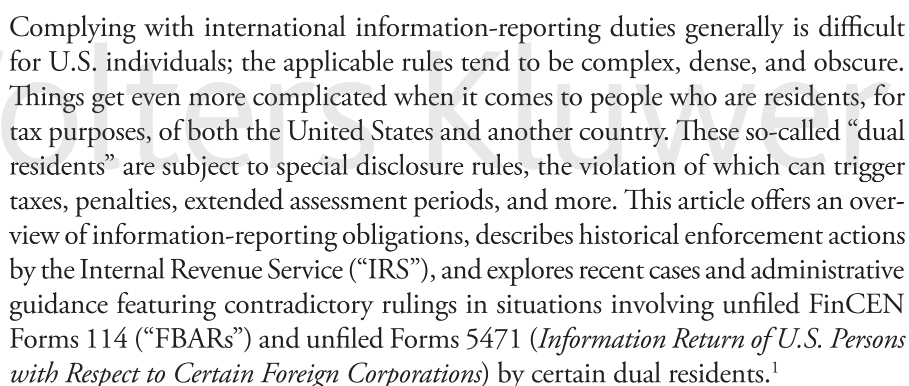
Exploring Recent Cases and IRS Guidance on Unique International Disclosure Duties for Dual Residents

By Hale E. Sheppard*

I. Introduction



Complying with international information-reporting duties generally is difficult for U.S. individuals; the applicable rules tend to be complex, dense, and obscure. Things get even more complicated when it comes to people who are residents, for tax purposes, of both the United States and another country. These so-called "dual residents" are subject to special disclosure rules, the violation of which can trigger taxes, penalties, extended assessment periods, and more. This article offers an overview of information-reporting obligations, describes historical enforcement actions by the Internal Revenue Service ("IRS"), and explores recent cases and administrative guidance featuring contradictory rulings in situations involving unfiled FinCEN Forms 114 ("FBARs") and unfiled Forms 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*) by certain dual residents.[1]

II. International Disclosure Duties

U.S. individuals holding foreign assets often have several information-reporting obligations with the IRS. For instance, they must disclose certain foreign assets on Form 8938 (*Statement of Specified Foreign Financial Assets*). They also need a FinCEN Form 114 (*Report of Foreign Bank and Financial Accounts*) to supply details about foreign financial accounts. Additionally, if they hold sufficient interests in, or have certain other links to, foreign corporations, they have to file Form 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*).[2]

Taxpayers submit Forms 5471 as an attachment to their federal income tax returns.[3] If they file late, inaccurate, or substantially incomplete Forms 5471, then the IRS may assert a penalty of $10,000.[4] This penalty increases on a monthly basis, to a maximum of $50,000, if the problem persists after notification by the IRS.[5] The IRS will not impose penalties, however, if there was "reasonable cause" for the violation.[6]

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Financial penalties can be painful, but other consequences of Form 5471 violations might hurt taxpayers even more, giving the IRS an indefinite period to do its job. The general rule is that the IRS has three years from the time a taxpayer files a tax return to identify it as problematic, conduct an audit, and issue a final notice proposing adjustments.[7] There are various exceptions to the normal three-year rule. One of these, found in Code Sec. 6501(c)(8), applies to situations where a taxpayer fails to file information returns regarding foreign entities, transfers, or assets, including Form 5471.[8] This tax provision grants the IRS three years after the date on which a taxpayer ultimately submits Form 5471 to do two things. First, the IRS can impose Form 5471 penalties during the extended assessment period. Second, it can assert additional taxes, penalties, and interest "with respect to *any* tax return, event, or period to which [Form 5471] relates."[9] Legislative history indicates that amounts asserted by the IRS during the prolonged period are *not* limited to the items that should have been reported on Form 5471.[10]

III. Prior IRS Stances

Reasons for the historical frequency of Form 5471 penalties abound. Below are just a few.

A. Automatic Assessment

The IRS *automatically* imposed Form 5471 penalties for many years. Starting in 2009, in situations where a taxpayer files a late U.S. tax return with a Form 5471 attached, the IRS routinely assesses a $10,000 penalty and starts the collection process. This is true, regardless of whether the taxpayer includes a compelling statement of "reasonable cause" with the delinquent filings.[11] The IRS has confirmed this reality, providing the following guidance to its personnel: "For Form 1120s filed late after December 31, 2008, the [IRS] automatically assesses an initial penalty of $10,000 for each Form 5471 attached. *It is assessed even when a request for reasonable cause is submitted with the Form 1120*."[12]

B. No Free Passes

The IRS has a general first-time-penalty-abate policy, which taxpayers facing penalties often cite in seeking relief.[13] This policy states that the IRS will grant abatement, with respect to virtually all delinquency penalties, in situations where a taxpayer has not been required to file a certain return before or the taxpayer has no prior penalties.[14] Unfortunately, for many years, the first-time-penalty-abate policy did *not* apply to Forms 5471.[15] Things changed in late 2022. The IRS issued a memo to its Appeals Officers at that time indicating that they can waive penalties using the policy when it comes to certain international information returns, such as Form 5471.[16] Good news, indeed, but it did nothing to rectify rampant penalties in prior years.

C. Specialized Standards

The IRS did not resolve Form 5471 penalties for many years by applying normal standards, but rather by utilizing an obscure guide. The so-called "Decision Tree," found in the Internal Revenue Manual, featured standards that were much more rigid than those located elsewhere.[17] The following snippets from the Decision Tree show that attaining abatement of Form 5471 penalties was exceptionally challenging for taxpayers. In fact, the instructions found in the Decision Tree make one wonder how *any* taxpayer could have expected to obtain penalty relief. IRS personnel were told *not* to abate Form 5471 sanctions in the following situations: (i) the taxpayer claims that he was simply unaware of the filing requirement; (ii) the taxpayer seeks clemency because of financial problems; (iii) the taxpayer states that the Form 5471 was late because the relevant transaction, law, or business structure was complicated; (iv) the taxpayer claims that multiple layers of ownership prevented him from obtaining all the data necessary to file a complete Form 5471; (v) the taxpayer demands relief because the person with sole authority to prepare and file Forms 5471 was absent for a reason other than death or serious illness; (vi) the taxpayer personally neglected to submit a filing-extension request for the tax return to which the Form 5471 was attached; (vii) the taxpayer hired a third party (such as an accounting firm) to prepare returns and believed, erroneously, that such party submitted a filing-extension request on behalf of the taxpayer; (viii) the taxpayer failed to hire and get advice from a U.S. tax professional; (ix) the taxpayer, instead of relying on a U.S. accountant or attorney, got inaccurate advice from a bookkeeper, financial advisor, business associate, or person who merely formed the corporation that needed to be reported; and (x) the taxpayer did not take reasonable steps to independently investigate or get a second opinion about the advice supplied by a U.S. accountant or attorney.[18]

D. International Practice Unit

One way in which the IRS trains its personnel is to issue them International Practice Units ("IPUs"). They do not

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constitute legal precedent, but many IRS employees give IPUs considerable weight in conducting audits, determining whether penalties apply, *etc.*[19] The IRS released an IPU focused on Form 5471 violations by certain categories of U.S. persons.[20] Specifically, it contained guidance about the limited circumstances under which the IRS would consider a Form 5471 to be "substantially complete" and thus not subject to penalties. The IPU supplied many situations warranting sanctions. Among them were (i) failing to identify the category or categories into which the taxpayer falls, (ii) offering only partial data about the identity and location of the foreign corporation, (iii) not completing all required Schedules, (iv) stating that certain information required by Form 5471 will be provided by the taxpayer only upon express request from the IRS, (v) using computer-generated Forms 5471 that have not been approved by the IRS, (vi) omitting proper financial statements for the foreign corporation, and (vii) neglecting to report items in U.S. dollars or in accordance with U.S. generally accepted accounting principles, when required.[21]

E. Litigation Positions

A recent Tax Court case, *Kelly*, shows the traditional, aggressive manner in which the IRS has attempted to impose Form 5471 penalties.[22]

The taxpayer in that case ran many businesses. In doing so, he formed several domestic single-member limited liability companies, which he treated as disregarded entities for tax purposes. Thus, instead of filing separate tax returns for such entities, each was reported on a Schedule attached to the taxpayer's annual Form 1040 (*U.S. Individual Income Tax Return*).

In 2008, the taxpayer formed a corporation in the Cayman Islands ("Cayman Corporation") for the sole purpose of buying a commercial yacht from a distressed seller at a discounted price. The taxpayer was the only owner of the Cayman Corporation. The business plan consisted of renovating the yacht and then selling it at a profit or chartering it to generate an income stream. The Cayman Corporation was the only foreign entity that the taxpayer owned.

The taxpayer had a longstanding professional relationship with an outside, independent accounting firm ("Accounting Firm"). The controller for various companies owned by the taxpayer sent the Accounting Firm all tax-related data, including that about the Cayman Corporation. The controller also sent an email to the Accounting Firm stating that the Cayman Corporation was a foreign entity, the taxpayer was the sole owner, and he was unsure about which U.S. filing requirements applied. Despite this email, the Accounting Firm treated the Cayman Corporation as a *domestic* disregarded entity, reporting it on a Schedule C, and did not file a Form 5471 disclosing it to the IRS.

The IRS later started an audit of the taxpayer, identified potential problems in multiple years, issued a Notice of Deficiency in 2016 proposing adjustments all the way back to 2007, and raised unfiled Forms 5471 for the Cayman Corporation as grounds for both penalties and an unlimited assessment period.

The Tax Court pointed out that both it and the Supreme Court had previously accepted reasonable reliance on tax professionals as "reasonable cause" under certain circumstances.[23] It then emphasized the following facts: the Accounting Firm had been preparing the taxpayer's Forms 1040 since 2000, including Schedules C for his many companies; the relevant professionals at the Accounting Firm had no prior disciplinary actions; the taxpayer timely notified the Accounting Firm about the Cayman Corporation, its foreign status, and its ownership; the Accounting Firm did not have a conflict of interest; and the situation did not involve some tax result that was "too good to be true."

The IRS urged the Tax Court to believe that the preceding circumstances were not enough. Specifically, the IRS argued that not only did the taxpayer need to inform the Accounting Firm about the existence, location, and ownership of the Cayman Corporation, but he also needed to expressly tell the Accounting Firm that it needed to file a Form 5471. The IRS, in other words, suggested that the taxpayer was obligated to do the Accounting Firm's job for it.

The Tax Court held in favor of the taxpayer, ruling that he had "reasonable cause" for not filing timely Forms 5471. In reaching this decision, the Tax Court referenced the circumstances described above and underscored some other points. It explained, for instance, that the Accounting Firm's complete lack of prior experience with Forms 5471 before 2008 was not detrimental to the taxpayer's reasonable reliance position. It also clarified that taxpayers do *not* need to question advice they receive from tax professionals, do *not* need to obtain second opinions, and do *not* need to monitor the advice received from professionals. Lastly, with respect to timing, the Tax Court noted that the IRS itself failed to advise the taxpayer of his Form 5471 problems until 2019, which was nearly a decade *after* the audit started and three years *after* the Tax Court litigation began.

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IV. Emerging IRS Stances

As seen above, the IRS has traditionally taken a strong position when it comes to imposing Form 5471 penalties and rarely forgiving them. A new IRS position is on the horizon, and it deals with information-reporting duties for taxpayers, who are residents of both the United States and another country, and who claim to be foreign residents for tax purposes thanks to a treaty. This emerging issue is explored below.

A. Varying Disclosure Duties of Dual Residents

Information-reporting obligations for dual residents are, in a word, inconsistent. Various sources generally explain that individuals who are considered foreign residents for U.S. income tax purposes might nonetheless be considered U.S. residents when it comes to filing certain information returns with the IRS. For example, legislative history states the following:

> [A]n alien who is a resident of the United States under the new statutory definition but who is a resident of a treaty partner of the United States (and not a resident of the United States) under a U.S. income tax treaty is eligible for the benefits that the treaty extends to residents of the treaty partner. *However, notwithstanding the treatment of the alien as a resident of the other country for treaty purposes, the Act treats the alien as a U.S. resident for purposes of the internal tax laws of the United States. For example, if the alien owns more than 50 percent of the voting power of a foreign corporation, [then] the foreign corporation will be a controlled foreign corporation* ....”[24]

The corresponding regulations confirm the earlier theme from the legislative history, indicating that “for purposes of the Internal Revenue Code *other than* the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident.”[25]

Specific rules about Form 5471 stem from that foundation, but add a twist. The applicable regulations allow certain individuals claiming to be foreign residents under a treaty to provide limited information, as opposed to the entire Form 5471. They say that attaching audited financial statements for foreign corporations suffices in situations where a U.S. resident is considered a non-resident under a treaty, he properly claims such treaty benefit with the IRS, and no other U.S. resident has a separate duty to file a Form 5471 for the same foreign corporation.[26]

The government took a more stringent approach when it came to the FBAR. The Preamble to the pertinent regulations states that a Green Card holder who claims that he is only a resident of a foreign country thanks to the tie-breaker rules of a treaty still needs to file. Leaving no room for doubt, the Preamble says that “a legal permanent resident who elects under a tax treaty to be treated as a non-resident for tax purposes *must still file the FBAR*.”[27]

The IRS went the opposite way in cases involving Forms 8938. In its Temporary Regulations, the IRS initially maintained that U.S. resident status for any part of the year, no matter how small or non-exclusive, suffices to trigger the Form 8938 filing requirement.[28] The first version of the Instructions to Form 8938 echoed that sentiment, giving the following warning: “If you qualify as a resident alien, *you are a specified individual even if you elect to be taxed as a resident of a foreign country under the provisions of a U.S. income tax treaty*.”[29] The IRS later received public comments, including those suggesting that dual residents who file a Form 8833 claiming foreign residency status under the tie-breaker rules of a treaty should *not* be considered a U.S. person for purposes of Form 8938.[30] Unexpectedly, the IRS accepted this recommendation and reversed course. It reasoned in the Final Regulations that “because the taxpayer’s filing of a Form 8833 with his or her Form 1040NR (or other appropriate form) will permit the IRS to identify individuals in this category and take follow-up enforcement actions when considered appropriate, *reporting of Form 8938 … is not essential to effective IRS tax enforcement efforts relating to this category of U.S. residents*.”[31]

B. Recent Case

An ongoing, multi-part, dispute, *Aroeste*, frames interesting FBAR and Form 5471 issues.[32]

Husband in that case was born, raised, and educated in Mexico. He also worked in Mexico throughout his career, until he retired in 2012. He always filed annual Mexican tax returns as a Mexican resident, and he lived in Mexico for more than 50 years. He had a condominium in Florida, too, which he bought in 1980 and uses for vacations.

Husband obtained his Green Card around 1984, and he never formally relinquished it. Wife, on the other hand, became a U.S. citizen in 2011 and maintained that status. In 2012 and 2013, Husband had a reportable interest in five accounts in Mexico. Husband filed a joint Form 1040 with Wife for those two years. However, he did *not* file Forms 8833 claiming that he should be treated as a Mexican resident under the U.S.–Mexico Tax Treaty (“Treaty”), Forms 8854 announcing that he

was expatriating, Forms 5471 for Mexican corporations, FBARs for Mexican accounts, or other international information returns.[33]

Husband learned of possible U.S. non-compliance around 2014. Based on the advice of legal counsel, he applied to resolve matters with the IRS through the Offshore Voluntary Disclosure Program ("OVDP"). Husband later hired new legal counsel, who notified the IRS that Husband wanted to withdraw from the OVDP and avoid the standard penalties. The IRS then initiated an audit, and Husband filed as part of that process Forms 1040-NR for 2012 and 2013, enclosing Forms 8833 claiming Mexican residency.

Complying with international information-reporting duties generally is difficult for U.S. individuals; the applicable rules tend to be complex, dense, and obscure. Things get even more complicated when it comes to people who are residents, for tax purposes, of both the United States and another country.

The IRS eventually assessed FBAR penalties for 2012 and 2013, totaling $100,000. Husband paid a portion of the penalties and then filed suit in District Court seeking return of the money, along with discharge from all remaining amounts for both years. The Department of Justice ("DOJ") counterclaimed. It wanted to keep the amount that Husband had already submitted, as well as force Husband to pay off the outstanding balance.

Both the DOJ and Husband filed Motions for Summary Judgment asking the District Court to resolve matters, before trial, based solely on the facts and documents in its possession already. Husband essentially argued that he was not a U.S. person thanks to the tie-breaker rules in the treaty, such that he was not required to file FBARs. The DOJ, in contrast, suggested that Husband was a U.S. person during the relevant years because he did not timely claim that he was a Mexican resident pursuant to the treaty; that is, he did not file Forms 1040-NR enclosing Forms 8833 until years later, after he withdrew from the OVDP, and after the IRS started the audit. Husband, moreover, never filed Forms 8854.

The District Court divided its ruling into several issues, only one of which is pertinent here. The DOJ suggested that, even if the IRS were to accept the late Forms 1040-NR enclosing Forms 8833, Husband nonetheless would not be entitled to treaty benefits because he failed to enclose Forms 8854 telling the IRS that was "expatriating" from the United States, as required by Notice 2009-85. Husband countered that he was not required to file Form 8854 because the IRS broke the rules from the outset; it did not adhere to the Administrative Procedures Act ("APA") when it published Notice 2009-85.

The District Court sided with Husband. Referencing several recent cases in which the IRS was admonished for improperly creating rules through Notices, the District Court held that "Notice 2009-85 *is not binding authority* as it fails to comply with the Administrative Procedures Act" and Husband "was *not* required to file Form 8854 with his amended returns." The District Court decision was positive for Husband, but the battle is not over yet. Two Tax Court cases involving Husband are still pending; the IRS is seeking additional income taxes, as well as sanctions for unfiled Forms 5471 (related to foreign corporations) and other international information returns.[34]

C. Newest IRS Guidance

The IRS recently released, in response to a demand under the Freedom of Information Act, guidance about Form 5471 filing duties for dual resident taxpayers. It came in the form of a Field Service Advisory ("FAA").[35]

The taxpayer discussed in the FAA was a Mexican citizen treated as a U.S. resident because he met the "substantial presence" test. During the relevant years, the taxpayer filed Forms 1040-NR, attaching Forms 8938 disclosing foreign financial assets, Forms 8833 indicating that he was a Mexican resident pursuant to the tie-breaker rules in the Treaty, and Forms 8275-R (*Regulation Disclosure Statement*) revealing that he was adopting a position that ran counter to the applicable regulation. The taxpayer also filed timely FBARs. He did not submit, however, Forms 5471 for various foreign corporations.

As explained above, the critical regulation dealing with treaties and dual residency states the following:

> Generally, for purposes of the Internal Revenue Code other than the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident. Therefore, for example, the individual shall be treated as a United

States resident for purposes of determining whether a foreign corporation is a controlled foreign corporation under Section 957 or whether a foreign corporation is a foreign personal holding company under Section 552.[36]

The taxpayer featured in the FAA filed a Form 8275-R acknowledging the existence of the preceding regulation, but denying its validity and applicability to him. In particular, he argued that he was not obligated to file Forms 5471 based on the following line of reasoning:

This [regulation] may be interpreted as requiring a dual resident taxpayer who files as a nonresident pursuant to a treaty tie-breaker election to file certain information reporting returns required to be filed by U.S. persons. However, the IRS has no reasonable basis for requesting such information from a dual resident taxpayer who files as a nonresident and is, therefore, not obliged to pay U.S. income tax. In addition, the IRS would not derive any useful information from such information as such information only is relevant in determining the U.S. tax liabilities of a U.S. taxpayer. Thus, taxpayer is taking the position that [the regulation] is invalid insofar as it may require a dual resident taxpayer who files as a nonresident pursuant to a treaty tie-breaker election to file certain information reporting returns required to be filed by U.S. persons.

The IRS audited the taxpayer. It sought data about Forms 8275-R as part of that scrutiny, of course. The taxpayer, sticking with his initial viewpoint, maintained that he was not obligated to file Forms 5471, and even if he were, he had "reasonable cause" for not doing so. He based these arguments on several items, including supposed reliance on professionals:

The Tax Advisors specifically prepared a statement on Form 8275-R attached to Form 1040-NR that Form 5471 was not required to be filed and any requirement is not valid. It is the taxpayer's understanding that the Tax Advisors and other international tax practitioners in the same community believe this position (*i.e.*, no 5471 or other certain information return is required to be filed when a person is a non-resident pursuant to income tax treaty tie breaking rules) is valid.

The taxpayer further attempted to excuse his inaction by underscoring Form 5471 rules are complex and subject to criticism, as follows:

The obligations to file information returns for ordinary U.S. tax residents is complicated, but the obligations to file information returns for a non-U.S. resident relating to [the Treaty's] tie breaking rules is substantially even more complicated. It is so complicated that even highly knowledgeable and experienced international tax practitioners dispute the requirement to file 5471 in the case of taxpayer.

The FAA leaves no doubt that the IRS strongly disagreed with the taxpayer and his justifications. The IRS first summarized the tax provisions and regulations discussed earlier in this article about the general rules for dual resident taxpayers, along with special rules involving Forms 5471. It then concluded that the applicable authorities provide "clear and consistent" treatment of dual residents claiming foreign residency status under a treaty. Such treatment is comprised of the following elements: a taxpayer must disclose the treaty-based position on Form 8833; he is deemed a U.S. person for purposes of determining whether a corporation is a controlled foreign corporation; he must file Forms 5471 to report controlled foreign corporations; and his U.S. income tax liability is calculated as if he were a non-resident.

Citing a recent Tax Court case, the IRS next discussed the manner in which it must analyze matters when a conflict between the Internal Revenue Code and a treaty exists. This issue is moot, suggested the IRS, because there is no conflict here: The Treaty only addresses federal income taxes and does not affect domestic administrative or procedural provisions, such as those requiring U.S. residents to file information returns. The IRS added additional context to its conclusion, as follows:

Congress did not need to provide an exception to the [Form 5471] reporting requirement for dual residents because there is no conflict between the [Treaty] and the reporting obligations imposed on U.S. persons (including dual residents). These reporting obligations are both reasonable and appropriate in light of the statute's purposes and are not in conflict with a Treaty tie-breaker rule that seeks to assign a single [country] of residence to a dual resident solely for the application of the Treaty provisions and not for other purposes.

Merely determining that the taxpayer had a Form 5471 filing duty despite his Mexican residency was not enough for the IRS, as evidenced by the fact that the FAA continued for another eight pages explaining, in considerable detail, why he should not escape penalties based on "reasonable cause." The passion with which the IRS

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rejected the justifications presented by the taxpayer was reminiscent of the Decision Tree's prior harshness. For example, the IRS indicated in the FAA that Form 8275-R showed that the taxpayer "clearly understood" that a Form 5471 filing duty existed, he decided to disobey it, and "that choice is the very definition of the intentional disregard of rules or regulations." The IRS also opined that, given the taxpayer's high level of education and business sophistication, "it was unreasonable for him not to make a greater effort to understand the position and form his own conclusion as to its merits, particularly when the position taken was directly contrary to the obligations imposed under a statute and regulation." Moreover, the IRS concluded that the taxpayer did not meet the judicial standard for reasonable reliance because he failed to provide his tax advisors, whose identities were never revealed, important details about his location, sources of income, relationship to foreign entities, services performed, and more. The IRS further emphasized that, even though the taxpayer filed a Form 8275-R indicating his reasons for omitting Forms 5471, this disclosure was inadequate, from both a technical and substantive standpoint. In this regard, the IRS underscored that the taxpayer failed to identify the relevant tax provision and correct regulation at issue, failed to file a separate Form 8275-R for each foreign corporation, and failed to offer a "reasonable basis" for his position. The IRS labeled the taxpayer's statements on his one Form 8275-R nothing more than "one person's unsupported view that reporting should not be required."

Seemingly unable to resist, the IRS went on to point out an aspect of this case that it considered "ironic." It noted, in particular, that the taxpayer attached Forms 8938 to his Forms 1040-NR, although the regulations specifically exempt him from doing so, yet he refused to attach Forms 5471, when the regulations expressly mandate this action.

V. Conclusion

This article shows that meeting various international information-reporting duties can be troublesome, particularly when it comes to dual residents facing unique and inconsistent standards. It also demonstrates that the IRS has been eager over the years to impose FBAR and Form 5471 penalties, but reluctant to abate them later, regardless of the circumstances. The authorities explored in this article suggest that battles on these critical issues are far from each other. Consequently, taxpayers with transnational reach, especially dual residents taking refuge in a treaty, would be wise to engage qualified professionals before taking international tax and disclosure positions with the IRS.

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ENDNOTES

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[1] This article builds on several previous articles by the same author. *See, e.g.*, Hale E. Sheppard, *Tax Court Rules that IRS Cannot Assess and Collect Form 5471 Penalties: Many Questions Triggered by Novel Ruling*, 49, 3 INT'L TAX J. 21 (2023) and 25, 2 J. TAX PRACT. PROC. 39 (2023); Hale E. Sheppard, *Does Residency Status under a Treaty Affect FBAR Duties? District Court Order Ponders Potential "Escape Hatch" for Taxpayers*, 49, 2 INT'L TAX J. 21 (2023); Hale E. Sheppard, *Recent Tax Court Case Reveals Rare Use of Form 5471 Penalty Defenses*, 47, 5 INT'L TAX J. 53 (2021); Hale E. Sheppard, *Flume v. Commissioner and Form 5471 Penalties for Unreported Foreign Corporations: A Glimpse at Unique Aspects of International Tax Disputes*, 95, 8 TAXES 39 (2017); Hale E. Sheppard, *Form 5471: How Does New IRS Guidance Impact the "Substantially Complete" Defense?* 94, 4 TAXES 39 (2016) and 42(2) INT'L TAX J. 33 (2016).

[2] Code Sec. 6038; Reg. §1.6038-2; Code Sec. 6046; Reg. §1.6046-1; Code Sec. 6679; Reg. §301.6679-1.

[3] Code Sec. 6038(a)(2); Reg. §1.6038-2(i).

[4] Code Sec. 6038(b)(1); Reg. §1.6038-2(k)(1)(i); Code Sec. 6046(f); Reg. §1.6046-1(k).

[5] Code Sec. 6038(b)(2); Reg. §1.6038-2(k)(1)(ii); Code Sec. 6046(f); Reg. §1.6046-1(k).

[6] Reg. §1.6038-2(k)(3)(i).

[7] Code Sec. 6501(a).

[8] Code Sec. 6501(c)(8).

[9] Public Law 111-147 (March 18, 2010), Title V, Subtitle A, Parts I through V, Section 511(b).

[10] U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment to the House Amendment to H.R. 1586, Scheduled for Consideration by the House of Representatives on August 10, 2010. JCX-46-10. August 10, 2010, pg. 36; *see also* U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act." JCX-4-10. February 23, 2010, pg. 66; *see also* IRSIG SBSE-25-0312-022 (March 9, 2012).

[11] IRM 21.8.2.20.1 (October 1, 2014).

[12] "Failure to File the Form 5471—Category 4 and 5 Filers—Monetary Penalty." International Practice Unit (updated as of October 7, 2015).

[13] IRM 20.1.1.3.6.1(7) (August 5, 2014).

[14] *Id.*

[15] IRM 20.1.1.3.6.1(8) and (9) (August 5, 2014); Kristen A. Parillo, "IRS Looking to Fix Problems with Some Automatic Assessments," Federal Tax Notes Today Doc. 2019-47399 (December 16, 2019); Andrew Velvarde, "Practitioners Fault Accelerated Assessable Penalty Collection," Federal Tax Notes Today Doc. 2020-10055 (March 28, 2020).

[16] "Appeals Guidance Issued on Abatement for International Penalties," 2022 Tax Notes Today International 248-23 (December 7, 2022).

[17] IRM Exhibit 21.8.2-1 (October 1, 2022)—Failure to File or Late-Filed Form 5471—Decision Tree.

[18] The final aspect of the Decision Tree is particularly remarkable because it is contrary to the legal precedent established by the U.S. Supreme Court years ago on this point. *See R.W. Boyle*, SCt, 85-1 USTC ¶13,602, 469 US 241, 251, 105 SCt 687.

[19] Jasper L. Cummings, Jr., *LB&I International Practice Units*, TAX NOTES, November 23, 2015, pg. 1077; Kristen A. Parillo and Jaime Arora, *IRS Plans to Release International Training Materials*, TAX NOTES, March 24, 2014, pg. 1317.

[20] "Failure to File the Form 5471—Category 4 and 5 Filers—Monetary Penalty." International Practice Unit (updated as of October 7, 2015).

[21] "Failure to File the Form 5471—Category 4 and 5 Filers—Monetary Penalty," International Practice Unit (updated as of October 7, 2015); IRS News Release, IR-90-58; CCA 200645023 (June 20, 2006); 2002 IRS NSAR 20167; 2002 WL 32167873; 1997 WL 33381431 Field Service Advisory.

[22] *M.R. Kelly*, 121 TCM 1561, Dec. 61,888(M), TC Memo. 2021-76.

[23] *M.R. Kelly*, 121 TCM 1561, Dec. 61,888(M), TC Memo. 2021-76, pgs. 48 and 49 (referencing *R.W. Boyle*, SCt, 85-1 USTC ¶13,602, 469 US 241, 246, 105 SCt 687, *E.S. Flume*, 113 TCM 1097, Dec. 60,822(M), TC Memo. 2017-21, and *Neonatology Associates, P.A.*, 115 TC 43, Dec. 53,970 (2000)).

[24] U.S. Joint Committee on Taxation. General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, JCS-41-84 (December 31, 1984), pg. 468 (emphasis added).

[25] Reg. §301.7701(b)-7(a)(3) (emphasis added).

[26] Reg. §1.6038-2(j)(2)(ii).

[27] 76 FR 10238 (Feb. 24, 2011) (emphasis added). Taxpayers recently challenged this notion in District Court and won. *See A. Aroeste*, DC-CA, 2023-2 USTC ¶50,220, Case No. 22-cv-682-AJB-KSC, Order on Cross-Motions for Summary Judgment, November 20, 2023.

[28] T.D. 9657, IRB 2014-13, 687, Preamble to Temporary Regulations, 76 FR 78555 (December 19, 2011) (emphasis added).

[29] Instructions for Form 8938 (November 2011), pg. 2 (emphasis added).

[30] Preamble to Final Regulations, 76 FR 73818 (December 12, 2014).

[31] Preamble to Final Regulations, 76 FR 73818 (December 12, 2014) (emphasis added); *see also* Reg. §§1.6038D-2(e)(1), (2), and (3).

[32] *A. Aroeste*, DC-CA, 2023-2 USTC ¶50,220, Case No. 22-cv-682-AJB-KSC, Order on Joint Discovery Motion, February 13, 2023; Order on Cross-Motions for Summary Judgment, November 20, 2023; Andrew Velvarde, "Mexican Treaty Dual Resident Scores Big Win in FBAR Dispute," 2023 Tax Notes Today Federal 224-9 (November 22, 2023).

[33] The Treaty is comprised of the (i) Convention between the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with First, Second and Additional Protocol (1992); (ii) Treasury Department Technical Explanation of Convention and First, Second and Additional Protocol (1992); (iii) Second Additional Protocol (2003); (iv) Treasury Department Technical Explanation of the Second Additional Protocol (2003).

[34] *See A. Aroeste*, Tax Court Docket Nos. 13024-20 and 15372-20, Order, May 13, 2022.

[35] IRS Field Service Advisory 20223302F; Amanda Athanasiou, "Dual Resident Can't Escape Form 5471 Obligations, Memo Says," 2024 Tax Notes Today Federal 115-6 (June 13, 2024).

[36] Reg. §301.7701(b)-7(a)(3).

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