



United States Tax Court

Washington, DC 20217

JOSEPH SAFDIEH,

Petitioner

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent

Docket No. 11680-20L.

ORDER AND DECISION

This case was originally on the Court's May 24, 2021 trial calendar for New York City. It arises from a notice of determination sustaining the filing of a notice of federal tax lien to collect penalties assessed under IRC § 6038¹ for tax years 2005–2009. Respondent moved for summary judgment, but the question of the assessability of section 6038 penalties was bubbling up in other cases as well. In *Farhy v. Commissioner*, 160 T.C. 399, 403–13 (2023), we finally held that those penalties are not assessable, but likely recoverable only in a civil action. *Id.* The government then appealed *Farhy* to the D.C. Circuit. *See Farhy v. Commissioner*, 100 F.4th 223 (D.C. Cir. 2024).

While that appeal was pending, we declined to overrule *Farhy* in a case appealable to the Eighth Circuit. *Muhki v. Commissioner*, No. 4239-22L, 162 T.C., slip op. at 18 (Apr. 8, 2024). Our citation to *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971) meant that we would not wait on the appeal in *Farhy* for cases appealable other than to the D.C. Circuit.

¹ Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

But then the D.C. Circuit reversed our decision in *Farhy*. See *Farhy v. Commissioner*, 100 F.4th 223 (D.C. Cir. 2024). 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.

Mr. Safdieh was a New York resident when he filed his petition, so appellate venue presumptively lies in the Second Circuit. He is representing himself, and we infer from the fact that his filings are mostly handwritten that he is not the most sophisticated of litigants in Tax Court. In his response to the IRS’s summary-judgment motion in his case, he did not include his own motion for summary judgment, and he did not raise the argument that ultimately prevailed in *Farhy* and *Mukhi*.

We have nevertheless held that we can grant summary judgment *against* the Commissioner even when he is the only party moving for summary judgment. See *Rogers v. Commissioner*, 157 T.C. 20, 49 (2021) (Court, in rejecting respondent’s lone summary judgment motion, held that respondent abused his discretion). We have also held that it is the obligation of the appeals officer conducting a CDP hearing to verify “that the requirements of any applicable law or administrative procedure have been met.” I.R.C. §§ 6320(c), 6330(c)(1). See *Freije v. Commissioner*, 125 T.C. 14, 32–37 (2005) (finding an appeals officer’s verification was insufficient due to an error of law). In this case, verification is a legal impossibility now that we’ve twice held that the Code does not permit the assessment of section 6038 penalties. And because the Commissioner lacks the power to assess these penalties in the first place, Mr. Safdieh’s notice of determination cannot survive.

Our Rule 121(g) required that we give respondent notice and an opportunity to point out any difference between this case, and *Farhy* and *Mukhi*. The Commissioner admitted in his response that “the basic facts that underlie the assessment issue in these cases do not differ.”

That means that we can now enter decision in Mr. Safdieh's favor—and we will note that we regard any arguments in *Farhy* and *Mukhi* as having been made in this one as well.

Therefore, it is

ORDERED that respondent's February 8, 2021 motion for summary judgment is denied. It is also

ORDERED that summary judgment in favor of petitioner is granted. It is also

ORDERED and DECIDED that respondent may not proceed with the collection of petitioner's liability for penalties under section 6038 for the tax years 2005 through 2009 as described in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated September 1, 2020.

The undersigned respectfully suggests, if this decision is appealed to the Second Circuit, that Court consider appointing *pro bono* counsel to represent Mr. Safdieh.

(Signed) Mark V. Holmes
Judge