415, 417.

¹⁸ *Id.*

¹⁹ *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003).

²⁰ See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

²¹ See 5 U.S.C. §706(2)(D).

²² See *Final Report of the Attorney General’s Committee on Administrative Procedure*, 87–88 (1941).

²³ See *United States v. Nixon*, 418 U.S. 683, 703–05, 94 S.Ct. 3090, 3105–06, 41 L.Ed. 2d 1039 (1974).

²⁴ See 5 U.S.C. §706.

²⁵ See 5 U.S.C. §706(2)(A), (E).

²⁶ 603 U.S. 369 (2024).

²⁷ 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

²⁸ See 42 U.S.C. §7409.

²⁹ See 42 U.S.C. §7502.

³⁰ See *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782.

³¹ See *Chevron*, 467 U.S. at 865–66, 104 S.Ct. at 2793.

³² 603 U.S. 369 (2024).

³³ See, e.g., *Massachusetts v. Secretary of HHS*, 749 F.2d 89 (1st Cir. 1984), cert. denied 472 U.S. 1017, 105 S.Ct. 3478, 87 L.Ed. 2d 613 (1985).

³⁴ 5 U.S.C. §704; see also *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 600 (2016) (“Even if final, an agency is reviewable under the APA only if there are no adequate alternatives to APA review in court.”)

³⁵ *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

³⁶ See, e.g., *Wilson v. Commissioner*, 705 F.3d 980, 990 (9th Cir. 2013) (“Where Congress has enacted a special statutory review process for administrative action, that process applies to the exclusion of the APA.” (citing *Bowen*, 487 U.S. at 903)); *Star Int’l Co. v. United States*, 910 F.3d 527, 536 (D.C. Cir. 2018) (holding the

taxpayer did not have a “cause of action under the APA” because the taxpayer had an adequate remedy under the Internal Revenue Code).

³⁷ See *United States v. Paisley*, 473 F. App’x (9th Cir. 2012).

³⁸ See *Flora v. United States*, 362 U.S. 145, 177 (1960).

³⁹ 494 F. Supp. 3d 661 (N.D. Cal. 2020).

⁴⁰ See *Wrzesinski v. United States*, Case No. 2:22-cv-03568, Eastern Dist. of Penn. (2022).

⁴¹ See U.S.C. §555(e).

⁴² See *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976); *French’s Estate v. FEFC*, 603 F.2d 1158 (5th Cir. 1979).

⁴³ See *Bowman v. U.S. Bd. of Parole*, 411 F. Supp. 329 (W.D. Wis. 1976) (denial of parole requires statement sufficient to show decision not arbitrary); *National Resources Defense Council v. SEC*, 389 F. Supp. 689 (D.D.C. 1974).

⁴⁴ See IRC §6330(c)(2)(B).

⁴⁵ See *Goza v. Commissioner*, 114 T.C. 167, 181–182 (2000).

⁴⁶ *Id.* at 182.

⁴⁷ IRC §6330(c)(2)(B).

⁴⁸ Treas. Reg. 301.6330-1(e)(3), Q&A-E2.

⁴⁹ *Id.*

⁵⁰ See *Smith v. Commissioner*, 133 T.C. 424, 428–430 (2009).

⁵¹ See *Id.* at 430 n.6 (citing *Williams v. Commissioner*, 131 T.C. 54, 58 n.4 (2008), and *Callahan v. Commissioner*, 130 T.C. 44, 48 (2008)); *Gardner v. Commissioner*, 145 T.C. 161 (2015) (upholding Tax Court jurisdiction to review §6700 penalties in the CDP context).

⁵² See IRC §6330(c)(2)(B).

⁵³ 143 T.C. 157 (2014), *aff’d*, ___ F.App’x ___, 2016 WL 5940054 (9th Cir. Oct. 13, 2016).

⁵⁴ See Treas. Reg. 301.6330-1(e)(3), Q&A-E2.

⁵⁵ See *Lewis v. Commissioner*, 128 T.C. 48, 60–61 (2007).

⁵⁶ *Id.*

⁵⁷ See *Smith v. Commissioner*, T.C. Memo 2016-186; *Mangum v. Commissioner*, T.C. Memo 2016-24, 111 T.C.M. (CCH) 1099, 1102 (declining to reconsider *Lewis*).

⁵⁸ See, e.g., *Lee v. IRS*, 89 AFTR2d (RIA) 2002-1520 (M.D. Tenn. 2002) (“Plaintiff received notice of the exercise tax liabilities to the Appeals Office; therefore, the underlying exercise tax liability cannot be raised in the hearing.”); *Adams v. United States*, 2002-1 U.S. Tax Case (CCH) para 50,295 (D. Nev. 2002) (holding similar in the case of a civil penalty under §6682).

⁵⁹ *Nat’l Fed. Ind. Bus. v. Sebelious (NFIB)*, 567 U.S. 519, 543 (2012).

⁶⁰ IRC §7421(a).

⁶¹ *Perlowin v. Sassi*, 711 F.2d 970, 971 (9th Cir. 1983).

⁶² 575 U.S. 1 (2015).

⁶³ *Id.* at 12-13.

⁶⁴ *Id.* at 13.

⁶⁵ 567 U.S. 519 (2012).

⁶⁶ See Robert Horowitz, "Can the IRS Assess or Collect Foreign Information Reporting Penalties?" *Tax Notes*, Jan. 21, 2019.

⁶⁷ See, e.g., IRC §§ 860(h)(1), 6324A(a), 6601(e)(1)-(2), 6602, 7122(b).

⁶⁸ See *National Federation of Independent Business*, 567 U.S. 545-546.



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