

## TAX LITIGATION ISSUES

# The Seventh Amendment and IRS Civil Penalties After *Jarkesy*

By Jeremy H. Temkin

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**T**he Seventh Amendment guarantees the right to a jury trial “[i]n suits at common law, where the value in controversy shall exceed twenty dollars.” In *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024), in a 6-3 decision authored by Chief Justice Roberts, the Supreme Court held that the SEC’s enforcement scheme, which permits the imposition of monetary penalties for securities fraud in an in-house forum, violates a defendant’s right to a jury trial.

In reaching its decision, the court first considered “whether the cause of action resembles common law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law.” After finding that SEC civil penalties are “legal in nature,” the court next considered whether the “public rights” exception, which allows Congress to assign certain classes of disputes to administrative agencies for determination without a jury, rescues the SEC’s enforcement scheme.

Concluding that an action seeking civil penalties

under the anti-fraud provisions of the federal securities laws falls outside the exception, the court held that the SEC’s imposition of penalties through an administrative forum violates the Seventh Amendment.



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In a dissenting opinion joined by Justices Elena Kagan and Jackson, Justice Sonya Sotomayor predicted that *Jarkesy* would have “momentous consequences” in other areas of law. Over the past two years, parties have invoked *Jarkesy* in challenging a variety of penalties imposed by the IRS. This article surveys cases addressing such challenges.

## Civil Fraud Penalties Asserted by the IRS

In *Hirsch v. Commissioner*, Nos. 28898-10, 5819-11, 5821-11, 6034-11 (T.C. Oct. 11, 2022), following an audit, the IRS assessed approximately \$42 million in taxes and over \$15 million in penalties pursuant to 26 U.S.C. §6651(f) and §6663. By statute, taxpayers disputing such

assessments have the choice of filing a petition in Tax Court or paying the assessment and seeking a refund in the federal district court. 26 U.S.C. §§6703(c); 7422(a); 7442. Petitioners in *Hirsch* took the former course.

While the Tax Court proceedings were pending, the Fifth Circuit decided *Jarkesy* in favor of the defendants, and petitioners in *Hirsch* demanded a jury trial of their dispute with the IRS. In a two-page decision, the Tax Court summarily denied that request, quoting the Fifth Circuit for the proposition that “[s]ince there was no right of action at common law against a sovereign, enforceable by jury trial or otherwise, there is no constitutional right to a jury trial in a suit against the United States.” *Mathes v. Comm’r*, 576 F.2d 70, 71 (5th Cir. 1978), *aff’g* T.C. Memo. 1977-220.

The court rejected application of the Fifth Circuit’s decision in *Jarkesy*, concluding that “Tax Court proceedings occupy wholly different ground than the enforcement action in *Jarkesy*.” Finally, in a footnote, the Tax Court added that since “the Hirsches have the option to pay the deficiency... and sue for a refund in federal district court... [a]ny deprivation of the jury-trial right ‘was due to [their] own act.’”

Petitioners sought mandamus review in the Eleventh Circuit, which rejected their petition without addressing the merits of the Seventh Amendment claim. *In re Hirsch*, Nos. 25-10420, 25-10426 (May 30, 2025). Petitioners then sought review in the Supreme Court, arguing that tax fraud penalties were historically tried to juries. Recognizing that the public rights exception squarely applies to the collection of revenue, petitioners in *Hirsch* distinguished tax penalties from the collection of tax revenue.

Finally, petitioners rejected the Tax Court’s assertion that their Seventh Amendment claim is obviated by their right to pay the assessment and sue for a refund in federal district court, arguing that the Seventh Amendment attaches to the initial adjudication and collection of a penalty and cannot be replaced with a “penalty-now-trial-later” regime. Just last week, the court granted the IRS’s request for additional time to respond to the cert petition, which remains pending.

### **TEFRA Proceedings**

*Jarkesy* has also been invoked in response to fraud penalties imposed in a partnership-level proceeding under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). In *Silver Moss Properties, LLC v. Commissioner*, 165 T.C. No. 3 (Aug. 21, 2025), the IRS issued a Notice of Final Partnership Administrative Adjustment (FPAA) disallowing the petitioner’s charitable contribution deduction in connection with a syndicated conservation easement. The petitioner challenged the FPAA in Tax Court and, in its answer, the IRS asserted a fraud penalty. Petitioner then moved for partial summary judgment, arguing that the penalty cannot be applied without the opportunity for a jury trial.

After reviewing the relevant statutes that grant district courts and the Federal Court of Claims jurisdiction to hear certain claims against the United States, but limits the right to a jury trial to tax refund suits brought under 28 U.S.C. §1346(a)(1)—and not TEFRA partnership-level proceedings which are brought under 28 U.S.C. §1346(e)—the court concluded that principles of sovereign immunity barred a jury trial, even where the IRS asserts a counterclaim that would otherwise fall under section 1346(a)(1). The court concluded that, as a general rule, claims

against the United States “lie wholly outside the scope of the judicial power vested by Art. III in the constitutional courts.”

The court then addressed the public rights exception, which it viewed as providing a “second and related reason [for concluding] that the Seventh Amendment does not apply.” At bottom, the Tax Court found the fraud penalty imposed by the SEC in *Jarkesy* was qualitatively different than tax fraud penalties: *Jarkesy* involved purported fraud upon private individuals (not fraud upon the federal government), and unlike the claims in *Jarkesy* that were “modeled after causes of action traditionally available to private parties at common law,” a private litigant could not pursue a statutory civil tax fraud penalty on behalf of the federal government.

### **FBAR and Promoter Penalties**

Taxpayers have also invoked *Jarkesy* in challenging penalties imposed by the IRS in cases pending in federal district court. These claims raised the threshold issue of whether *Jarkesy* mandates the availability of a jury trial at some point in the process, in which case the IRS’s “penalty-first-trial-later” structure would not run afoul of the Seventh Amendment, or whether a jury trial is only required before the IRS can impose the penalty.

In *United States v. Sagoo*, 2025 WL 2689912 (N.D. Tx. Sept. 19, 2025), the IRS concluded that the defendant willfully failed to file Foreign Bank and Financial Accounts Reports (FBARs) for three tax years, and assessed a penalty in excess of \$1,000,000. After the defendant did not pay the penalty, the IRS filed suit in federal district court seeking a judgment in an amount to be recalculated in the future.

The defendant moved to dismiss the complaint, arguing that imposition of the FBAR penalty

violated her right to a jury trial. The government conceded that the Seventh Amendment is implicated when the IRS imposes FBAR penalties and did not raise the public rights exception. Instead, the government argued that the right to *de novo* review of the FBAR penalty in district court obviated the defendant’s Seventh Amendment challenge.

The defendant responded that, under *Jarkesy*, she was entitled to a jury trial before the IRS could impose a penalty, not merely the ability to contest a previously assessed penalty. Given the government’s concession that FBAR penalties implicate the Seventh Amendment, the court did not have to address the threshold issue of whether the penalties were legal in nature.

Going straight to the application of *Jarkesy*, the court agreed with the taxpayer that an after-the-fact jury trial is not sufficient.

In *HDH Group, Inc. v. United States*, 2025 WL 2711877 (W.D. Pa. Sept. 23, 2025), the court reached the opposite conclusion in connection with a challenge to penalties imposed for promotion of abusive tax shelters. There, the IRS determined that HDH was liable for promoter penalties under section 6700 of the Code. HDH paid \$989,000 of the \$6,564,449 penalty imposed and sued for a refund, and the government counterclaimed for the unpaid balance.

The court first addressed the threshold issue of whether the section 6700 penalty implicates the Seventh Amendment. Because the penalty is only available if the government establishes that the defendant knowingly made false or fraudulent statements, 26 U.S.C. §6700(2) (A), the court found that it was analogous to common-law fraud. Before addressing the public rights exception, the court considered whether

the IRS's imposition of the penalty deprived HDH of its Seventh Amendment rights.

Unlike the district court in *Sagoo*, the court found that the statutory framework permitting a *de novo* review of the section 6700 penalty "stands in stark contrast" to the statute in *Jarkesy* and other precedent, and that the plaintiff was not deprived of its right to a jury trial.

### **Disgorgement Under the Code**

Finally, in *United States v. Madison*, 2025 WL 3623726 (M.D. Fla. Dec. 15, 2025), the government sought, inter alia, disgorgement of any fees the defendants had earned for preparing false or fraudulent tax returns for clients. Defendants argued that they were entitled to a jury trial on the government's claim for disgorgement.

The court found that the disgorgement claim "bears limited resemblance" to the securities fraud claim at issue in *Jarkesy* since the governing statute (26 U.S.C. §7402(a)) does not require proof of fraud, but only gross negligence or recklessness. The court further found that since the government only seeks the return of unjustly obtained funds owed to the Treasury, the disgorgement order did not have the "hallmarks of a penalty," and therefore did not implicate the Seventh Amendment under *Jarkesy*.

In so holding, the court rejected defendants' argument that, under the Supreme Court's decision in *Kokesh v. SEC*, 581 U.S. 455 (2017), disgorgement constituted a penalty, limiting *Kokesh* to the specific statute at issue.

Commentators have been critical of *Madison*, both for its reading of *Jarkesy* as limited to fraudulent conduct (and inapplicable to reckless or grossly negligent conduct), and for ignoring the government's allegations that the defendants in *Madison* had engaged in fraudulent conduct. See, e.g., Stephen J. Olsen, "District Court Holds No Right to Jury Trial for Disgorgement Part 2," Tax Notes (Jan. 21, 2026).

### **Conclusion**

To successfully invoke *Jarkesy*, litigants contesting penalties imposed by the IRS will need to persuade the court that the penalty at issue is a legal remedy that historically could only be enforced through courts of law. Next, they will need to establish that the public rights exception, which applies to revenue collection, is inapplicable to tax penalties.

Additionally, they will need to persuade the court that the availability of judicial review, either by paying an assessment and litigating in district court or in the context of an action by the government to collect the penalty, is insufficient under *Jarkesy*.

While litigants have thus far had limited success in running this gauntlet, practitioners need to track this developing area of the law and reserve their clients' right to litigate penalties in what may be a more favorable forum.

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