

A collage of travel-related items including a passport, a map, sunglasses, and Euro currency. The passport is open, showing a visa and a stamp. The map is in the background, and the sunglasses are in the top right. Euro banknotes and coins are scattered in the foreground.

# International Taxation: Information Reporting and Penalties

2025 D.C. Bar Tax Conference

Breakout Session 2

January 15, 2025 (10:45 a.m. to 11:55 a.m.) | Washington, D.C.



**Maricarmen Cuello** is the Area Director, International, for the IRS Independent Office of Appeals.

Maricarmen Roca Cuello has been with the Internal Revenue Service for 29 years. For the past 17 years, she has been with the Independent Office of Appeals, first as an Appeals Officer and then transitioned into various managerial positions including oversight over the Estate and Gift, Tax Exempt/ Government Entities and Art Appraisal programs. She is currently the Appeals Area Director of International Operations. She oversees all unagreed corporate and individual tax cases with international tax implications, including all the international information return penalties.

Maricarmen began her career with the Service as a Revenue Agent. After obtaining her law degree, she transferred to the Estate and Gift division. As an Estate Tax Attorney, she performed examinations of highly complex Estate and Gift returns. In 2006, she was hired as an Appeals Officer, where she settled Income, International, Estate and Gift tax cases.

Maricarmen is a member of the Florida Bar. She received her B.A. in Accounting from Florida International University and her law degree from the University of Miami. She has been a frequent speaker about Appeals procedure, income and estate tax topics at gatherings of attorneys, CPAs and tax professionals. Most recently, the Florida Bar Tax Section awarded her with the Marvin C. Gutter Outstanding Public Service Award.



**Daniel N. Price** focuses his practice on federal tax and Title 31 matters including civil and criminal defense of IRS audits and investigations and much more. Before founding his own firm, Law Offices of Daniel N. Price, PLLC, Dan served as an attorney for the Office of Chief Counsel of the IRS for more than 19 years. Dan's government service included extensive work in international tax enforcement. Dan's deep expertise concerning the IRS' voluntary disclosure practice, the Streamlined Filing Compliance Procedures, and international penalties allows him craft strategies to mitigate civil penalties and criminal exposure. Dan further assists taxpayers in battling significant penalties assessed by the IRS and certain state tax authorities.

Dan's prior government service included extensive work in the arena of international enforcement and included assisting the IRS in completely revising the Voluntary Disclosure Practice. Dan also worked with the Offshore Voluntary Disclosure Programs, the Streamlined Filing Compliance Procedures, foreign bank account reporting, Bank Secrecy Act investigations, various LB&I compliance campaigns, expatriation issues, international collection of taxes, and much more. Dan served as a Chief Counsel "FBAR Coordinator" reviewing willful FBAR penalty cases proposed by IRS revenue agents. Dan was also part of the Chief Counsel team who met quarterly with the Department of Justice Tax Division on FBAR cases and annually on significant international enforcement matters.

Beyond Dan's normal tax practice, he has an active pro bono practice in both tax, immigration asylum, and other matters. Dan spent the year 2022 volunteering his legal services as in-house counsel with a nonprofit. In the tax realm, Dan has represented low-income taxpayers pro bono in Tax Court proceedings and in administrative proceedings including abatement requests of unjustified international information return penalties. Dan taught in a tax webinar on tax compliance issues for refugees; the webinar was tailored to help volunteer tax return preparers assisting asylum seekers. Dan also volunteers as a member of the Form 3520 Task Force of the American Institute of Certified Public Accountants (AICPA).

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**Lawrence (Larry) Sannicandro** focuses his practice on a broad range of federal and state tax disputes affecting individual private clients as well as their estates, trusts, and closely held businesses. These disputes include audits and examinations, administrative appeals, collection matters, summons proceedings, criminal tax investigations and prosecutions, and litigation in the United States Tax Court, federal district and appellate courts, and state tax tribunals. He has extensive experience providing tax-related advice with respect to original tax return reporting positions on a broad range of substantive tax issues, amending tax returns, filing and litigating claims for refund, challenging civil tax penalties, reporting foreign assets and income, and making voluntary disclosures.

Larry is a member of the Internal Revenue Service Advisory Council (IRSAC) and a fellow of the American College of Tax Counsel. He serves the American Bar Association (ABA) Section of Taxation as a vice chair of the Court Procedure and Practice Committee as well as a member of the Appointments to the Tax Court Committee. He was also a past Chair of the ABA Section of Taxation's Committee on Tax Collection, Bankruptcy and Workouts. A dedicated pro bono advocate, Larry was awarded the 2020 Janet Spragens Pro Bono award for his team's work providing tax-related advice to wrongfully incarcerated individuals.

Prior to entering private practice, Larry served as a law clerk for the United States Tax Court, and before that, as an estate and gift tax attorney for the IRS. Previously, he taught courses in tax practice and procedure and legal ethics at several universities. A prolific writer, Larry is a co-author of the BNA Portfolio on *IRS National Office Procedures – Rulings, Closing Agreements*, an author of the BNA Portfolio on *Innocent Spouse*, a contributing author of *Effectively Representing Your Client Before the IRS*, and a co-author of *Qualified Appraiser, Qualified Appraisal: Practice, Procedure, Legal Analysis, and Theory*, among other books and articles.

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**Melissa Wiley** has over 20 years of experience in tax controversy and litigation on a wide range of civil tax matters at the federal and state level. She represents clients at all levels of administrative controversy with the IRS, including audits and cases before the IRS Office of Appeals, and has significant experience handling penalty and international information reporting matters. Her experience includes litigation in the U.S. Tax Court, Court of Federal Claims, and various federal district courts, representing clients facing government and third-party subpoenas and investigations. She also counsels on voluntary disclosures of prior tax noncompliance.

An actuary by training, Melissa has practiced at a Big Four accounting firm, first as an Assistant General Counsel and later as a Senior Manager in the firm's National Tax department; as well as in the Tax practice of an AmLaw 20 global law firm. A respected authority on tax controversy topics, Melissa frequently presents on IRS filing requirements, penalties, and enforcement, as well as on ethics and the Corporate Transparency Act. She is active in numerous professional organizations such as the AICPA, where she currently chairs the IRS Advocacy and Relations Committee, and the ABA Tax Section, where she serves as the Vice Chair for Membership, Diversity and Inclusion. She is also the Regent for the Federal Circuit for the American College of Tax Counsel.

Melissa's pro bono work includes assisting local children and caretakers through the Children's Law Center, where she served on the board for a decade and has provided pro bono services in custody and abuse/neglect matters for more than 15 years. She also serves on the board of directors for the Community Tax Law Project, a low-income taxpayer clinic that represents taxpayers in disputes with the IRS and local taxing authorities.

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# Agenda

- Introduction
- Common international information return penalties
- Recent developments involving Title 26 international information return penalties
  - Case updates
  - Other administrative developments
  - Current enforcement trends
- Using FOIA in cases involving international information return penalties



# Common International Information Returns



# Common International Information Returns

- Form 926 – Certain Transactions with a Foreign Corporation
- Form 3520 – Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts
- Form 3520-A – Foreign Trust with U.S. Owner
- Form 5471– Controlled Foreign Corporation
- Form 5472 – Foreign-Owned U.S. Corporation
- Form 8621 – Passive Foreign Investment Company
- Form 8833 – Treaty Benefits
- Form 8854 – Initial and Annual Expatriation Statement
- Form 8858 – Foreign Disregarded Entities
- Form 8865 – Foreign Partnerships
- Form 8938 – Foreign Financial Assets
- FinCEN Form 114 – Report of Foreign Bank & Financial Accounts (FBAR)

# International Information Return Penalties

Form	Code Section	Potential penalties*
<b>Form 926</b> (Return by a U.S. Transferor of Property to a Foreign Corporation)	6038B(c)	10% of the FMV of property transferred to foreign corporation (max. \$100,000)
<b>Form 3520</b> (Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts)	6677 6039F	Up to four penalties may apply. <ul style="list-style-type: none"> <li>For trust contributions, ownership, or distributions, a separate penalty applies for failure to timely report each transaction. Each penalty is equal to the greater of \$10,000 or (1) 35% of the trust contribution, (2) 5% of the gross value of U.S. person's portion trust assets (at close of U.S. person's tax year), or (3) 35% of the trust distribution</li> <li>For failure to timely report a foreign gift/bequest, a maximum penalty equal to 25% of the FMV of the foreign gift/bequest may apply</li> </ul>
<b>Form 3520-A</b> (Annual Information Return of Foreign Trust with a U.S. owner)	6677(b)	The greater of \$10,000 or 5% of the gross value of U.S. person's portion of foreign trust assets (measured as of the close of the U.S. person's tax year)
<b>Form 5471</b> (Information Return of U.S. Persons with Respect to Certain Foreign Corporations)	6038	\$10,000 per form
<b>Form 5472</b> (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in U.S. Trade or Business)	6038A	\$25,000 per form
<b>Form 8621</b> (Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund)	6501(c)(8)	Statute of limitations for tax year remains open until 3 years after form is filed

\* Additional/increased penalties may apply for intentional disregard of reporting requirements and/or continued noncompliance. The statute of limitations may also remain open indefinitely for failure to file the appropriate form (see Section 6501(c)(8))

# International Information Return Penalties

Form	Code Section	Potential penalties*	
<b>Form 8833</b> (Treaty-Based Return Position Disclosures Under Sections 6114 or 7701(b))	6114, 7701(b)	Loss of treaty benefits?	
<b>Form 8854</b> (Initial Expatriation Statement)	877A, 6039G	\$10,000 per failure and potential treatment as “covered expatriate” subject to U.S. exit tax	
<b>Form 8858</b> (Information Return of U.S. Persons with respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs))	6038(b)	Form 5471, Category 4/5 filers Form 8865, Category 1/2 filers	\$10,000 per failure
<b>Form 8865</b> (Return of U.S. Persons with Respect to Certain Foreign Partnerships)	6038(b), 6038B(c), 6046A/6679	Multiple penalties may apply: <ul style="list-style-type: none"> <li>• \$10,000 per failure Category 1, 2, and 4</li> <li>• 10% of FMV of property transferred (capped at \$100,000) per Category 3 failure</li> </ul>	
<b>Form 8938</b> (Statement of Specified Foreign Financial Assets)	6038D(d)	\$10,000 per form	
<b>FBAR</b>	31 U.S.C. 5321	<ul style="list-style-type: none"> <li>• Up to \$16,117 (after 1/25/2024) for “non-willful” violations</li> <li>• Up to the greater of \$161,166 (after 1/25/2024) or 50% of account balances, plus potential criminal penalties, for “willful” violations</li> </ul>	

\* Additional/increased penalties may apply for intentional disregard of reporting requirements and/or continued noncompliance. The statute of limitations may also remain open indefinitely for failure to file the appropriate form (see Section 6501(c)(8))

# International Information Returns – Enforcement

- The IRS remains committed to enforcement of late-filed (or unfiled) international information returns
  - Heavy reliance on Campus-based assessments
  - Auditors actively identify failure to file international information return penalties
    - Reasonable cause exceptions unlikely to apply at the examination level
- Sources of information:
  - Reporting under the Foreign Account Tax Compliance Act (FATCA)
  - Inter-governmental cooperation
    - Specific requests
    - Spontaneous exchanges
  - Legacy use of Swiss Bank Program data and leads resulting from new non-prosecution agreements with DOJ Tax Division
  - Campaigns
  - John Doe summonses
  - Information provided in voluntary disclosures and tax filings
  - Whistleblowers
  - Congressional investigations

# Recent Case Updates





# Farhy I

*Farhy v. Commissioner*, 160 T.C. 6 (Apr. 3, 2023)

- Farhy was a U.S. taxpayer residing in Israel who owned various Belizean corporations. He participated in an illegal scheme to reduce his tax, provided an affidavit as to his role, and entered into a nonprosecution agreement with the government.
- In 2016, the IRS issued Farhy a notice of his failure to file Forms 5471, but he never filed them. The IRS imposed an initial penalty of \$10,000 for each year the forms were not filed, as well as \$50,000 continuation penalties. Farhy did not pay the penalties, and the IRS sought to levy his property to collect the penalties.
- In response to the levy notices, Farhy requested a collection due process (CDP) hearing. The IRS Independent Office of Appeals sustained the imposition of the penalties, as well as the levy.
- Farhy petitioned the Tax Court, asserting that the IRS lacked authority to assess penalties for failure to file Forms 5471 because they were not “assessable penalties.” The Tax Court agreed with Farhy, holding that the IRS lacks authority to assess penalties for failure to file Forms 5471, though they may be collected through a civil action under 28 U.S.C. § 2461(a).
- The Government appealed the case to the D.C. Circuit.

# *Farhy II*

*Farhy v. Commissioner*, \_ F.4th \_, 2024 WL 1945977 (D.C. Cir. May 3, 2024)

- At issue was whether penalties for late-filing Form 5471 are assessable (and administratively collectible under section 6201(a)) of the Internal Revenue Code (Code) or whether the government must sue in federal court to assess and collect the penalties
- The D.C. Circuit held that the “text, structure, and function” of Code section 6038 demonstrate Congress’ intent that penalties for failing to timely file Forms 5471 are meant to be assessable
- The Court of Appeals reversed the Tax Court and remanded the case for further proceedings
- On June 4, 2024, Farhy petitioned for rehearing en banc, which the court denied on June 13, 2024

# Mukhi I

*Mukhi v. Commissioner*, 162 T.C. 8 (Apr. 8, 2024)

- From 2001 through 2005, Mr. Mukhi created multiple foreign entities, including a corporation and trust. He opened numerous brokerage accounts in the entities' names and transferred around \$15 million to those accounts
- He was indicted on two counts of subscribing to false tax returns and four counts of willful failure to file FBARs. He eventually pleaded guilty to one felony for failure to file a tax return and one felony for failure to file FBARs.
- Once the criminal case was resolved, the IRS examined whether any civil penalties should be imposed. At the end of the audit, the IRS proposed:
  - Over \$5.5 million of penalties for failure to file Forms 3520;
  - Over \$5.9 million of penalties for failure to file Forms 3520-A; and
  - \$120k in penalties for failure to file Forms 5471.

# Mukhi I

Issues Raised	Tax Court's Conclusions
Form 5471 penalties are not "assessable"	IRS lacks assessment authority (cites <i>Farhy I</i> )
Fifth Amendment procedural due process in CDP hearing → settlement officers must be independent	No Fifth Amendment violation → settlement officer independently reviewed case
Abuse of discretion rejecting collection alternatives → based on reasonable collection potential	No abuse of discretion → rejected offers were significantly below collection potential
Eighth Amendment Excessive Fines Clause → prohibits excessive fines	No Eighth Amendment violation → section 6677 penalties not "fines"

# *Mukhi II*

*Mukhi v. Commissioner*, 163 T.C. 8 (Nov. 18, 2024)

- IRS requested reconsideration of the Tax Court's opinion in *Mukhi I* in light of the D.C. Circuit's decision in *Farhy II*
- The Tax Court applied the *Golsen* doctrine to hold that it would follow *Farhy I* except in cases appealable to the D.C. Circuit
  - *Mukhi* is appealable to the U.S. Court of Appeals for the Eighth Circuit



# *Safdieh*

*Safdieh v. Commissioner*, Dkt. No. 11680-20L (Dec. 5, 2024)

- The IRS sought to collect penalties assessed under Code section 6038 and moved for summary judgment
- The Court *sua sponte* granted summary judgment in favor of the taxpayer on the ground that the penalties could not be assessed and collected administratively, but could be collected only in a civil action brought under 28 U.S.C. § 2461(a)
- *Safdieh* is appealable to the U.S. Court of Appeals for the Second Circuit



### **Judge Holmes in *Safdieh*:**

“Our Court's tradition when we've been reversed is to reexamine our reasoning when the issue is next raised in a case appealable to a different circuit. As it turned out, *Mukhi* was not yet final and unappealable when the D.C. Circuit issued *Farhy*. The Commissioner moved to reconsider our decision in *Mukhi* itself. Last week we issued *Mukhi II*, No. 4329-22L, 163 T.C. (Nov. 18, 2024), in which we held that **we still think we're right** in our interpretation of section 6038, and expressly held that we would continue our disagreement with the D.C. Circuit in cases appealable to other circuits.”

# Mukhi-Parallel Arguments in FBAR Context

- In the FBAR context, litigants have argued that willful FBAR penalties violate the Eighth Amendment's excessive fines clause
- Most courts have held that the Eighth Amendment does not apply to willful FBAR penalties
  - *See, e.g., United States v. Toth*, 33 F.4th 1, 15 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 552 (2023), *reh'g denied*, 143 S. Ct. 2604 (2023); *United States v. Rund*, 2024 WL 3690774, at \*8 (E.D. Va. Aug. 6, 2024); *Landa v. United States*, 153 Fed. Cl. 585, 601 (2021); *United States v. Estate of Schoenfeld*, 344 F. Supp. 3d 1354, 1370 (M.D. Fla. 2018).
- However, in August 2024, in *United States v. Schwarzbaum*, \_\_ F.4th \_\_, 2024 WL 3997326 (11th Cir. 2024), the Eleventh Circuit held that the willful FBAR penalty is subject to the excessive fines clause
- What impact, if any, does *Schwarzbaum* have on the Eighth Amendment argument in the international information return context?

# Assessment Trends – Form 5471 Penalties

- The IRS is not following *Mukhi*

**Department of the Treasury**  
**Internal Revenue Service**  
**Director**  
 333 W PERSHING ROAD  
 KANSAS CITY, MO 64108

Document Locator Number  
 [REDACTED]

MET	Tax Period	Assessment Date	Trans Code
55	201212	10/03/2024	370

IRRS Number: [REDACTED]  
 Notice Date: 10/03/2024  
 Name Control: [REDACTED]  
 Taxpayer Identifying Number: [REDACTED]  
 Form Number: 8278  
 Plan/Report Number:  
 Tax Period Ended: 12/31/2012

Taxpayer  
 [REDACTED]

**Notice of Tax Due on Federal Tax Return**

This is a notice of tax due on your tax return identified above. Please pay the amount shown as Balance Due when you receive this notice. Make your check payable to the United States Treasury and send it with a copy of this notice to the address shown above. If the balance due as shown below is incorrect because you made a recent payment, please send us the amount you believe you owe and an explanation of the difference.

The balance due may include penalty and interest. If you have any questions concerning the balance due or penalty and interest computation call us at 800-829-0115 (Business filers) or 800-829-5374 (Individual filers).

31. Reference	32. TC	33. Assessment	34. Adjustment or Credit	35. Balance Due
10/03/2024 ADD'L TAX	290		0.00	
36. Reference Code: see enclosed notice 623 see enclosed notice			20,000.00	20,000.00

Please return this copy with your payment to the address shown above

Form 3552 (Rev. 11-2022)(Part 3)  
 Catalog Number 49356T



Supervisory  
Approval under  
Section 6751(b)



# Lu

## *Lu v. Commissioner*, Tax Court Docket No. 10523-23L

- In *Lu*, the IRS assessed a penalty for late-filing Form 3520-A. The IRS approved the penalty assessment in the Accounts Management System Case File History notes. Lu argued this did not satisfy Code section 6751(b).
- The Appeals Case Memorandum stated, “Given that both [the requestor] and [the requestee] are employed by IRS Cincinnati Accts Management and [the requestor] holding the title ‘Program Manager’ and [the requestee] holding the title ‘Contact Representative,’ a reasonable presumption can be made by Appeals that [the requestor] and [the requestee] held a direct employee-manager relationship at the time of the penalty request and subsequent approval for purposes of IRC §6751(b) [sic] compliance.” The IRS Independent Office of Appeals therefore refused to abate the penalty.
- Lu petitioned the Tax Court to review the decision to sustain the issuance of a levy as well as the failure to abate the penalty. Subsequently, the IRS abated the late-filing penalty, which mooted the case.

# McCarthy

## *McCarthy v. Commissioner*, T.C. Memo 2020-74

- Lu relied on *McCarthy* to argue that the approval did not satisfy Code section 6751(b).
- In *McCarthy*, the IRS imposed accuracy-related penalties under Code section 6662(b)(2). The court noted that, under Code section 7491(c), the IRS bears the burden of production with respect to the penalty. The IRS sought to meet the burden of production for supervisory approval with “a notation in a one-page stipulated exhibit captioned ‘Correspondence Examination Automation Support’, dated April 25, 2018. On this document in a single line entry dated September 6, 2017, with an indication that it was ‘Submitted by’ an otherwise unidentified ‘Brodnax Felicia L’ and with an indication that the ‘Action Type’ is (mysteriously) ‘Non Action’, the ‘Note’ states in its entirety: ‘6662 penalty approved.’” The court was not convinced.
- In holding that the IRS failed to meet its burden of production, the court noted that the document on which the IRS relied did not show approval of a penalty under Code section 6662(b)(2). It further noted that the IRS had “not established which Internal Revenue Service (IRS) employee made the initial determination of any accuracy-related penalty, who that IRS employee's immediate supervisor was, or that the penalty was approved timely in writing by that immediate supervisor.”

# *Ueland I*

*Ueland v. United States*, Dkt. No. 1:23-cv-00931 (Court of Federal Claims)

- IRS penalized taxpayers for untimely filing of Forms 3520-A reporting Australian Superannuation funds, notwithstanding taxpayers filing of Form 7004 to request an extension
- IRS took nearly \$100,000 from the taxpayer's following year's refund to satisfy the assessed penalty
- Taxpayers did not receive notice of penalty assessment
- Taxpayers argued multiple violations of Code section 6751:
  - Failure to provide penalty computation under Code section 6751(a)
  - Failure to establish a supervisor approved the penalty in writing prior to assessment under Code section 6751(b)(1)
- Taxpayers sued for a refund in the Court of Federal Claims
- DOJ Tax Division conceded the case without filing a responsive pleading

# *Ueland II*

*Ueland v. United States*, Dkt. No. 1:24-cv-00367 (Court of Federal Claims)

- Same fact pattern as *Ueland I*, but penalty assessment was nearly \$279,000
- Taxpayer again argued:
  - IRS failed to provide penalty computation under Code section 6751(a)
  - IRS failed to establish a supervisor approved the penalty in writing prior to assessment under Code section 6751(b)(1)
- IRS Independent Office of Appeals during CDP hearing refused to consider merits of the penalty
- IRS failed to follow Notice 2022-36 and grant automatic penalty relief
- Taxpayers sued for a refund in the Court of Federal Claims
- Déjà vu: DOJ Tax Division conceded the case without filing a responsive pleading

# Administrative Developments





# Delinquent International Information Return Submission Procedures

## General Eligibility Criteria:

- Taxpayer has not filed required international information returns (Forms 926, 3520, 3520-A, 5471, 5472, 8858, 8865, 8938, etc.)
- Does not have unreported income that would necessitate filing amended/delinquent returns to report and pay additional tax
- Not under civil examination, criminal investigation, and have not been contacted about delinquent information returns

## Must attach a reasonable cause statement to each delinquent filing:

- Statement must be made under penalty of perjury and traditional reasonable cause principles apply
- Taxpayer must certify that any entity for which the information returns are being filed was not engaged in tax evasion
- Reasonable cause for failure to file return versus reasonable cause for an underpayment of tax

Penalties may be assessed for failure to provide reasonable cause statement or if IRS does not accept explanation

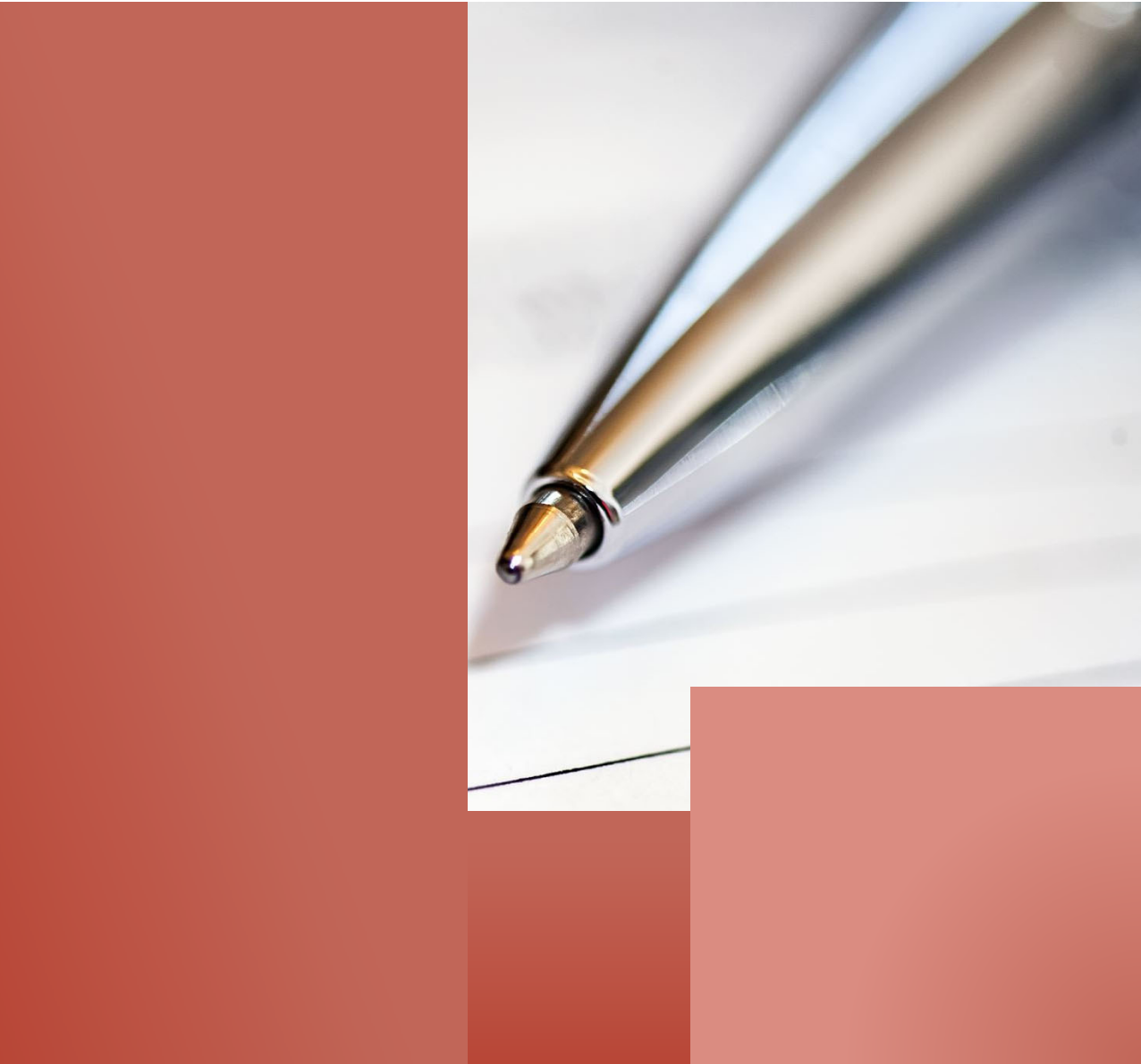
## Delinquent International Information Return Submission Procedures

- Historically, the IRS had not been considering reasonable cause statements. Instead, particularly with respect to Forms 3520, 3520-A, 5471 and 5472, the IRS had been summarily assessing international information return penalties.
- **10/24/2024:** Commissioner Werfel announced that the IRS will no longer automatically assess late-filing penalties for Forms 3520 filed solely to report receipt of a large foreign gift (Part IV).

Further, the IRS will now review reasonable cause statements attached to Forms 3520 and 3520-A pursuant to I.R.M. policies concerning other penalties.

# Defenses to Int'l Information Return Penalties

- First-Time Abatement
  - Applicable to SOME Forms 5471 and 5472 per I.R.M., pts. 20.1.9.3.5 and 20.1.9.5.5
- Reasonable Cause
  - “Any reason that establishes a taxpayer exercised ordinary business care and prudence but nevertheless failed to comply with the tax law may be considered for penalty relief.” I.R.M., pt. 20.1.1.3.2.1(1) (Mar. 29, 2023)
    - Death, serious illness, or unavoidable absence
    - Fire, casualty, natural disaster, or other disturbance-reasonable cause
    - Unable to obtain records
    - Mistake of fact or mistake of law
    - Erroneous advice or reliance
    - Ignorance of the law
    - Forgetfulness
    - Inaccessible notices\*




# Using FOIA in Cases Involving International Information Return Penalties

# When to Use FOIA

- Penalty abatement/refund cases to establish whether the IRS met Code section 6751(b)(1) supervisory approval and other requirements
- To gain an understanding of what transpired before you became the representative
- No IRS employee is assigned the case
- Obstinate, difficult, or perhaps unorthodox IRS employees
- IRS policy information or stats not publicly available
- IRS training material not publicly available
- Prepare for litigation against the IRS

# Example 1- Form 3520 Penalty Case

Navigation

 **Correspondence Imaging System** [? Help](#) [X Logoff](#)

**Case Notes** Case Assigned To: 0433972885  
Case ID: [REDACTED]

Case Notes

[Return to Case](#)

Note Description	Employee	Date
Case closed	0433972885	2021/02/25
Approved to assess F3520 [REDACTED] civil penalty per IRM 21.8.2.19.2, ME, Manager	0433084679	2021/02/11
3520 penalty per IRM 21.8.2.19.2 659 for [REDACTED]	0433972885	2021/02/09
Case marked as statute searched	0433972885	2021/02/09
2MGR command executed by user.	0433972885	2021/02/09
Case Assigned from 0436000005 to 0433972885	0433548082	2021/02/05
Case Assigned	SYSTEM	2019/12/27



## Example 1- Form 3520 Penalty Case (cont'd)

Note Description	Employee	Date
Case closed	0433972885	2021/02/25
Approved to assess F3520 [REDACTED] civil penalty per IRM 21.8.2.19.2, ME, Manager	0433084679	2021/02/11
3520 penalty per IRM 21.8.2.19.2 659 for [REDACTED]	0433972885	2021/02/09

- Who approved the penalty?
- What are the names of the employees involved?
- What positions with IRS do they hold?
- Is the “manager” actually a supervisor?
- Where are the documents underlying the assessment?

# Example 2- Form 3520-A Penalty Case

Case Notes

Show entries: All Filter

Note Description	Employee ID	Date
Case closed	0433463103	12/16/2011 10:22:44
Approval to assess F 3520 CIV PEN on owners SSN, MFT 55/201612 with PRN 677 for \$ [REDACTED] PRN 677 for \$ [REDACTED] PRN 667 for \$ [REDACTED] PRN for \$ [REDACTED] PRN 677 for \$ [REDACTED] and PRN 677 for \$ [REDACTED] per BU Lead MS.	0433975907	12/13/2011 09:07:14
emailed	0433463103	12/11/2011 08:54:14
Statute Searched indicator expired.	SYSTEM	11/15/2011 02:03:37
Case reassigned from 0433759909 to 0433463103	0441459909	11/01/2011 21:02:36
DOCREQ command executed by user.	0441459909	11/01/2011 20:58:08
CAPTURE command executed by user: DOC REQ 2 Request Completed Screen	0441459909	11/01/2011 20:57:56
Case reassigned from 0433463103 to 0433759909	0433407752	11/01/2011 13:36:46
2WRKLR command executed by user.	0433463103	11/01/2011 10:30:56
2WRKLR command executed by user.	0433463103	10/30/2011 20:17:26
mssg	0433463103	10/30/2011 20:17:09
2WRKLR command executed by user.	0433463103	10/29/2011 17:52:38
2nDOCREQ TC976 DLNs... [REDACTED] [REDACTED] [REDACTED] [REDACTED]	0433463103	10/29/2011 17:52:17
MONITOR command executed by user.	0433463103	10/23/2011 09:57:23
pn4docreqs	0433463103	10/23/2011 09:57:03
Case reassigned from 0433787088 to 0433463103	0433787088	10/01/2011 21:35:21
DOCREQ command executed by user.	0433787088	10/01/2011 20:50:58
CAPTURE command executed by user: ESTAB Request Completed	0433787088	10/01/2011 20:50:40

## Example 2- Form 3520-A Penalty Case (cont'd)

Note Description	Employee ID	Date
Case closed	0433463103	12/16/2016 10:22:44
Approval to assess F 3520 CIV PEN on owners SSN, MFT 55/201612 with PRN 677 for \$ [REDACTED], PRN 677 for \$ [REDACTED], PRN 667 for \$ [REDACTED] PRN for \$ [REDACTED], PRN 677 for \$ [REDACTED] and PRN 677 for \$ [REDACTED] per BU Lead MS.	0433975907	12/13/2016 09:07:14
emailed	0433463103	12/11/2016 08:54:14
Statute Searched indicator expired.	SYSTEM	11/15/2016 02:03:37

# Sample FOIA for International Penalty Cases

1. All documents sent to Taxpayer and/or her authorized representatives concerning the penalties and IRS efforts to collect the penalties.
2. All documents sent to the IRS by Taxpayer and/or her authorized representatives concerning the penalties and IRS efforts to collect the penalties.
3. All documents and information relating to all penalties assessments. This request includes but is not limited to the following:
  - a. All penalty notices including but not limited to CP15 and CP215 notices.
  - b. All documents, including but not limited to workpapers, notes, case activity records, case notes, job aids, penalty calculators, and the like relating to the penalty computation, penalty determination, and penalty assessment.
  - c. All documents in the Correspondence Imaging System (CIS) or any other IRS system, including but not limited to the Accounts Management System (AMS), relating to the penalty computations, penalty determinations, and penalty assessments. For each and every line entry in the CIS and AMS system “case notes,” we request the documents underlying the entries.
4. All documents relating to written supervisory approval of the penalties.
5. If not provided pursuant to an earlier request, all penalty worksheets/penalty calculators showing the computation of the penalties.
6. If in the IRS’ penalty file and any other available records showing the date of assessment for the penalties.
7. All documents identifying the person who made the “initial determination” of the penalty assessment.
8. The complete “Discovery Directory” entry for the person who made the “initial determination” of the penalty assessment.

# Sample FOIA for International Penalty Cases

9. All documents and information establishing that the person who approved the penalty assessment was a supervisor, manager, or acting supervisor/manager. This request includes documents establishing that the penalty was approved by a supervisor or acting supervisor.
  - a. If an acting supervisor approved the penalty, please provide a copy of the document delegating acting supervisor/manager status.
  - b. For all purported managers and supervisors identified by employee number in the CIS case notes, provide all documents identifying the purported manager or supervisor by name.
10. All documents indicating that the person who approved the penalty assessment was a “team lead,” “work leader,” or similar worker.
11. The complete “Discovery Directory” entry for the person who approved the penalty assessment.
12. All documents relating to the OPM General Schedule (“GS”) job series and job description of the person who approved the penalty assessments. If performance appraisals are the only responsive documents, we will accept redacted appraisals only showing the employee’s critical elements with actual ratings redacted.
13. All other documents revealing the GS/IR/ES level and job series of the person who approved the penalty assessments.
14. If not provided in response to an earlier request, all emails between the person who made the “initial determination” of the penalty assessment and the person who purported to approve the penalty assessment.
15. If not provided in response to an earlier request, all other documents relating to the penalty assessment, including internal documents, memoranda, case activity records, written reports and recommendations, and any other records.
16. All records relating to the consideration of the request to abate the penalties. This request includes but is not limited to all records of IRS consideration of the penalty abatement including CIS case notes, emails, and any job aids or similar guides used by IRS workers in considering the abatement request.

# What is the “Discovery Directory”?

- Web based database for IRS and Chief Counsel employees to locate other IRS employees
- Includes
  - Name
  - Title
  - Job series and grade
  - Indicators of management or non-management
  - Contact info and office address
  - Working hours (known as “tour of duty”)
  - Manager’s name

**Support:**

- [Welcome Page](#)
- [FAQs](#)
- [Contact Us](#)
- [Additional Services](#)
- [Help](#)

**The last search found 1 person**

**Who are you looking for?** [\(Click for more options\)](#)

**Last Name:** Mueller       Exactly  Sounds like  Contains  
**First Name:** Melissa       Exactly  Sounds like  Contains

**Find:**

- [People \[Advanced\]](#)
- [Business Units](#)
- [Locations](#)

**SEID:** ?

**Job Series**

**Browse:**

- [Business Units](#)
- [Locations](#)

**What do you want to see?**

- Just a list of names
- Names, telephone numbers and E-Mail addresses
- All available information
- Display results in Excel

**HotList:** [Empty]

**History:**

Discovery vp2smemldpcads3  
 Version: 2.6  
 Revision: 07/20/2022  
 Directory: vp2smemldpcads3

**Here is what you asked for:** [\[Download to Excel\]](#)

[REDACTED] [\[Download vCard\]](#) [\[Add to HotList\]](#) [\[Download to Excel\]](#)

**SEID** [REDACTED]  
**Employee ID** [REDACTED]  
**Badge Number** 1 [REDACTED]  
**Title** SUPV CONTACT REPRESENTATIVE  
**Series and Grade** IR-0962-7  
**Management Level** 2 - Supervisor/Manager [NBU]  
[Employees of this manager](#)  
**Work Address** [333 Scott Street](#)  
 Covington, KY 41011-1538  
[Others at this address](#)  
**Building** KY2032  
**Mailing Address** 7940 Kentucky Dr  
 Florence, KY 41042-2915  
**Work Phone** [REDACTED] (Desk)  
**Email address** [REDACTED]@irs.gov  
**Tour of Duty** Monday-Friday 4:30pm-1:00am  
**Work Schedule** F - Full time permanent  
**Organization code** 934175753933090000 (41-78-B1002)  
 W&I Service Centers  
 Cincinnati Accts Management  
 AM Operations 2  
 Dept 3 Toll-Free & Adjustments  
 BMF Toll Free Team 309  
[Others in this business unit](#)  
**Manager** [REDACTED]  
**Last Update** 03/27/2023

# Argument Applied to Examples

- Argue that the entries do not satisfy Code section 6751(b)(1):

No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the **immediate supervisor** of the individual making such determination or such higher level official as the Secretary may designate.

- *See McCarthy v. Commissioner*, T.C. Memo. 2020-74 (rejecting the IRS' assertion that an entry in the IRS' "Correspondence Examination Automation Support" system sufficed for written supervisory approval of a penalty).





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QUESTIONS?