

Tax Court Holds There Is No Right to a Jury Trial on Liability for a Civil Fraud Penalty

by Robert S. Horwitz

The 7th Amendment to the U.S. Constitution states that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” Last year, the Supreme Court in *SEC v. Jarkesy*, 603 U.S. 109 (2024), held that under the 7th Amendment a person was entitled to a jury trial before the SEC could impose a civil penalty for securities fraud. The Court reasoned that under the common law, an action seeking to collect a monetary remedy for fraud could only be brought in a court of law and not an equity or admiralty court. Since the SEC was seeking a monetary penalty for fraud it had to institute suit in a district court, which provided Jarkesy an opportunity for trial by jury.

Following the *Jarkesy* decision, several commentators considered whether liability for civil tax fraud penalties require a jury trial.¹ In *Silver Moss Properties LLC v. Commissioner*, 165 T.C. No. 3 (August 21, 2025), a partnership in a TEFRA partnership-level proceeding challenged the Tax Court’s jurisdiction to determine a civil fraud penalty on the ground that the civil fraud penalty can only be determined in a jury trial, which is not available in Tax Court. The arguments advanced by the partnership and amicus Center for Taxpayer Rights were rejected by the Tax Court.

Facts

The partnership purchased land in Florida in 2017, granted a conservation easement on the property to a §501(c)(3) entity, and claimed a charitable contribution deduction. The IRS audited the partnership return and disallowed the deduction. The partnership then petitioned the Tax Court, and the IRS answered. In an amendment to the answer the IRS asserted the fraud penalty under IRC §6663(a). The partnership filed a motion for partial summary judgment, arguing that a civil fraud penalty requires a jury trial and, since the Tax Court is not authorized to

¹ See, Bryan Camp, “The Impact of *Jarkesy* on Civil Tax Fraud Penalties,” 27 Fla. Tax Rev. 478 (Spring 2024); Steve R. Johnson, “Jarkesy, the Seventh Amendment, and Tax Penalties,” 79 U. Mia. L. Rev. 461 (2024); Gary Proctor, “Twelve Angry Taxpayers: Why the Constitution Might Require a Jury Trial for Accuracy and Fraud Penalties in Tax Cases,” Florida Bar Journal May/June 2025.

empanel juries, it lacks jurisdiction to determine the fraud penalty. The Tax Court denied the motion.

The Tax Court's Analysis

a. Sovereign Immunity

Under TEFRA a partnership can challenge the adjustments in Tax Court, the Court of Federal Claims or federal district court. Neither the Tax Court nor the Court of Federal Claims are empowered to or have mechanisms for jury trials. Although district courts can hold jury trials, 28 U.S.C. §2402 provides that, other than in tax refund cases, there is no right to jury trial in a suit against the federal government for civil actions arising under Title 26.

Under long-standing Supreme Court precedent, the United States, as sovereign, cannot be sued absent its consent and the terms of consent define a court's jurisdiction. The 7th Amendment right to jury trial does not apply to actions against the federal government, which "lie wholly outside the scope of the judicial power vested by Article III in the constitutional courts." Congress, in authorizing judicial review in TEFRA partnership-level proceedings did not assent to jury trial in any court. Thus, there was no right to jury trial in a TEFRA partnership proceeding.

b. The "Public Rights Exception" to Trial by Jury

The Court then turned to the "Public Rights Exception" to trial by jury. Public rights are "rights of the public-that is rights pertaining to claims brought by or against the United States." They are historically actions that could have been determined by the legislative or executive branch alone even if presented in a form that the judicial power was capable of acting on.

Whether the exception applies depends on the substance of the action. The majority, concurring and dissenting opinions in *Jarkesy* "all recognized the collection of revenues as a quintessential public right (meaning a right belonging to the sovereign, not a private citizen)." Prepayment challenges to an assessment of tax were not subject to judicial review. Since no common law remedy existed for a prepayment challenge to a tax, the Court concluded that under the public rights exception to the 7th Amendment there is no entitlement to a jury trial.

According to the Court, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 US 272(1856), was the first case dealing with the public rights exception. There, the Supreme Court confirmed Congress' power to rely on "summary methods" to collect unpaid taxes.

c. Historically Jury Trials Were Required before Imposition of Tax Penalties

The Tax Court then turned to Amicus Center for Taxpayer Rights' argument that, unlike taxes, traditionally tax penalties were not imposed administratively. In England, Parliament enacted forfeitures and penalties to buttress the collection of taxes, which were assessed by local tax commissioners and adjudicated by local justices of the peace. In England, certain penalties could be collected through a *qui tam* action brought by a private citizen who would split any proceeds with the Crown and in the United States certain excise tax penalties could be collected through a *qui tam* action brought by a private citizen who would split any proceeds with the Government. According to the Tax Court, this only proved that *qui tam* cases had a long tradition and did not "establish that all tax penalties must be collected in that manner."

The Civil War ushered in the first federal income tax and "a new era of tax penalties." These penalties were assessed and collected administratively.

d. Prior Supreme Court Cases Support the Position that Jury Trial Is Not Required before Imposition of the Civil Tax Penalties

In *Oceanic Steamship Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), the Supreme Court considered the imposition of a penalty by the customs collector at a port of entry. The Court concluded that Congress had the power for both tariffs and internal revenue taxes "to impose appropriate obligations *and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.*" 214 U.S. at 339. The Tax Court concluded its discussion of *Oceanic Steamship Navigation* by stating that "our federal income tax system has a lengthy tradition of administratively imposed and collected penalties."

The Tax Court next considered *Helvering v. Mitchell*, 303 U.S. 391 (1938), which considered the predecessor of the §6663(a) fraud penalty. The Supreme Court held

the civil fraud penalty was a civil penalty and that “the determination of the facts upon which liability is based may be by an administrative agency instead of a jury.” The current §6663(a) and its predecessor both contemplate the same conduct: an underpayment of tax with a fraudulent intent to evade.

e. *Jarkesy* Does Not Require Jury Trial Just Because a Penalty Is Labeled Fraud

The Tax Court rejected the petitioner’s argument that any penalty labeled fraud falls outside the public rights exception. This argument was contrary to Supreme Court jurisprudence. Under *Jarkesy*, the court must consider whether a civil tax fraud penalty resembles a common law action that is traditionally reserved for juries. The statutory claims such as those in *Jarkesy* were modelled after causes of action available to private parties at common law and required fraud upon private individuals and a private party who was a victim of securities fraud could pursue a fraud cause of action outside the statutory scheme. The civil tax fraud penalty under §6663(a) is not comparable, which contemplates fraud upon the federal government and is not comparable to a suit by a private party for fraud. The Court concluded

Because the Seventh Amendment is limited to suits at common law, not suits against the sovereign, it cannot enlarge the limited waiver of sovereign immunity that Congress authorized for challenges to these penalties.

f. Conclusion

One argument that the Tax Court did not consider is that in *Jarkesy* the SEC could alone decide whether to file a district court action to impose the penalty or to seek imposition of the penalty through an in-house administrative proceeding. In the case of a civil tax fraud penalty, the taxpayer can obtain a jury trial on the issue of fraud in a refund suit or in a collection action.

The Tax Court’s decision in *Silver Moss* will not be the final word on the issue. I expect that the petitioner will appeal if the Tax Court sustains the fraud penalty on the merits. The issue of whether the civil fraud penalty requires trial by jury is pending in several other Tax Court cases, including *North Donald LA Property, LLC v. Commissioner*, Docket No. 24703-21. One thing is certain: this decision is not the final word on the issue.



Robert S. Horwitz is a Principal at Hochman Salkin Toscher Perez P.C., former Chair of the Taxation Section, California Lawyers' Association, a Fellow of the American College of Tax Counsel, a former Assistant United States Attorney and a former Trial Attorney, United States Department of Justice Tax Division. He represents clients throughout the United States and elsewhere involving federal and state administrative civil tax disputes and tax litigation as well as defending clients in criminal tax investigations and prosecutions. He was the 2022 Joanne M. Garvey Award for lifetime achievement in and contribution to the field of tax law by the Taxation Section of the California Lawyers' Association. Additional information is available at <http://www.taxlitigator.com>.