



INDEPENDENT OFFICE
OF APPEALS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

November 21, 2023

Control No. AP-08-1123-0012
Expiration Date: 11/21/2025
Affected IRMs: 8.22.5
8.22.6
8.22.8

MEMORANDUM FOR: Collection Appeals Technical Employees (ATEs)

FROM: Patrick E. McGuire /s/ *Patrick E. McGuire*
Acting Director, Case and Operations Support

SUBJECT: Collection Due Process Case Procedures for Settlement Officers In
Consideration of Farhy v. Commissioner for USC Title 26, Subtitle
F, Chapter 61 Penalties

Purpose: This memorandum issues guidance for identification and handling of U.S. Code Title 26, Subtitle F, Chapter 61 penalties, and other non-frivolous arguments as a result of the U.S. Tax Court's recent decision in Farhy v. Commissioner¹ (Farhy). In Farhy, the Tax Court entered a decision on a Collection Due Process (CDP) case holding that the IRS may not proceed with the collection of IRC 6038(b) penalties via a proposed levy because the IRS did not have the statutory authority to assess these penalties against the taxpayer for a failure to file Forms 5471. The Court determined that unlike some other penalty provisions, there is not an explicit authorization for assessment of that penalty in the statute. Further, we have received additional arguments from taxpayers asserting that a similar rationale should result in penalty relief in both CDP and non-CDP cases for penalties in addition to IRC 6038(b). Subsequently, the Independent Office of Appeals has designated this as a coordinated issue in coordination memo SEPR-23-02.

Background/Source(s) of Authority: IRM 8.22.5.4.2.1 and the related subsections provide instructions to verify the validity of assessments for CDP matters as part of the legal and administrative procedure review required by IRC 6320 (lien) and 6330 (levy).

Procedural Change: Where Farhy is raised, or at issue, in the CDP or Equivalent Hearing (EH) request, the Settlement Officer (SO) will classify the issue raised into one of the following three scenarios. After verifying compliance with the managerial approval of penalties requirement under IRC 6751(b), determine which of the three scenarios below applies:

¹ Farhy v. Comm'r, 160 T.C. No. 6 (T.C. 2023).

- 1) For a penalty assessment where the liability is raised and not precluded in a timely CDP or EH, and the taxpayer either raises Farhy, or, when conducting initial analysis, the SO recognizes the penalty raised is one of those penalties referenced in the table below, continue to follow established procedures in IRM [8.22.6.4](#) and [8.22.8.5.1](#) for establishing a liability Work Unit Number (WUNO) and referring the case to Area 11, International.
- 2) In situations where the Chapter 61 liability is precluded in CDP/EH, or not raised by the taxpayer, but the SO recognizes the assessment is a penalty referenced in the table below, establish a new WUNO following procedures below in “Process of Making a Referral,” and refer the case to Area 11, International.
- 3) For all other cases not identified above where the taxpayer raises the Farhy case as a challenge to any penalty, excluding obvious frivolous arguments, follow the instructions below in “Process of Making a Referral,” and refer to Area 11, International.

***Note: If it’s unclear if a referral should be made based on the three scenarios above, please consult with your ATM.**

The chart located in the attachment to this IG, Attachment to IG AP-08-1123-0012, indicates the penalties for which a referral must be submitted when identified in the initial analysis as part of the required CDP Legal and Administrative review. Refer to this chart when reviewing the case transcripts or IDRS prints to locate any penalties. These cases will come through the CDP/EH workstream and will be associated with an MFT 13 or MFT 55 tax period.

Process of Making a Referral:

1. SO contacts their ATM for approval of the referral.
2. After approval is received, request a separate WUNO from APS, along with input of the following feature codes and appropriate tracking code.

Type: OTHPEN

Feature Codes:

- AI (Appeals Coordinated Issue)
- DP (Code for CDP & related 6404, OIC, ABINT, or type I)
- IC (International Case)
- PL (Paperless Workstreams)
- If applicable, EH (Equivalent Hearing Case)

LOC 7 Tracking Code, as appropriate:

- CLI (CDP/EH, Liability at Issue)
- CLP (CDP/EH, Liability Precluded)
- CLR (CDP/EH, Liability not Raised)

3. Obtain, scan and upload information relevant to the liability or assessment issue to the new OTHPEN WUNO on ACDS.
4. Request ATM to assign newly created WUNO to Area 11 following local procedures. Generate Form 30/40 with the Case Activity Record for the new WUNO and forward to the ATM for approval and transfer to Area 11.

5. Suspend the CDP/EH WUNO awaiting decision from Area 11.

6. Area 11 AO-IS will submit the following forms to their ATM for approval when finished with their determination, as warranted:

- Form 30-40 Transfer Form
- Form 5402
- Form 3210
- Form 3870, if the SEPR AO determines that an adjustment to the liability is warranted.
- ACM as an attachment to the CAR so the decision can be incorporated into the CDP decision and attachment. The AO-IS ACM should NOT be shared with the taxpayer. The AO-IS can assist the collection ATE in drafting language for their determination letter.

7. Area 11 ATM sends the case to APS for reassignment back to the SO.

8. The SO should incorporate the determination of the Area 11 AO-IS into any collection alternative, and will close the case following procedures for a CDP/EH with a related WUNO.

Effect on Other Documents: This guidance may be incorporated into the IRM within two years of the date of this memorandum.

Effective Date: This guidance is effective as of the date of this memorandum.

Contact: Appeals employees should follow existing procedures to elevate questions through their management chain and follow established procedures on [How to Contact an Analyst](#).

Attachment(s):

1. AP-08-1123-0012, Farhy vs. Commissioner CDP Cases – Creation of New WUNO for Certain Penalties
2. Appeals Coordinated Issue Memorandum (ACI) Due to Farhy v. Commissioner

Cc: www.irs.gov

Attachment 1: AP-08-1123-0012, Farhy vs. Commissioner CDP Cases – Creation of New WUNO for Certain Penalties

Penalty Reference Number (IDRS Transaction Code 240)	IRC	Penalty Description
599	6038(b)(1)	Failure to file Form 5471 in conjunction with failure to file corporate return (systemically asserted)
603	6038C(c)	Failure to file Form 5472 for a foreign corporation engaged in a U.S. business
619	6038(b)(2)	Failure to file Form 5471 with respect to certain foreign corporations and partnerships (continuation penalty)
623	6038(b)(1)	Failure to file Form 5471/8865 with respect to certain foreign corporations and partnerships
625	6038A(d)(1)	Failure to file information on foreign owned corporations (Form 5472)
668	6039F(c)	Failure to report receipt of foreign gifts (Form 3520 - Part IV)
671	6039G(c)	Failure to file expatriation (Form 8854)
676	6038B(c)	Failure to file information on transfers and distributions to foreign persons (Forms 926 and 8865/Sch G, H, & O)
679	6039E(c)	Failure to provide information concerning resident status (Passports and Immigration)
700	6038D(d)	Information with respect to foreign financial assets (Form 8938)
701	6038A(d)(2)	Failure to file information with respect to certain foreign-owned corporations (Form 5472, continuation penalty)
705	6038C(c)	Failure of foreign corporation engaged in U.S. business to furnish information or maintain records (Form 5472, continuation penalty)
710	6038D(d)(2)	Information with respect to foreign financial assets (Form 8938, continuation penalty)

711	6038A(d)(2)	Failure to file information on foreign owned corporations, systemically asserted (Form 5472)
712	6038(b)	Failure to file Form 5471 in conjunction with failure to file partnership return, systemically asserted



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

October 4, 2023

SEPR-23-02

**MEMORANDUM FOR DIRECTOR, COLLECTION APPEALS & DIRECTOR,
EXAMINATION APPEALS**

FROM: John E. Hinding /s/ *John E. Hinding*
Director, Specialized Examination Programs & Referrals

SUBJECT: Appeals Coordinated Issue (ACI) Due to
Farhy v. Commissioner

Effective the date of this memorandum, I am designating the following as an Appeals Coordinated Issue (ACI): evaluating the assessment authority for U.S. Code Title 26, Subtitle F, Chapter 61 penalties.

This memorandum issues guidance for identifying the legal hazards of litigation as a result of the U.S. Tax Court's recent decision in Farhy v. Commissioner.¹ In Farhy, the Tax Court entered a decision on a Collection Due Process (CDP) case holding that the IRS may not proceed with the collection of IRC § 6038(b) penalties via a proposed levy because the IRS did not have the statutory authority to assess these penalties against the taxpayer for a failure to file Forms 5471. The Court determined that unlike some other penalty provisions, there is not an explicit authorization for assessment of that penalty in the statute. Subsequently Appeals has received arguments from taxpayers asserting that a similar rationale should result in penalty relief from both CDP and non-CDP cases for penalties in addition to IRC § 6038(b).

Appeals follows court decisions and considers the hazards existing case law may present to a set of facts. Appeals is aware Farhy has been appealed and that other cases may be litigated in various courts. Accordingly, as of the date of this memorandum, Appeals will apply Farhy to determine litigation hazards in cases similar to Farhy (e.g., CDP cases with IRC § 6038(b) penalties) and will consider Farhy's impact in other cases with analogous penalties. As case law evolves in this area, Appeals will continue to reassess hazards in a variety of circumstances.

The chart below indicates the penalties for which a referral must be submitted when identified in the initial 45-day review or as part of the required CDP legal and administrative review:

¹ Farhy v. Comm'r, 160 T.C. No. 6 (T.C. 2023).

Penalty Reference Number (IDRS Transaction Code 240)	IRC	Penalty Description
599	6038(b)(1)	Failure to file Form 5471 in conjunction with failure to file corporate return (systemically asserted)
603	6038C(c)	Failure to file Form 5472 for a foreign corporation engaged in a U.S. business
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623	6038(b)(1)	Failure to file Form 5471/8865 with respect to certain foreign corporations and partnerships
625	6038A(d)(1)	Failure to file information on foreign owned corporations (Form 5472)
668	6039F(c)	Failure to report receipt of foreign gifts (Form 3520 - Part IV)
671	6039G(c)	Failure to file expatriation (Form 8854)
676	6038B(c)	Failure to file information on transfers and distributions to foreign persons (Forms 926 and 8865/Sch G, H, & O)
679	6039E(C)	Failure to provide information concerning resident status (Passports and Immigration)
700	6038D(d)	Information with respect to foreign financial assets (Form 8938)
701	6038A(d)(2)	Failure to file information with respect to certain foreign-owned corporations (Form 5472, continuation penalty)
705	6038C(c)	Failure of foreign corporation engaged in U.S. business to furnish information or maintain records (Form 5472, continuation penalty)

Penalty Reference Number (IDRS Transaction Code 240)	IRC	Penalty Description
710	6038D(d)(2)	Information with respect to foreign financial assets (Form 8938, continuation penalty)
711	6038A(d)(2)	Failure to file information on foreign owned corporations, systemically asserted (Form 5472)
712	6038(b)	Failure to file Form 5471 in conjunction with failure to file partnership return, systemically asserted

In accordance with IRM 1.4.28.10, IRM 8.2.1.6(2), and IRM 8.7.3.2, Appeals Technical Employees (ATEs) who have been assigned cases with this issue must make a referral to Appeals Area 11 - International coordinators through their manager upon assignment or preliminary review. The referral will be initiated by using Form 13381, available on ACDS through the “Form 13381 Submission Menu” link. However, see the exceptions listed below outlining when a Form 13381 is not necessary.

Collection Appeals Exceptions

Liability Referrals. An exception to making a Form 13381 referral is made for Collection ATEs who are 1) assigned a Collection Due Process or Equivalent Hearing case that contains a coordinated issue, 2) the liability is in dispute and not precluded under IRC §§ 6330(c)(2)(B) or (c)(4), and 3) a separate work unit number is created under IRM 8.22.8.5.1 to have the liability considered by an International Specialist from Appeals Area 11 (AO-IS).

Precluded Liability Referrals. An exception to making a Form 13381 referral is made for Collection ATEs who are 1) assigned a Collection Due Process or Equivalent Hearing case that contains a coordinated issue, 2) the liability is precluded under IRC §§ 6330(c)(2)(B) or (c)(4) or otherwise not in dispute, and 3) the penalty is identified as coordinated pursuant to this memorandum. A separate work unit number should be created under pending interim guidance being issued by Collection Appeals. This separate work unit will be transferred to an AO-IS. The AO-IS will follow the Form 13381 process described above to refer the Farhy issue to a coordinator.

SEPR/Exam Appeals Exception

Multiple Form 13381 Exception. An exception to making a Form 13381 referral for this issue is made for ATEs who are assigned an issue that is both separately coordinated and coordinated via this memorandum (e.g., a Form 8938 penalty assessed pursuant to IRC § 6038D). The ATE need only make one referral and can do so based on the “non-Farhy” basis. The ATE will be responsible for identifying the hazards of litigation which might

include the Farhy decision. The Technical Specialist assigned as the coordinator is responsible to provide advice, guidance, and assistance for this issue as well as other responsibilities described at IRM 8.7.3.4.

In addition, if the international information return penalty is not listed above and the taxpayer raises a Farhy argument in a conference or in a written submission, a referral is required. When an ATE identifies the ACI, the Feature Code AI will be added to the key case work unit record.

Appeals Area 11 has assigned a group of Technical Specialists to act as coordinators for this issue. These coordinators will assist the ATE in determining the hazards Farhy presents to a particular set of facts and circumstances. ATEs should follow IRM 8.2.1.6(2) and make a Form 13381 referral, if required, within 45 days of new case receipt. When an ATE identifies the ACI, the Feature Code AI will be added to the key case work unit record. The assigned Technical Specialist will be your primary contact. You may contact Edwin Jhun, Appeals Officer – International Specialist to obtain the most current information before a Form 13381 assignment.

If you have any questions, please call Maricarmen Cuello, Director, Area 11 (International) at (305) 982-5364.

cc:

Support
Chief, Appeals
Deputy Chief, Appeals
Senior Advisor to the Chief of Appeals
Acting Advisor to the Chief Appeals
Director, Technical Guidance
Director, Area 10
Director, Area 11 (International)
Director, Collection Appeals
Director, Case & Operations Support