

# “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency

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## INTRODUCTION

Tax law tends to be uninformed by other areas of law.<sup>1</sup> This insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization.<sup>2</sup> Tax *procedure* is no exception.<sup>3</sup> Although much of federal tax procedure has in fact drawn on general procedural principles,<sup>4</sup> the contribution is largely unac-

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<sup>1</sup> See Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference To Revenue Rulings*, 57 OHIO ST. L.J. 637, 637 (1996) (observing that tax law tends to view itself as isolated from other areas of law); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 531 (1994) [hereinafter Caron, *Tax Myopia*] (criticizing ignorance of nontax developments in statutory construction and legislative theory in developing role of legislative history in interpreting the Internal Revenue Code).

<sup>2</sup> See Caron, *Tax Myopia*, *supra* note 1, at 532 (advocating symbiotic relationship so that tax and nontax areas of law each benefit from developments in other).

<sup>3</sup> See Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie, and Beyond*, 71 OR. L. REV. 781, 782-85 (1992) (criticizing courts and commentators for insufficient attention to *Erie* doctrine in developing approach to determine state law in federal tax cases).

<sup>4</sup> The United States Tax Court Rules (Tax Court Rules) are modeled after the Federal Rules of Civil Procedure. See *Rules of Practice and Procedure of the United States Tax Court*, 60 T.C. 1057, 1057 (1973) (declaring that adaptation of the Federal Rules of Civil Procedure, where applicable, was a major objective in revision of Tax Court Rules). Tax Court Rule 1 provides in part that “[w]here in any instance there is no applicable rule of procedure, the [c]ourt . . . may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure . . . .” TAX CT. R. 1. The Tax Court Rules also borrowed from the rules of

knowledge.<sup>5</sup> As a result, tax practitioners have missed some opportunities to remedy tax procedure problems by borrowing from the repertoire of the general litigator. Applying civil procedure theory to the specific example of tax litigation can in turn illuminate that theory, so that each discipline benefits from the thinking of the other.<sup>6</sup>

While civil procedure learning can shed light on the questions key to tax procedure,<sup>7</sup> it must be adapted to the unique posture of the parties to tax cases, and reflect the reality that the government is always a party to the tax litigation. In tax cases, the

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the old Court of Claims. See *Stone v. Commissioner*, 865 F.2d 342, 345 (D.C. Cir. 1989).

The Federal Rules of Evidence apply in Tax Court. See TAX CT. R. 143; I.R.C. § 7453 (1996) (requiring that proceedings of Tax Court be conducted according to rules of evidence applicable to bench trials in United States District Court for the District of Columbia).

<sup>5</sup> “The procedural provisions of the Code appear to be the creation of a scholastic, but whimsical, mind. In general, however, the courts take them literally: the game must be played according to the rules.” Alan R. Johnson, *An Inquiry into the Assessment Process*, 35 TAX L. REV. 285, 286 (1980).

The primary role that civil procedure has had in tax controversies is that the United States Tax Court (Tax Court) sometimes looks to the Federal Rules of Civil Procedure to guide its actions. See *Berger v. Commissioner*, 404 F.2d 668, 675 (3d Cir. 1968) (invoking the “simplicity and rationality” of civil procedure as basis for finding statutory notice of deficiency valid); *Espinoza v. Commissioner*, 78 T.C. 412, 415-16 (1982) (considering Federal Rule of Civil Procedure 56 in interpreting Tax Court Rule 121 on summary judgment motion); Andrea K. Feirstein, *Smith v. Commissioner: Unilateral Concessions by Taxpayers*, 4 VA. TAX REV. 187, 202 (1984) (Tax Court occasionally looks to Federal Rules of Civil Procedure to guide its procedure). Some Tax Court rules are very similar to the comparable rules in the Federal Rules of Civil Procedure. See, e.g., *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring) (observing that Tax Court Rule 144, governing forfeiture of claims, is virtually identical to Federal Rule of Civil Procedure 46); *Fox v. Commissioner*, 718 F.2d 251, 255 (7th Cir. 1983) (citing Reporter’s Notes to Tax Court Rules, observing that Tax Court Rule 104 on enforcement of discovery requests was adapted from Federal Rule of Civil Procedure 37); *Estate of Allensworth v. Commissioner*, 66 T.C. 33, 35 (1976) (noting that Tax Court Rule 90, governing requests for admissions, was adapted from Federal Rule of Civil Procedure 36); see also *supra* note 4 (Tax Court Rules are modeled after the Federal Rules of Civil Procedure).

<sup>6</sup> Civil procedure may benefit by seeing the application of general rules in a specific subset of federal cases, that is, tax cases. Cf. Caron, *Tax Myopia*, *supra* note 1, at 518 (suggesting that other areas of law may benefit from development in tax law).

<sup>7</sup> In 1934, Judge Learned Hand declined to “invert the ordinary rules of procedure” in a tax case. *Taylor v. Commissioner*, 70 F.2d 619, 621 (2d Cir. 1934), *aff’d sub nom. Helvering v. Taylor*, 293 U.S. 507 (1935); see also *Clapp v. Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989) (“[I]f . . . Commissioner’s determination is arbitrary, courts generally shift the burden onto the Commissioner, putting the Commissioner in same position as a civil plaintiff.”).

customary litigating positions are reversed: the nominal plaintiff, the taxpayer,<sup>8</sup> is the party with property at risk.<sup>9</sup>

The United States Tax Court (the Tax Court),<sup>10</sup> hears approximately ninety-five percent of litigated federal tax cases.<sup>11</sup> Tax Court subject-matter jurisdiction requires two things: (1) Internal Revenue Service (IRS) issuance of a "statutory notice of deficiency"<sup>12</sup> (statutory notice) to the taxpayer, and (2) a timely responsive Tax Court petition by the taxpayer.<sup>13</sup> Many procedural issues raised by taxpayers relate to the statutory notice, the document by which the IRS informs a taxpayer of a deficiency<sup>14</sup>

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<sup>8</sup> A "taxpayer" is anyone "subject to any internal revenue tax." I.R.C. § 7701(a)(14).

<sup>9</sup> See *infra* notes 44-45 and accompanying text (explaining that tax litigation procedure places taxpayer in posture of plaintiff); see also *supra* note 7 and accompanying text (comparing tax procedure and general civil procedure).

<sup>10</sup> The Tax Court is an Article I court with jurisdiction limited by statute. See I.R.C. § 7441 (1996) (Tax Court is Article I court); Tax Reform Act of 1969, Pub. L. No. 91-172 § 951, 83 Stat. 487, 730 (1969) (establishing court renamed "United States Tax Court" as Article I court).

<sup>11</sup> David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 18; The Honorable Theodore Tannenwald, Jr., *The Tax Litigation Process: Where It is and Where It is Going*, 44 REC. ASS'N B. CITY N.Y. 825, 827 (1989). The United States district courts and the United States Court of Federal Claims hear the remainder; they have concurrent, original jurisdiction over taxes "alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. § 1346(a)(1) (1994).

In the United States government's fiscal year that ended on September 30, 1991, for example, taxpayers filed 29,345 cases in the Tax Court. In the same year, taxpayers filed 750 in the United States district courts and 175 in the United States Court of Claims. See 1991 IRS Ann. Rep.

<sup>12</sup> See I.R.C. § 6212 (authorizing mailing of statutory notice); TAX CT. R. 13(a), (c); *Portillo v. Commissioner*, 932 F.2d 1128, 1132 (5th Cir. 1991) (holding that Tax Court jurisdiction depends on valid statutory notice and timely petition). The statutory notice is also known as a "notice of deficiency" or "90-day letter." See MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* (2d ed. 1991) ¶ 8.08, Form 8.6, at 8-92 (providing form statutory notice).

<sup>13</sup> See I.R.C. § 6213 (establishing time for filing Tax Court petition and restrictions on assessment); TAX CT. R. 34(a), (c) (listing general requirements for petition); *Portillo*, 932 F.2d at 1132 (Tax Court jurisdiction requires timely filed taxpayer petition for redetermination).

<sup>14</sup> The Code defines a "deficiency" as the amount by which the correct tax liability exceeds the excess of the sum of (1) the amount shown as the tax by the taxpayer on her return (assuming a return was filed) and (2) the amounts previously assessed (or collected without assessment) as a deficiency, over the amount of rebates. I.R.C. § 6211(a). Black's Law Dictionary defines a deficiency assessment as "the excess of the amount of tax computed by the Internal Revenue Service over the amount computed by the taxpayer." BLACK'S LAW DICTIONARY 422 (6th ed. 1990). In many situations where the taxpayer has filed a timely original return showing a tax liability, the deficiency is the amount by which the taxpayer's true tax liability exceeds the liability shown on the return. Arthur W. Andrews,

in tax.<sup>15</sup> Because of the structure of tax litigation, the Tax Court petitioner, the taxpayer, has an incentive to challenge the subject-matter jurisdiction<sup>16</sup> of the court whose jurisdiction she has invoked.<sup>17</sup> Thus, many objections to statutory notices are framed as motions to dismiss a Tax Court case for lack of subject-matter jurisdiction.<sup>18</sup>

By framing an attack on a statutory notice as a challenge to the Tax Court's jurisdiction, some taxpayers have succeeded in defeating the IRS on a "technicality."<sup>19</sup> On the other hand,

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*The Use of the Injunction as a Remedy for an Invalid Federal Tax Assessment*, 40 TAX L. REV. 653, 654 n.5 (1985). Tax deficiencies can only exist for certain types of taxes, such as income taxes, estate and gift taxes, and certain excise taxes. See I.R.C. §§ 6212(d), 6213(a) (referring to subtitles A and B, and chapters 41 through 44 of the Code). The IRS can immediately assess other taxes, and a taxpayer cannot obtain Tax Court jurisdiction to dispute liability, but rather must follow the refund procedures. See *infra* note 44 (discussing refund procedures).

<sup>15</sup> See I.R.C. § 6212 (listing requirements for statutory notice of deficiency). A notice of Final Partnership Administrative Adjustment (FPAA) is an analogous document, used for coordinated partnership tax proceedings. See, e.g., *Seneca Ltd. v. Commissioner*, 92 T.C. 363, 368 (1989) (FPAA gives notice of final partnership administrative adjustment for tax years involved), *aff'd*, 899 F.2d 1225 (9th Cir. 1990); *Clovis I. v. Commissioner*, 88 T.C. 980, 982 (1987) (FPAA provides notice in litigation of partnership items, analogous to statutory notice of deficiency).

A notice of transferee liability is also similar to a statutory notice. See *Pearce v. Commissioner*, 95 T.C. 250, 253 (1990) (analogizing notice of transferee liability to statutory notice of deficiency), *rev'd* 946 F.2d 1543 (5th Cir. 1991); *Looper v. Commissioner*, 73 T.C. 690, 692 n.3 (1980) (indicating that § 6213(a) applies to notice of transferee liability as well as to statutory notice); *id.* at 696 n.6 (stating that there are no analytical differences between statutory notices of deficiency and notices of transferee liability). A notice of transferee liability is used when tax liability is based on the recipient's status as a transferee of assets. See I.R.C. § 6901(a)(1). Some of the case law discussed in this article was decided in the specific context of an FPAA or of a notice of transferee liability.

<sup>16</sup> A court's subject-matter jurisdiction is its authority to hear cases of a certain type and its power to render decisions in those cases. See *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 316 (1870) (defining subject-matter jurisdiction as jurisdiction over the nature of the cause of action and relief sought); *United States v. New York & O.S.S. Co.*, 216 F. 61, 66 (2d Cir. 1914) (defining subject-matter jurisdiction as power to hear and determine cases of general class to which proceedings in question belong); 21 C.J.S. *Courts* § 18 (1990) (same).

<sup>17</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b (1982) ("The peculiar procedural treatment of subject matter jurisdiction . . . create[s] pressure in favor of classifying as questions of 'jurisdiction' various issues that could equally be regarded as 'merely' procedural."); *infra* note 133 and accompanying text (discussing incentive for taxpayer to invoke Tax Court's jurisdiction and then move to dismiss for lack of jurisdiction).

<sup>18</sup> See *infra* note 111 and accompanying text (noting that taxpayers have raised "jurisdictional" challenges to statutory notices based on array of alleged defects in the notices).

<sup>19</sup> See *infra* text accompanying notes 132-33 (explaining that IRS may not be able to

misaddressed, uninformative or incorrect statutory notices may seriously impair the taxpayer's ability to dispute an alleged tax deficiency.<sup>20</sup> Thus, a challenge to the Tax Court's subject-matter jurisdiction based on a defect in a statutory notice can create all-or-nothing stakes for the parties.

Courts' and commentators' failure to distinguish among the jurisdictional and nonjurisdictional functions of the statutory notice has resulted in doctrinal incoherence. In particular, courts have struggled to identify the elements of the statutory notice that are essential for "validity"; the relief to afford if an essential element is missing; and the consequences of an invalid notice.<sup>21</sup>

This Article proposes both a theoretical framework for analyzing statutory notice problems, and remedies for defects in statutory notices. Part I of the Article briefly describes the tax controversy process, from the filing of the tax return through eventual litigation. Part II develops the multiple functions of the statutory notice in tax controversies by exploring analogies to general civil litigation. In Part III, the Article highlights how the parties are affected by defects that implicate the various functions of the notice. Part IV advances a conceptual basis for distinguishing critical, jurisdictional defects in the statutory notice from other,

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mail new notice after Tax Court dismissal for lack of subject-matter jurisdiction, because the statute of limitations on assessment may have already run).

<sup>20</sup> See *infra* text accompanying note 158 (explaining proper notice requirement).

<sup>21</sup> The case law reflects courts' confusion over what defects are sufficient to invalidate a document purporting to be a statutory notice, and what the consequences of an invalid notice are. See, e.g., *Roszkos v. Commissioner*, 87 T.C. 1255, 1263 (1986) (asserting that although "last known address" element of § 6212 was not met, notice was not null but only statutorily defective), *vacated and remanded*, 850 F.2d 514 (9th Cir. 1988).

The *Roszkos* decision is also an example of procedural confusion surrounding the consequences of defective statutory notices:

The Tax Court's order dismissing the case for lack of jurisdiction was vacated and replaced on February 12, 1987 by an order of summary judgment (*i.e.*, that there was no deficiency). The latter order was entered in response to the Commissioner's motion to have the Court comply with IRS [sic] § 7459(e). The February 12 order was itself vacated and replaced on April 15, 1987 by an order of summary judgment directing the parties to compute the amount of the *Roszkos*' overpayment. On June 11, 1987, the Tax Court entered its final decision regarding the overpayment, from which the Commissioner appeals.

*Roszkos v. Commissioner*, 850 F.2d 514, 516 n.2 (9th Cir. 1988), *vacating and remanding* 87 T.C. 1255 (1986).

less critical, nonjurisdictional defects in the notice. In Part V, the Article proposes a framework for remedying defects in statutory notices. The Article concludes that, by applying the appropriate theoretical framework, courts can balance the IRS's need for flexibility in drafting statutory notices with the taxpayer's need for reasonably specific notice of the IRS's claims and legal theory.

## I. THE TAX CONTROVERSY PROCESS

Tax procedure is specialized. It involves procedures of a particular administrative agency — the IRS — as well as a specialized court — the Tax Court. However, much of tax procedure involves issues common to all federal litigation.<sup>22</sup>

Under the federal tax system, each taxpayer is required to make a “self-assessment”<sup>23</sup> of income tax liability by filing annual tax returns.<sup>24</sup> “Assessment” is the act by which the IRS formally records the tax liability of the taxpayer.<sup>25</sup> The IRS legally

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<sup>22</sup> See *infra* notes 68, 77 and accompanying text (analogizing statutory notice to civil legal process and complaint); cf. Joseph R. Cook & Harold Dubroff, *The United States Tax Court: An Historical Analysis*, Part V: Pretrial Procedure, 41 ALB. L. REV. 639, 640-641 (1977) (explaining that tax court pretrial procedure generally parallels that in most trial courts).

<sup>23</sup> The term “self-assessment” is misleading; it is the IRS that assesses the tax, not the taxpayer. See Treas. Reg. § 301.6203-1 (1967) (“The assessment shall be made by an assessment officer signing the summary record of assessment.”).

<sup>24</sup> Treas. Reg. § 601.103(a) (as amended in 1984). If full payment is included with the return, the assessment is satisfied. See, e.g., *Clark v. United States*, 63 F.3d 83, 87 (1st Cir. 1995) (following Fifth and Seventh Circuits' approach that tax assessment extinguished to extent of taxpayer's payment); *O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. 1995) (holding that taxpayer's payment of assessment extinguishes all liability for assessment); *United States v. Wilkes*, 946 F.2d 1143, 1152 (5th Cir. 1991) (despite erroneous refund by IRS, tax assessment already paid by taxpayer cannot be revived); *Bilzerian v. United States*, 887 F. Supp. 1509, 1513 (M.D. Fla. 1995) (once deficiency owed to IRS is satisfied, taxpayer liability is extinguished), *rev'd* 86 F.3d 1067 (11th Cir. 1996); *Rodriguez v. United States*, 629 F. Supp. 333, 344 (N.D. Ill. 1986) (holding that IRS's mistaken refund of tax payment did not restore taxpayer's liability for purposes of IRS's collection mechanisms).

The taxpayer is required to keep records to substantiate the tax she reports, I.R.C. § 6001 (1996), but is not required to file those records with the IRS. See Treas. Reg. 1.6001-1(e) (as amended in 1990) (“All records . . . shall be kept . . . at one or more convenient and safe locations accessible to internal revenue officers, and shall at all times be available for inspection by such officers.”).

<sup>25</sup> See I.R.C. § 6203 (“The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary.”); *United States v. Toyota of Visalia, Inc.*, 772 F. Supp. 481, 488 (E.D. Cal. 1991) (requiring assessment be made by assessment officer signing the summary record,

can collect only tax that it has assessed.<sup>26</sup> Therefore, assessment is a key event<sup>27</sup> in the tax controversy process.

The IRS can summarily assess the tax liability reported by the taxpayer on her annual return,<sup>28</sup> but the IRS cannot summarily assess a tax deficiency, which is an additional amount of tax allegedly owed,<sup>29</sup> arising out of an IRS audit of the taxpayer.<sup>30</sup> Except where collection of the tax is in jeopardy,<sup>31</sup> the IRS or-

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which, through supporting records, indicates taxpayer's identification and nature, amount, and period (if applicable) of tax assessed), *aff d*, 988 F. 2d 126 (9th Cir. 1993); Treas. Reg. § 301.6203-1 (1967) (same).

<sup>26</sup> 1 LAURENCE E. CASEY, FEDERAL TAX PRACTICE, § 2.1, at 66 (rev. 1992); *see also* I.R.C. § 6401(a) (explaining that overpayment includes any portion of tax assessed or collected after expiration of applicable period of limitation). An overpayment is refundable to the taxpayer. *See* I.R.C. § 6511(b)(1) (giving Tax Court jurisdiction over overpayments); *id.* § 6512(b)(2) (Tax Court jurisdiction to enforce overpayment determination); Nesmith v. Commissioner, 42 T.C.M. (CCH) 1269, 1272 (1981) ("[A]n overpayment is refundable to the taxpayer when the decision of the Tax Court becomes final.").

Once a deficiency is assessed, it becomes a debt from the taxpayer to the government. *In re Dunne Trucking Co. v. I.R.S.*, 32 B.R. 182, 187 (Bankr. N.D. Iowa 1983). The IRS is required to give notice and demand for payment to the taxpayer as soon as practical and within 60 days of making an assessment under section 6203(a). I.R.C. § 6303(a). If the taxpayer fails to pay the tax within 10 days of the notice and demand, the IRS can collect the tax by levy. *Id.* § 6331(a). Under I.R.C. section 6321, if a taxpayer refuses or neglects to pay a tax after demand for payment, the amount becomes a lien on all of the taxpayer's real and personal property and rights to property until the tax is paid.

<sup>27</sup> Mary Ferrari, "Was Blind But Now I See" (*Or What's Behind the Statutory Notice and Why Won't the Tax Court Look?*), 55 ALB. L. REV. 407, 413 (1991).

<sup>28</sup> I.R.C. § 6201(a)(1).

<sup>29</sup> *See supra* note 14 (defining "deficiency").

<sup>30</sup> The "self-assessment" process is reinforced by audit of approximately one percent of returns filed. SALTZMAN, *supra* note 12, ¶ 8.01, at 8-4 & n.3 (explaining IRS's belief that audits ensure voluntary compliance despite audit coverage declining over time). Section 7601(a) of the Code gives the IRS the authority to ascertain the tax liability of all persons "who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed." I.R.C. § 7601(a) (1996). Section 7602 of the Code authorizes the IRS to examine records and witnesses in order to determine the correctness of tax returns and the liability of taxpayers who fail to file returns. *See* I.R.C. § 7602 (regarding "examination of books and witnesses"). "Tax disputes commence when the IRS notifies a taxpayer of an impending audit and, in some cases, informs the taxpayer of the issues that will be examined by the revenue agent." Debra A. Chini, *The 1988 Amendment to 26 U.S.C. Section 7430: Expanding Taxpayers' Rights to Recover Costs in Tax Controversies*, 42 VAND. L. REV. 1711, 1714 (1989) (citing I. SHAFIROFF, INTERNAL REVENUE SERVICE PRACTICE AND PROCEDURE DESKBOOK 35 (1985)).

<sup>31</sup> I.R.C. section 6861 provides authority and procedures for jeopardy assessments of taxes normally covered by deficiency procedures. I.R.C. section 6862 covers jeopardy assessments of other taxes. *See* 1 CASEY, *supra* note 26, § 2.8, at 90 n.3 (rev. 1992) (regarding timing and approval of jeopardy assessments). A jeopardy assessment might be used where a taxpayer attempts to conceal property or remove it from the United States; where a tax-

dinarly must mail the taxpayer a statutory notice before it may assess a tax deficiency.<sup>32</sup>

Section 6212(a) of the Internal Revenue Code (the Code)<sup>33</sup> provides, "If the Secretary [of the Treasury] determines that there is a deficiency in respect of any tax imposed by [certain subtitles and chapters of the Code] he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail."<sup>34</sup> Because mailing a statutory notice of deficiency is a prerequisite to assessment, the IRS must mail the notice within the statute of limitations on assessment. The statute of limitations is generally three years from when the return was filed.<sup>35</sup> Once the IRS mails the statutory notice to the tax-

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payer is indicted for tax fraud; where a taxpayer's financial status deteriorates or her assets are unavailable for collection; where an employer fails to make a timely return and payment of income or other employment taxes; or where a corporation plans to sell its assets for cash and immediately distribute the proceeds to a large number of shareholders. *Id.* at 90 n.1.

<sup>32</sup> I.R.C. § 6213(a). With a proper showing, a taxpayer can obtain an injunction against collection of a deficiency assessed without prior mailing of a statutory notice. I.R.C. § 6213(a); (providing exception to Anti-Injunction Act of § 7421(a), for assessments made or collection begun without mailing of a statutory notice or during the prohibited period); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (suit for injunctive relief may lie where taxpayer will suffer irreparable harm absent injunction and it is clear that "under no circumstances could the Government ultimately prevail" on underlying issue), *reh'g denied*, 370 U.S. 965 (1962); *Hutchinson v. United States*, 677 F.2d 1322, 1326 (9th Cir. 1982) (applying § 6213(a)); *Russell v. United States*, 774 F.Supp. 1210, 1214 (W.D. Mo. 1991) (same); *Slaven v. United States*, 53-2 U.S.T.C. ¶ 9461 (S.D. Cal. 1953) (same).

Assessment may be made without mailing a statutory notice for tax due on account of mathematical or clerical errors; amounts arising out of tentative carryback or refund adjustments; and amounts that have been paid by the taxpayer. I.R.C. § 6213(b).

<sup>33</sup> Further statutory references are to the Internal Revenue Code of 1996, as amended, unless otherwise indicated.

<sup>34</sup> I.R.C. § 6212. The Secretary of the Treasury has delegated to the Commissioner of Internal Revenue the authority to send statutory notices, and the Commissioner has re-delegated that authority to the District Directors. Treas. Reg. §§ 301.6212-1(a) (as amended in 1995), 301.7701-9(b) (1967).

<sup>35</sup> I.R.C. § 6501. There is a six-year period for substantial omission of income. I.R.C. § 6501(e)(1). If the taxpayer does not file a return, the IRS can assess at any time. I.R.C. § 6501(c)(3). Similarly, the IRS can assess at any time if the taxpayer files a fraudulent return. I.R.C. § 6501(c)(1). A nonfraudulent amended return does not cure fraud in the original return for this purpose. *Badaracco v. Commissioner*, 464 U.S. 386, 394 (1984).

During the limitations period, which generally runs from the date the return was filed, I.R.C. § 6501(a), the IRS generally follows certain procedures. When the revenue agent examining a return determines that there is a deficiency, if the taxpayer does not agree, the revenue agent prepares a detailed report. This report is commonly sent to the taxpayer with a cover letter known as a "30-day letter" and a form for the taxpayer to sign if she



payer, the taxpayer generally has 90 days within which to petition the Tax Court.<sup>36</sup> The IRS is prohibited from assessing the tax during the time provided for the taxpayer to petition the Tax Court ("the prohibited period"). If the taxpayer does petition the Tax Court, the prohibited period lasts until the court's decision is final.<sup>37</sup> The mailing of the statutory notice tolls the statute of limitations on assessment<sup>38</sup> for the length of the pro-

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wishes to waive restrictions on assessment. Treas. Reg. § 601.105(d)(1)(iv) (as amended in 1987). The 30-day letter informs the taxpayer of her right to request a conference with the IRS Regional Office of Appeals. *Id.* When the tax deficiency is more than \$10,000, the request must include a written protest explaining the taxpayer's position. Treas. Reg. § 601.105(d)(2)(iii).

The taxpayer may either request an appeals conference, ignore the 30-day letter, or pay the tax and file a refund claim. *See Chini, supra* note 30, at 1715. If the taxpayer requests a conference and Appeals does not succeed in settling the case, the IRS ordinarily issues a statutory notice. *Id.* at 1716. If the taxpayer ignores the 30-day letter, the IRS will normally send a statutory notice. *See id.* at 1715 (explaining taxpayer's administrative appeal options after receiving 30-day letter).

<sup>36</sup> I.R.C. § 6213(a) (1996). If the notice is addressed to a taxpayer outside the United States, the taxpayer has a 150-day period within which to file a petition. *Id.* If the taxpayer does not timely file a petition, the IRS can assess the tax allegedly owed. There is no requirement that the notice inform the taxpayer of the right to petition the Tax Court. *Thomaston Cotton Mills v. Rose*, 62 F.2d 982, 983 (5th Cir. 1933); *McDonnell v. United States*, 59 F.2d 290, 294-95 (Ct. Cl. 1932), *aff'd*, 288 U.S. 420 (1933).

The statutory notice of deficiency plays a particularly important role in the Tax Court in that the Tax Court is the court with jurisdiction over tax deficiencies. *See* I.R.C. §§ 6212, 6213 (prescribing Tax Court petition procedure for redetermination of deficiency); 9 JAMES WILLIAM MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 213.02[1] (2d ed. 1990) (stating that Congress created Board of Tax Appeals in 1924, and gave it jurisdiction over petitions for review of deficiency assessments). The Board of Tax Appeals is a predecessor of the Tax Court. *See* Revenue Act of 1924, ch. 234, sec. 900, 43 Stat. 253, 336-38 (establishing Board of Tax Appeals). In 1942, the Board of Tax Appeals was renamed the Tax Court of the United States. Revenue Act of 1942, ch. 619, sec. 504, 56 Stat. 957; 9 MOORE, *supra* ¶ 213.02[1]. In 1969, Congress renamed it the United States Tax Court. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.

Because a taxpayer cannot file a petition before the IRS mails her a statutory notice, her only method for earlier resolution of the case is to pay the amount in issue, claim a refund from the IRS, and then sue for a refund in a federal district court or the Court of Federal Claims. *McConkey v. Commissioner*, 199 F.2d 892, 895 (4th Cir. 1952); *see also, e.g., Abrams v. Commissioner*, 787 F.2d 939, 941 (4th Cir. 1986) (pre-filing notification was not a statutory notice; Tax Court lacked jurisdiction over petition filed in response to it); *infra* note 44 (explaining refund procedures).

<sup>37</sup> I.R.C. § 6213(a).

<sup>38</sup> When a statute of limitations is "tolled" for a period of time, it is suspended for that period. *See* John R. Bradley, *Time Limitations Which Bar Claims in Mississippi Worker's Compensation: A Re-examination*, 62 MISS. L.J. 511, 532 (1993) (providing non-tax reasons why a statute may be tolled: "while one is under a legal disability, outside the jurisdiction, in certain military service, or while another claim is being pursued." (footnotes omitted)).

hibited period, plus sixty days.<sup>39</sup> This enables the IRS to timely assess the tax if the taxpayer fails to petition the Tax Court or if, upon the taxpayer's petition, the Tax Court rules in the IRS's favor.<sup>40</sup>

If the taxpayer petitions the Tax Court, the petition must assign as errors anything in the notice with which the taxpayer disagrees.<sup>41</sup> The taxpayer may also request a refund of any amount allegedly overpaid.<sup>42</sup> The IRS is required to file an answer to the petition.<sup>43</sup> Although the IRS initiates a tax dispute by mailing the taxpayer a statutory notice, it is the taxpayer that brings the actual litigation by filing a petition with the Tax Court.<sup>44</sup> Therefore, although the taxpayer initiates any litiga-

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<sup>39</sup> I.R.C. § 6503(a)(1).

<sup>40</sup> *Cf. Kogan v. Commissioner*, 972 F.2d 1340, 1340 (9th Cir. 1992) (unpublished table decision) (“[I]n most cases, the IRS has 150 days from the Tax Court decision to assess a tax.”). Filing an appeal does not stay assessment or collection of a deficiency determined by the Tax Court unless the taxpayer files a bond with the court. I.R.C. § 7485; TAX CT. R. 192.

<sup>41</sup> TAX CT. R. 34(b)(4); *cf. FED. R. CIV. P. 8(b)* (“A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.”).

<sup>42</sup> I.R.C. § 6512(b)(1) (1996). This exists as an alternative to piecemeal litigation of a refund action in district court or the Court of Claims and of a deficiency action for the same year in the Tax Court. *See infra* note 44 (explaining refund procedures). If the taxpayer timely petitions the Tax Court with respect to a particular tax year, in response to a statutory notice, the other courts lose jurisdiction over the type of tax (such as income tax) for that tax year except in certain situations specified in the Code. I.R.C. §§ 6512(a), 7422(e); *Finley v. United States*, 612 F.2d 166, 169 (5th Cir. 1980); *see also Dorl v. Commissioner*, 57 T.C. 720, 721-22 (1972) (explaining that it is the taxpayer's action in filing valid petition in Tax Court, and not any action taken by the court, that bars subsequent refund suit in district court); *DeNicola v. Commissioner*, 48 T.C.M. (CCH) 1065, 1065 (1984) (stating that taxpayer's timely filing of petition bars subsequent refund suit in district court or Court of Federal Claims).

<sup>43</sup> TAX CT. R. 30. There are normally no other pleadings in Tax Court cases. *Id.* A reply by the taxpayer is optional. TAX CT. R. 37. However, if the taxpayer does not file a reply and, within 45 days after the expiration of the time for filing a reply, the IRS files a motion that specified allegations in the answer be deemed admitted, the motion may be granted unless the taxpayer files a reply in the time directed by the court. TAX CT. R. 37(c).

<sup>44</sup> *See* TAX CT. R. 20 (filing of Tax Court petition commences case).

If the taxpayer does not pay the tax or petition the Tax Court in response to a statutory notice, the IRS can assess the tax and, after notice and demand from the IRS, the taxpayer will be obligated to pay the tax. I.R.C. § 6213(c). After full payment and filing a timely claim for refund, the taxpayer may pursue refund litigation in a federal district court or the United States Court of Claims. *See* I.R.C. § 7422(a) (stating that no suit shall be maintained prior to filing claim for refund); 28 U.S.C. 1346 (1994); *United States v. Dalm*,

tion, functionally she is defending against a deficiency asserted by the IRS.<sup>45</sup>

The statutory notice therefore functions as an inchoate complaint that the taxpayer answers by filing a petition.<sup>46</sup> The IRS's formal answer to the Tax Court petition is generally its only official Tax Court pleading,<sup>47</sup> although in a sense the answer amplifies the statutory notice. After the pleadings are filed, the parties are required to stipulate to the fullest extent possible all relevant matters that are not privileged.<sup>48</sup> The parties do not generally file briefs until after trial.<sup>49</sup>

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494 U.S. 596, 601 (1990) (citing I.R.C. § 7422(a), which Court says tracks the language of I.R.C. § 1346(a)(1), which limits taxpayer's right to bring refund suit until claim has been filed with Secretary); *Flora v. United States*, 362 U.S. 145, 176 (1960) (requiring full payment), *aff g on reh'g* 357 U.S. 63 (1958); *Shore v. United States*, 9 F.3d 1524, 1524 (Fed. Cir. 1993) (requiring full payment of tax assessed for refund suit in Court of Federal Claims); *see also* I.R.C. § 6511 (stating that no credit or refund shall be allowed unless claim is filed by taxpayer during prescribed period). The taxpayer may not file suit until either six months have elapsed from the time she filed the claim or the IRS has sent a notice of disallowance of the claim. I.R.C. § 6532. Furthermore, the taxpayer may not file suit later than two years from the date the IRS mails a notice of disallowance of the claim to the taxpayer. I.R.C. § 6532; *Rosser v. United States*, 9 F.3d 1519, 1524 (11th Cir. 1993).

The refund procedure also places the taxpayer in the posture of plaintiff. The tax refund suit, which evolved from the common law right to sue the tax collector for an unjustified collection of tax, *United States v. Kales*, 314 U.S. 186, 198 (1941); *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915), is an action in the nature of money had and received; the taxpayer must show that the government has money that properly belongs to her. *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932) *modified by* 284 U.S. 599 (1932).

As in Tax Court, the taxpayer bears the burden of persuasion in a refund suit. In addition, unlike in Tax Court, the taxpayer must prove the correct amount of the tax. *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *cf. Estate of Mueller v. Commissioner*, 101 T.C. 551, 567 (1993) (Chabot, J., dissenting) (arguing that tax refund suit is not judicial review of administrative agency, but suit in which taxpayer must establish government has money it should refund; taxpayer must also establish correct amount of tax liability). Refund actions predate the Tax Court, which was created to provide an impartial pre-payment forum for litigation of tax disputes. Revenue Act of 1924, ch. 234, 43 Stat. 253. They also predate even the establishment of the IRS. *See, e.g., Bend v. Hoyt*, 38 U.S. 263 (13 Pet.) (1839) (suit brought to recover excess import duties).

<sup>45</sup> *See* I.R.M. ¶ 4463.1(1) (Sept. 14, 1984) ("The issuance of a notice of deficiency is the beginning of prospective litigation.").

<sup>46</sup> *See infra* notes 77-95 and accompanying text (noting similarities between statutory notice and civil complaint).

<sup>47</sup> *See* TAX CT. R. 30 (providing only for petition and answer, unless a reply is required under the Rules).

<sup>48</sup> TAX CT. R. 91(a).

<sup>49</sup> TAX CT. R. 151(a).

In ordinary civil litigation, the party who bears the burden of pleading a particular issue will also bear the burdens of production and persuasion on that issue.<sup>50</sup> By contrast, in tax litigation, the statutory notice, though conceptually an inchoate complaint,<sup>51</sup> benefits from a "presumption of correctness."<sup>52</sup> Accordingly, the taxpayer generally bears the burden of going forward and the burden of persuasion<sup>53</sup> on all issues and amounts raised in the statutory notice except fraud.<sup>54</sup> The IRS bears the burden of persuasion on "new matter" not raised in the notice and on increased deficiencies.<sup>55</sup>

## II. FUNCTIONS OF THE STATUTORY NOTICE

The statutory notice has sometimes been considered in its capacity as an indispensable prerequisite to Tax Court subject-matter jurisdiction.<sup>56</sup> At other times, the notice has been analogized to legal process<sup>57</sup> or compared to a civil complaint.<sup>58</sup> However, in analyzing challenges to statutory notices, courts and commentators have failed to explicitly recognize that

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<sup>50</sup> JOHN J. COUND ET AL., *CIVIL PROCEDURE CASES AND MATERIALS* 522-23 (6th ed. 1993).

<sup>51</sup> See *supra* text accompanying note 46 (analogizing statutory notice to inchoate complaint); *infra* notes 77-95 and accompanying text (explaining the analogy).

<sup>52</sup> *Welch v. Helvering*, 290 U.S. 111, 115 (1933); see also *infra* notes 97-100 and accompanying text (explaining that "presumption of correctness" is not "true presumption," but rather shifts burden of going forward to taxpayer).

<sup>53</sup> One commentator explained:

The actual burden [of proof] is twofold, imposing upon the burdened party, if the existence of the element is denied: (1) the burden of producing evidence in the first instance, of a quantum usually described as "sufficient to enable a jury acting reasonably to find" the existence of the element; and (2) the burden of persuasion, which requires the trier of fact to find against the burdened party as to the element unless persuaded, in view of all the evidence, that its existence is more probable than not.

Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 *STAN. L. REV.* 5, 15-16 (1959) (footnotes omitted).

<sup>54</sup> *TAX CT. R.* 142(a), (b).

<sup>55</sup> See *TAX CT. R.* 142(a) (placing burden of proof generally on petitioner except as otherwise provided by statute or court, and except "in respect of any new matter, increases in deficiency, and affirmative defenses").

<sup>56</sup> See *infra* note 59 (statutory notice is sometimes considered mere jurisdictional prerequisite to Tax Court litigation).

<sup>57</sup> See *infra* note 68.

<sup>58</sup> See *infra* note 77.

the notice serves all of these diverse functions.<sup>59</sup> This section explores these multiple roles and their civil litigation analogues.

A. *Tax Court Jurisdiction: The Notice as the  
"Ticket to Tax Court"*

By statute and Tax Court rule, the statutory notice is one of the two requirements for Tax Court subject-matter jurisdiction.<sup>60</sup> The notice has been termed the taxpayer's "ticket to the Tax Court,"<sup>61</sup> highlighting its jurisdictional function.<sup>62</sup> If the statutory notice mailed to the taxpayer is invalid,<sup>63</sup> or if the IRS did not mail the taxpayer a notice<sup>64</sup> for the year in question,<sup>65</sup> the Tax Court must dismiss the case for lack of jurisdiction for that reason. The case will be dismissed, generally on the

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<sup>59</sup> See, e.g., *Scar v. Commissioner*, 814 F.2d 1363, 1372 (9th Cir. 1987) (Hall, J., dissenting) (statutory notice "is nothing more than 'a jurisdictional prerequisite to a taxpayer's suit seeking the Tax Court's redetermination of [the IRS's] determination of the tax liability'" (quoting *Stamm Int'l Corp. v. Commissioner*, 84 T.C. 248, 252 (1985)); *Olsen v. Helvering*, 88 F.2d 650, 651 (2d Cir. 1937) (notice is intended only to advise taxpayer of deficiency).

By contrast, one article has suggested that the statutory notice has additional legal consequences directly related to the taxpayer's potential liability, such as establishing the issues on which the taxpayer will bear the burden of proof. Martha B. Brissette & Gilbert S. Rothenberg, *The "Last Known Address" Provisions of the Internal Revenue Code: A Modest Proposal for Reform*, 6 VA. TAX REV. 329, 365 (1986).

<sup>60</sup> I.R.C. § 6213(a) (1996); TAX CT. R. 13(a); *Laing v. United States*, 423 U.S. 161, 165 n.4 (1976). The second requirement is a timely petition to the Tax Court. I.R.C. § 6213(a); TAX CT. R. 13(c). The taxpayer must attach a copy of the notice to the Tax Court petition. TAX CT. R. 34(b)(8).

<sup>61</sup> *Scar*, 814 F.2d at 1372 (Hall, J., dissenting); Ferrari, *supra* note 27, at 411 & cases cited in n.32.

<sup>62</sup> *Andrews*, *supra* note 14, at 662 n.45; cf. *Commissioner v. Forest Glen Creamery*, 98 F.2d 968, 971 (7th Cir. 1938) ("The purpose of the notice is to give the taxpayer an opportunity to appeal to the Board of Tax Appeals, but there is no indication in the statute of an intention to require the notice to be the basis of jurisdiction of the Board in a technical sense.").

<sup>63</sup> See *infra* text accompanying note 110 (noting taxpayer's incentive to characterize defective notice challenge as jurisdictional).

<sup>64</sup> See, e.g., *Pietanza v. Commissioner*, 92 T.C. 729, 742 (1989) (since IRS did not prove it had mailed taxpayers statutory notice, case must be dismissed for lack of jurisdiction), *aff'd*, 935 F.2d 1282 (3d Cir. 1991); *Versteeg v. Commissioner*, 91 T.C. 339, 341 (1988) (case dismissed for failure to mail statutory notice to taxpayers); *Estate of Adamczyk v. Commissioner*, 41 T.C.M. (CCH) 1596 (1981) (same).

<sup>65</sup> See, e.g., *Moretti v. Commissioner*, 77 F.3d 637, 642 (2d Cir. 1996) (stating that Tax Court had no jurisdiction to consider claimed overpayment for year other than tax year at issue in statutory notice).

taxpayer's motion, even though it was the taxpayer who petitioned the Tax Court.<sup>66</sup> Dismissal of a Tax Court case for lack of jurisdiction based on an invalid statutory notice has a number of collateral consequences, as discussed below in Part III.<sup>67</sup>

*B. Notice and an Opportunity to be Heard: The Mailing of the Statutory Notice as Service of Process*

The statutory notice has occasionally been analogized to process in a civil action.<sup>68</sup> As one case states, "Service of process' is a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action."<sup>69</sup> Service of process provides notice and an opportunity to be heard,<sup>70</sup> two basic goals of due process.<sup>71</sup>

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<sup>66</sup> See, e.g., *Pietanza*, 92 T.C. at 735 (no action can be maintained unless there is valid notice of deficiency and timely filed petition); *Keeton v. Commissioner*, 74 T.C. 377, 379 (1980) (petition was untimely but if IRS did not issue valid statutory notice, court will dismiss on that ground rather than because petition was not timely).

<sup>67</sup> See *infra* notes 111-32 and accompanying text (discussing various implications of Tax Court dismissal for lack of subject-matter jurisdiction).

<sup>68</sup> See *Commissioner v. New York Trust Co.*, 54 F.2d 463, 466 (2d Cir. 1931) (finding taxpayer's invocation of Board of Tax Appeals's jurisdiction a general appearance, equivalent to service of process); *Brissette & Rothenberg*, *supra* note 59, at 366 (stating that analogies between deficiency notice and service of process show need for change in tax procedure, but not elaborating on the analogies).

A motion to dismiss for lack of jurisdiction based on invalidity of the statutory notice may be analogized to a special appearance before a court to contest the validity of service of process. "A special appearance is an appearance made by a defendant at the threshold of the litigation before he asserts any other objections or defenses and in which he contends that the process served on him is invalid." RESTATEMENT (SECOND) OF JUDGMENTS § 10 comment b (1982). However, proper service of process ordinarily implicates only personal jurisdiction over a party, which must be raised early or it is waived. See FED. R. CIV. P. 12(g), (h)(1) (personal jurisdiction is waived if not raised as affirmative defense). Yet, the validity of a statutory notice relates to the Tax Court's subject-matter jurisdiction over the case, which may be raised at any time, and cannot be waived. FED. R. CIV. P. 12(h)(3); *United States v. New York & O.S.S. Co.*, 216 F. 61, 67-68 (2d Cir. 1914). See *infra* note 115 and accompanying text (parties cannot consent to subject-matter jurisdiction). Thus, *Commissioner v. New York Trust Co.*, 54 F.2d 463 (2d Cir. 1931), is incorrect in its statement that "[t]he appearance here before the Board of Tax Appeals was general, not special, and the [taxpayer] waived any defect in the notice by invoking the jurisdiction of the Board of Tax Appeals." *Id.* at 466.

<sup>69</sup> *R. Griggs Group, Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1103 (D. Nev. 1996) (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988)).

<sup>70</sup> See *City of New York v. Chemical Bank*, 470 N.Y.S.2d 280, 283 (Sup. Ct. 1983) (service is intended to notify defendant of action and to symbolize assertion of authority, serving as modern substitute for *capias ad respondendum*); cf. *In re Wencke*, No. 78-02149-K,

In tax cases, the statutory notice informs the taxpayer of the IRS's deficiency determination,<sup>72</sup> and that the IRS will assess the tax deficiency if the taxpayer does not respond to the notice.<sup>73</sup> Sections 6212 and 6213 of the Code provide a mechanism for a taxpayer to receive the notice and an opportunity to be heard by the Tax Court.<sup>74</sup> Section 6212 provides in part:

If the Secretary determines that there is a deficiency in respect of [certain taxes] . . . he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. . . . In the absence of notice to the Secretary . . . of the existence of a fiduciary relationship, notice of a deficiency . . . if mailed to the taxpayer at his last known address, shall be sufficient . . . .<sup>75</sup>

Section 6213 provides that the taxpayer may petition the Tax Court, generally within 90 days after the statutory notice was mailed,<sup>76</sup> and thus obtain a hearing.

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slip op. (U.S. Bankr. Ct. S.D. Cal. 1980) ("The fact that the deficiency notice is notice of a debt owed to the United States is inferred from the nature of the deficiency notice itself.").

<sup>71</sup> Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); see *infra* text accompanying notes 147-150 (discussing due process requirements).

<sup>72</sup> Several courts and commentators have stated that a key aspect of the statutory notice is that it actually notify the taxpayer. See, e.g., Boren v. Riddell, 241 F.2d 670, 672 (9th Cir. 1957) (finding taxpayer is entitled to actual notice to allow her to petition government if desired); Commissioner v. Stewart, 186 F.2d 239, 241 (6th Cir. 1951) (finding deficiency notice is designed to give taxpayer opportunity to have Tax Court review ruling before it becomes effective); Kennedy v. United States, 403 F. Supp. 619, 622 (W.D. Mich. 1975) (purpose of statutes dealing with statutory notice of deficiency is to ensure taxpayer's opportunity for review of IRS's ruling before it becomes effective), *aff'd*, 556 F.2d 581 (6th Cir. 1977); Johnson, *supra* note 5, at 287 (pointing out that violation of § 6212 is one of few statutory exceptions to Anti-Injunction Act, I.R.C. § 7421).

<sup>73</sup> Cf. *infra* note 136 and accompanying text (if court invalidates statutory notice, IRS is precluded from assessing and collecting deficiencies).

<sup>74</sup> The Internal Revenue Manual describes the statutory notice as consisting of two parts, "a letter stating the amount of the deficiency and a statement showing how the deficiency was computed." I.R.M. ¶ 4463.1(2) (1984). The "letter" portion should identify the name and address of the taxpayer, I.R.M. ¶ 4464.12(1) (1994), the type of tax, the taxable years involved, and the amount of any deficiency or additions to tax. I.R.M. ¶ 4464.14(1) (1983). The letter portion of the notice is comparable to legal process. In addition, the information contained in the letter portion is essential to Tax Court jurisdiction. See *infra* note 229 and accompanying text (discussing elements essential for jurisdictional validity of statutory notice).

<sup>75</sup> I.R.C. § 6212(a), (b)(1) (1996).

<sup>76</sup> *Id.* § 6213(a); see Frieling v. Commissioner, 81 T.C. 42, 53 (1983) (under § 6213(a), taxpayers have 90 days from mailing of notice to file petition in deficiency case); Violette v.

C. *Framing the Issues in Tax Court Litigation:  
The Notice as an Inchoate Complaint*

The statutory notice has also been analogized to a civil complaint.<sup>77</sup> Like a complaint, the statutory notice generally identifies the amount in issue<sup>78</sup> and helps frame the issues in dispute

Commissioner, 67 T.C.M. (CCH) 2715, 2717 (1994) (finding petitioner prejudiced by inability to petition Tax Court within 90 days of mailing of statutory notice).

To provide constitutional due process, a notice must be sent by a means reasonably calculated to reach the particular recipient and provide a reasonable time for an interested person to make a responsive appearance. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Mullane*, 339 U.S. at 314; *Roller v. Holly*, 176 U.S. 398, 413 (1900) (holding five-day notice insufficient). State statutes generally allow a nonresident defendant at least 20 days to respond to service of process, and this has been found constitutionally sufficient. ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.03[1][e], at 2-42 (2d ed. 1991). The Code allows a taxpayer to petition the Tax Court within 90 days of the mailing of the notice, or 150 days if the notice is addressed to someone outside the United States. I.R.C. § 6213(a).

Section 907(a) of the Revenue Act of 1926 provided in part, referring to the Board of Tax Appeals, "Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable." Revenue Act of 1926, ch. 27, sec. 907(a), 44 Stat. 9, 107.

<sup>77</sup> See *Clapp v. Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989) ("Issuing a statutory notice is in many ways analogous to filing a civil complaint."); see also Randolph E. Paul, *A Plea for Better Tax Pleading*, 18 CORNELL L.Q. 507, 512 n.20 (1933) (if taxpayer petitions the Board of Tax Appeals in response to statutory notice, it serves as the "complaint").

One article remarked,

[N]otwithstanding the Third Circuit's observation in *Berger v. Commissioner* that "[a] deficiency notice, unlike a complaint in a civil action, is not a legal process or pleading," it clearly is similar in several respects. On the one hand, it notifies the taxpayer that the Commissioner has determined that a deficiency exists. On the other hand, however, it generally operates to toll the statute of limitations on assessments. If the taxpayer wishes to prevent the government from collecting the alleged deficiency, he must file a petition in the Tax Court.

Brissette & Rothenberg, *supra* note 59, at 365-366 (footnotes omitted).

The statutory notice may also qualify as a proof of claim in Bankruptcy Court. See, e.g., *In re International Horizons, Inc.*, 751 F.2d 1213, 1218 (11th Cir. 1985) (dictum) ("We may suppose, arguendo, that a notice of deficiency, known to the trustee, before the cut-off date, would have some claim to be regarded as an informal proof of claim in the bankruptcy."); *In re Wencke*, No. 78-02149-K, slip op. (U.S. Bankruptcy Court S.D. Cal. Oct. 2, 1980) (finding that, because deficiency notice brings to court's attention nature and amount of claim, it is sufficient to constitute proof of claim within general meaning of Section 57(a) of Bankruptcy Act). *But cf. In re Eddie Burrell*, 85 B.R. 799, 801 (Bankr. N.D. Ill. 1988) (statutory notice did not constitute informal proof of claim because it did not "make an express demand for payment . . . . It simply notified the taxpayer of the IRS's determination and his right to a 'redetermination' of the amount of his tax."). This possible role of the statutory notice in bankruptcy proceedings is not a typical role of the notice in the tax controversy process.

<sup>78</sup> A federal complaint must allege an amount of damages, FED. R. CIV. P. 8(a)(3), just



in any subsequent Tax Court proceeding.<sup>79</sup> The only issues the Tax Court may consider besides those covered in the statutory notice and contested in the petition are: (1) an overpayment for the same tax year that is the subject of the statutory notice<sup>80</sup> and claimed by the taxpayer in the Tax Court proceeding, and (2) new matters or increased deficiencies raised by the IRS after the statutory notice was mailed and with respect to the same tax year.<sup>81</sup> A taxpayer's overpayment claim is analogous to a counterclaim by the taxpayer.<sup>82</sup> New matters are new allegations of the kind typically seen in an amended complaint.<sup>83</sup>

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as a statutory notice must contain the amount of the deficiency. *See infra* note 229 and accompanying text (describing minimal contents of statutory notice required for subject-matter jurisdiction). Under Federal Rule of Civil Procedure 54(c), the court can award whatever relief the evidence shows that the plaintiff is entitled to. In Tax Court, the court can find a deficiency greater than that determined by the IRS. I.R.C. § 6214(a). In practice, however, the court limits itself to amounts claimed by the IRS in the statutory notice unless the IRS has made an affirmative claim for an increased deficiency. 1 CASEY, *supra* note 26, § 6.53, at 737. The IRS bears the burden of persuasion on increased deficiencies. TAX CT. R. 142(a).

<sup>79</sup> *See infra* text accompanying notes 80-83 (discussing issues Tax Court may consider besides those covered in statutory notice); Cook & Dubroff, *supra* note 22, at 641 ("The opportunity for court review is initially provided by the Commissioner's issuance of a deficiency notice which asserts that additional tax is due. This, in effect, provides the gravamen on which the cause of action is based.").

<sup>80</sup> Under I.R.C. section 6512(b)(1), the Tax Court has jurisdiction over overpayments arising out of the same tax year with respect to which the IRS claims a deficiency. I.R.C. § 6512(b)(1).

<sup>81</sup> *See id.* § 6214(a) (1996) (giving Tax Court jurisdiction to redetermine existence and amount of deficiency). The IRS bears the burden of proof on new matters. TAX CT. R. 142(a).

<sup>82</sup> Overpayment jurisdiction may be analogized to compulsory counterclaims in federal court. *See* FED. R. CIV. P. 13(a) ("A pleading shall state as a counterclaim any claim which at the time of serving the pleader has against the opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."). That is, the taxpayer cannot make an overpayment claim in Tax Court without the IRS's initial assertion that there is a deficiency. I.R.C. § 6512(b)(3). In addition, if the taxpayer files a Tax Court petition, that act deprives other courts of jurisdiction over that tax for that tax year, so the taxpayer forfeits any overpayment claim if she does not raise it in the Tax Court proceeding. *See* I.R.C. § 6512(a) (denying other courts jurisdiction over same tax year upon taxpayer's filing of Tax Court petition); *Russell v. United States*, 592 F.2d 1069, 1071-72 (9th Cir. 1979) (recognizing that Tax Court's decision is *res judicata* as to year in question); *City Bank Farmers Trust Co. v. United States*, 143 F. Supp. 921, 922 (S.D.N.Y. 1956) (resorting to Tax Court is act that raises bar to subsequent action in district court).

<sup>83</sup> *See infra* notes 174-91 and accompanying text (discussing case law that relates to statutory notice).

The IRS apparently recognizes that the statutory notice should fulfill a "notice pleading" function. The Internal Revenue Manual (the Manual)<sup>84</sup> terms the statement portion of the statutory notice,<sup>85</sup> which explains the IRS's proposed adjustments,<sup>86</sup> the "bill of particulars of the Commissioner's determination."<sup>87</sup> The Manual provides that it should inform the taxpayer of the proposed adjustments in "clear and concise language"<sup>88</sup> and state the IRS's position with respect to the adjustments.<sup>89</sup> The Manual further states, "if a case goes to Tax Court the explanatory paragraphs become a part of the basic pleadings for the Commissioner."<sup>90</sup> However, the IRS is not bound by the provisions of the Manual.<sup>91</sup>

Nonetheless, the statutory notice is not actually a pleading<sup>92</sup> and does not invoke the jurisdiction of the Tax Court.<sup>93</sup> Thus,

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<sup>84</sup> "The Internal Revenue Manual is designed to serve as the single official compilation of policies, delegated authorities, procedures, instructions, and guidelines relating to the organization, functions, administration, and operations of the [Internal Revenue] Service. Components of the manual are policy statements, delegation orders, basic text . . . , handbooks and manual supplements." I.R.M. 1230 HB 241 (July 7, 1994).

<sup>85</sup> *Id.* ¶ 4463.1(2) (Sept. 14, 1984). The other portion of the notice, according to the Manual, is the "letter" portion. *See supra* note 74 (discussing "letter" portion of the notice).

<sup>86</sup> I.R.M. ¶ 4464.21 (Aug. 5, 1981).

<sup>87</sup> *Id.* "A bill of particulars is an amplification or a more particularized outline of a pleading . . . [and] when such statement is furnished[,] the same is to be construed as if it had been originally incorporated in the pleading." *Pratt v. United States*, 87 Ct. Cl. 586, 589 (1938); *cf.* N.Y. C.P.L.R. § 3041 (McKinney Supp. 1996) ("Any party may require any other party to give a bill of particulars of such party's claim . . .").

<sup>88</sup> I.R.M. ¶ 4464.23(1)(a) (July 23, 1990).

<sup>89</sup> *Id.* ¶ 4464.23(1)(b) (July 23, 1990).

<sup>90</sup> *Id.* ¶ 4463.1(1) (Sept. 14, 1984); *see also* TAX CT. R. 32(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *cf.* FED. R. CIV. P. 10(c) (same).

<sup>91</sup> *See United States v. Caceres*, 440 U.S. 741 (1979) (refusing to suppress tape-recorded conversation with IRS agent made in violation of the Manual; agencies are not required to follow all their rules or risk invalidation of their actions); *Urban v. Commissioner*, 964 F.2d 888, 890 (9th Cir. 1992) ("The CIR's compliance with the IRM's requirements is not mandatory"); *United States v. Will*, 671 F.2d 963, 967 (6th Cir. 1982) (Manual was "adopted solely for the protection of the taxpayer, [and] does not confer any rights upon the taxpayer").

<sup>92</sup> *See Berger v. Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968) ("A deficiency notice, unlike a complaint in a civil action, is not a legal process or pleading even though it is a prerequisite to the subsequent litigation before the Tax Court on a petition for redetermination."); *Cook & Dubroff, supra* note 22, at 643 ("[T]he deficiency notice has only a negligible connection with the Tax Court pleading structure.")

<sup>93</sup> *See Cook & Dubroff, supra* note 22, at 643 (statutory notice "neither confers jurisdiction nor commences the proceeding").

the notice more nearly resembles an *inchoate* complaint. It is the taxpayer who actually initiates the Tax Court proceeding by filing a petition responding to the statutory notice.<sup>94</sup> The IRS's answer to the petition later complements the notice so that, together, the notice and the answer function comparably to a civil complaint.<sup>95</sup>

In general civil litigation, the party who bears the burden of pleading bears not only the burden of providing notice of the claim-generating transaction and legal theory but also the burden of production on that matter.<sup>96</sup> Tax cases are different, perhaps because of the special role that the IRS's administrative determination plays in tax proceedings. For example, although the IRS asserts the deficiency in the statutory notice, and may modify it in its answer, the IRS need not come forward with evidence of its determination. Instead, the statutory notice benefits from a "presumption of correctness."<sup>97</sup> This is not a "true presumption,"<sup>98</sup> in that the IRS is not required to present any

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<sup>94</sup> See TAX CT. R. 20 (filing of Tax Court petition commences case).

<sup>95</sup> Cf. TAX CT. R. 142(a) (requiring that, if IRS asserts new matter or increased deficiency in answer, it will bear burden of persuasion on new matter or increased deficiency).

<sup>96</sup> COUND ET AL., *supra* note 50, at 522-23.

<sup>97</sup> *Welch v. Helvering*, 290 U.S. 111, 115 (1933). The justifications for the presumption of correctness are "the government's strong need to accomplish swift collection of revenues and . . . the need to encourage taxpayer recordkeeping." *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991) (citing *Carson v. United States*, 560 F.2d 693, 696 (5th Cir. 1977)).

The presumption of correctness has its basis in the common law presumption of administrative regularity. See Harold Dubroff & Dan S. Grossman, *The United States Tax Court: An Historical Analysis*, 42 ALB. L. REV. 191, 209 (1978) (identifying long-recognized principle that administrative actions of government are presumed correct); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 275 (1988) (presumption of correctness is derived from presumption of administrative regularity); Sean M. Moran, Note, *The Presumption of Correctness: Should the Commissioner be Required to Carry the Initial Burden of Production*, 55 FORDHAM L. REV. 1087, 1106-07 (1987) (presumption of correctness's placement of burden of proof on taxpayer is validated by general rule that government's administrative actions are presumed correct). The presumption of administrative regularity is the presumption that government officials act according to the law and properly discharge their official duties. *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926).

<sup>98</sup> "All scholars seem to agree that a 'true' presumption is a rule of law which provides that if a particular group of facts has been established, another fact is deemed established." Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697, 698 (1984).

evidence of its determination.<sup>99</sup> Instead, the presumption serves to place the burden of going forward on the taxpayer.<sup>100</sup>

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<sup>99</sup> See Steven David Smith, Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. Rev. 1101, 1106-07 (1984) (distinguishing "true presumptions," which require some proof, from "assumptions," which are not dependent on proof); see also Dubroff & Grossman, *supra* note 97, at 205-06 ("The presumption is merely a procedural device, not a substitute for evidence and cannot survive the introduction by the taxpayer of countervailing evidence.").

Smith states, with respect to *United States v. Ahrens*, 530 F.2d 781 (8th Cir. 1976), a case in which the Eighth Circuit held that evidence of the disputed fact of the mailing of a statutory notice could not be adequately countered by arguments that the notice was invalid:

It is important to distinguish between presumptions and assumptions in general. Many times an assumption is incorrectly referred to as a "presumption." This is misleading because assumptions do not depend on the proof of any fact, but rather are a way of allocating the burden of proof. An example of this phenomenon is the so-called "presumption of innocence." Every defendant enjoys the benefit of this "presumption" without proving any fact at all; it is another way of stating that the prosecution bears the burden of proof.

Smith, *supra*, at 1106-07 (footnotes omitted); see also *United States v. Ahrens*, 530 F.2d 781, 786 (8th Cir. 1976) (classifying presumption of official regularity as assumption rather than presumption, so that taxpayer bears burden of proof). *But cf.* Cleary, *supra* note 53, at 16 ("Sometimes presumptions take effect simply because of the type of situation which is presented by the pleadings, and no preliminary evidence is needed. An example is the presumption of sanity . . ."). Cleary points out that

[p]resumptions have been described variously and picturesquely as "bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts," "like Maeterlinck's male bee, having functioned, they disappear," and, in more ruggedly American fashion, as "the pitcher's 'fair balls,' which, unless the batsman hits them, become 'strikes,' and may finally put the batsman out . . ."

*Id.* at 17-18 (footnotes omitted).

<sup>100</sup> See *Cozzi v. Commissioner*, 88 T.C. 435, 443-44 (1987) (burden of proof and burden of going forward rest on petitioner); *Estate of Gilford v. Commissioner*, 88 T.C. 38, 51 (1987) (where petitioner does not sufficiently rebut Commissioner's presumption, Commissioner wins); Dubroff & Grossman, *supra* note 97, at 205 ("The prevailing view is that the presumption is coextensive with the taxpayer's initial burden of going forward with the evidence."); Leandra Lederman Gassenheimer, *The Dilemma of Deficient Deficiency Notices*, 73 TAXES 83, 85 (1995) (arguing that presumption of correctness places burden of going forward on taxpayer).

Federal Rule of Evidence 301 provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In addition, the taxpayer bears the burden of persuasion on all issues raised in the statutory notice except fraud.<sup>101</sup> Only when the IRS raises "new matter" not covered in the statutory notice, or increases the deficiency,<sup>102</sup> will the IRS bear the burden of persuasion.<sup>103</sup> This contrasts sharply with general civil litigation, in which the plaintiff bears the burdens of production and persuasion on all amounts sought.<sup>104</sup>

### III. THE STAKES BEHIND ADEQUATE STATUTORY NOTICES

Taxpayers have challenged statutory notices based on an array of alleged defects in the notices.<sup>105</sup> Courts have generally treated these attacks as factual questions, ignoring the jurisprudential underpinnings of each challenge. As discussed above, the statutory notice plays three conceptually distinct roles in tax litigation.<sup>106</sup> First, it is said to be the jurisdictional "ticket to Tax Court."<sup>107</sup> Second, it notifies the taxpayer of the IRS's determination, comparable to legal process.<sup>108</sup> Third, it also functions as a pleading in ensuing Tax Court litigation.<sup>109</sup> Taxpayers, although nominally the petitioners in Tax Court, have a particular

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FED. R. EVID. 301. The Federal Rules of Evidence apply to Tax Court proceedings. I.R.C. § 7453 (1996) (declaring applicable rules of evidence are those that apply in bench trials in United States District Court for District of Columbia).

<sup>101</sup> See GERALD A. KAFKA & RITA A. CAVANAGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES § 8.01, at 8-3 (2d ed. 1995). The Tax Court rules refer to the burden of "proof" and not the burden of "persuasion." TAX CT. R. 142(a). The IRS bears the burden of proof on fraud. TAX CT. R. 142(b).

<sup>102</sup> Just as the plaintiff can claim increased damages even after the statute of limitations has run, FED. R. CIV. P. 54(c), the IRS can increase the amount of the deficiency even after the date on which the statute of limitations would have run if the taxpayer had not petitioned the court. See I.R.C. § 6214(a); *Rosenthal v. Commissioner*, 29 T.C.M. (CCH) 1521 (1970).

<sup>103</sup> TAX CT. R. 142(a).

<sup>104</sup> See *J.Z.G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 214 (6th Cir. 1996) (finding that plaintiff bears burden of proof on both liability and damages).

<sup>105</sup> See *infra* note 111 and accompanying text (stating that moving to dismiss for lack of jurisdiction is most common and advantageous way for taxpayers to challenge validity of notice); *infra* note 151 and accompanying text (focusing on compliance with § 6212); *infra* note 232 and accompanying text (incorrect tax year is grounds for invalidating statutory notice).

<sup>106</sup> See *supra* text accompanying notes 56-58.

<sup>107</sup> See *supra* text accompanying note 61.

<sup>108</sup> See *supra* text accompanying note 68.

<sup>109</sup> See *supra* text accompanying note 77.

incentive to frame challenges to defective notices as jurisdictional.<sup>110</sup> However, the legal analysis of a defect and its appropriate remedy should depend on which of these functions the defect undermines.

### A. Jurisdictional Defects

Petitioning the Tax Court and moving to dismiss for lack of jurisdiction is a very common way for taxpayers to litigate the validity of a statutory notice,<sup>111</sup> and one that is particularly advantageous to taxpayers.<sup>112</sup> If a statutory notice is invalid and the taxpayer petitions the Tax Court in response, the Tax Court must dismiss the case for lack of jurisdiction.<sup>113</sup> By filing a petition in response to the notice, the taxpayer does not waive the right to object to its validity;<sup>114</sup> a true subject-matter jurisdiction objection cannot be waived.<sup>115</sup>

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<sup>110</sup> See *supra* note 13 and accompanying text (timely taxpayer petition required for Tax Court jurisdiction); *infra* notes 117-20 (explaining taxpayer's incentive to make motion to dismiss for lack of subject-matter jurisdiction).

<sup>111</sup> See, e.g., *Balkissoon v. Commissioner*, 995 F.2d 525 (4th Cir. 1993) (discussing alleged violation of mailing element of § 6212); *Clapp v. Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989) (discussing alleged violation of "determination" element of § 6212); *Scar v. Commissioner*, 814 F.2d 1363, 1366 (9th Cir. 1987) (same); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982) (discussing alleged violation of "last known address" element of § 6212); *Abeles v. Commissioner*, 91 T.C. 1019 (1988) (same).

<sup>112</sup> See *infra* text accompanying notes 129-32, 137 (discussing implications of Tax Court dismissal for lack of subject-matter jurisdiction).

<sup>113</sup> See *supra* notes 63-65 and accompanying text (discussing validity and mailing of statutory notice).

<sup>114</sup> Some Tax Court cases have stated that the taxpayer waives any defects in a statutory notice by filing a petition. In *Lifter v. Commissioner*, 59 T.C. 818 (1973), the Tax Court clarified this, stating:

In a number of cases, it has been said that a taxpayer waived any defects in the notice when he filed a timely petition in the Tax Court, but in these cases, it is apparent that the taxpayer received actual notice of the deficiency in sufficient time to file a petition with the Court.

*Id.* at 823-24. See also *infra* notes 158-59 and accompanying text (discussing "last known address" cases).

<sup>115</sup> See *National Bank of Commerce v. Commissioner*, 34 B.T.A. 119, 124 (1936) (finding that, once jurisdiction question raised, jurisdiction could not be conferred on Board by consent of parties); see also *Accessories Mfg. Co. v. Commissioner*, 12 B.T.A. 467, 467 (1928) (holding that consent or estoppel cannot confer jurisdiction if not provided for by statute). A subject-matter jurisdiction objection can be raised at any time. *Shelton v. Commissioner*, 63 T.C. 193, 198 (1974); *Wheeler's Peachtree Pharmacy, Inc. v. Commissioner*, 35 T.C. 177, 179 (1960); cf. FED. R. CIV. P. 12(h)(3) (requiring court to dismiss

The Tax Court's determination that the notice is invalid is binding on the parties for all purposes.<sup>116</sup> This result is mandated because, as with all courts,<sup>117</sup> the Tax Court has jurisdiction to determine its jurisdiction.<sup>118</sup> Factual findings essential

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action if court lacks subject-matter jurisdiction). The United States Supreme Court has stated:

[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, . . . principles of estoppel do not apply, . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.

*Insurance Corp. Of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted).

<sup>116</sup> For example, an invalid notice does not terminate a Form 872-A extension of the statute of limitations on assessment. *See, e.g.*, *Ward v. Commissioner*, 907 F.2d 517, 521 n.7 (5th Cir. 1990) (waiver of Form 872-A limitations period does not terminate until IRS sends taxpayer valid notice of deficiency); *Hubbard v. Commissioner*, 872 F.2d 183, 186 (6th Cir. 1989) (holding that, to terminate Form 872-A waiver, notice of deficiency must comply with § 6212); *Holof v. Commissioner*, 872 F.2d 50, 55-56 (3d Cir. 1989) (holding that only "effective" notice of deficiency will terminate Form 872-A waiver); *Roszkos v. Commissioner*, 850 F.2d 514, 517-18 (9th Cir. 1989) (interpreting Internal Revenue Code § 6212 to allow only valid notices to satisfy Form 872-A reference to statutory notice of deficiency). Further, an assessment based on an invalid notice does not invalidate the Form 872-A. *See, e.g.*, *Coffey v. Commissioner*, 96 T.C. 161, 166-67 (1991) (finding invalid assessment not type of assessment contemplated by Form 872-A agreement); *Duncan v. Commissioner*, 56 T.C.M. (CCH) 1073, 1075 (1989) (citing *Roszkos* and finding that invalid assessment did not terminate Form 872-A agreement). This benefits the IRS in that Form 872-A is an unlimited extension by the taxpayer of the statute of limitations on assessment. The extension can be terminated by certain actions, one of which is mailing a statutory notice. *See Rev. Proc. 79-22*, 1979-1 C.B. 563 (mailing statutory notice terminates statute of limitations extension). If an invalid notice does not terminate the extension, the statute remains open for the IRS to send a valid notice.

<sup>117</sup> 20 AM. JUR. 2D *Courts* § 60 (1994); *see also Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (Court has power to determine whether or not it has jurisdiction); *United States v. Freights, Etc. of S.S. Mt. Shasta*, 274 U.S. 466, 471 (1927) (stating that court derives jurisdiction from its power); *Atlantic City Mun. Utils. Auth. v. Regional Adm'r*, 803 F.2d 96, 103 (3d Cir. 1986) (courts have jurisdiction to determine their jurisdiction).

<sup>118</sup> *See, e.g.*, *Continental Prod. Co. v. Commissioner*, 66 F.2d 434, 435 (1st Cir. 1933) (Tax Court has jurisdiction to determine its jurisdiction); *King v. Commissioner*, 88 T.C. 1042, 1047 (1987) (same), *aff'd*, 857 F.2d 676 (9th Cir. 1988); *Pyo v. Commissioner*, 83 T.C. 626, 632 (1984) (same); *Shelton v. Commissioner*, 63 T.C. 193, 198 (1974) (same); *Violette v. Commissioner*, 67 T.C.M. 2715, 2716 (1994) (same); *cf. Brannon's of Shawnee, Inc. v. Commissioner*, 69 T.C. 999, 1001 (1978) (finding jurisdiction to entertain motion to vacate its prior decision for lack of jurisdiction).

In one unusual case, the Tax Court held that, because the taxpayer's husband signed her name on the Tax Court petition without her ratification and intent to be a party to the case, the court lacked authority to determine whether the statutory notice was valid as to her. *Levitt v. Commissioner*, 97 T.C. 437, 442-43 (1991). This decision, coupled with cases

to the jurisdictional determination have a collateral estoppel or issue-preclusive effect as to those questions,<sup>119</sup> even though the

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in which the Tax Court held that a statutory notice was invalid on a motion to dismiss following an untimely petition, implies that the act giving the court jurisdiction to determine its jurisdiction over a case is the filing of a petition, even an untimely one. See *infra* notes 139-43 and accompanying text (discussing cases which held that statutory notice was invalid on motion to dismiss, even after untimely petition); cf. TAX CT. R. 13(c) ("In all cases, the jurisdiction of the Court also depends on the timely filing of a petition."); TAX CT. R. 20 ("A case is commenced in the Court by filing a petition with the Court to redetermine a . . . deficiency . . . issued by the Commissioner . . ."). Apparently, where, as in *Levitt*, no petition at all was filed by a particular party, the court does not even have jurisdiction to determine jurisdiction. *Levitt*, 97 T.C. at 443.

<sup>119</sup> See *North Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429, 432-33 (11th Cir. 1993) (dismissal of complaint for lack of jurisdiction adjudicates court's jurisdiction); *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1263 (5th Cir. 1986) (dismissal of claim for lack of jurisdiction is not res judicata on merits); *Stewart Sec. Corp. v. Guaranty Trust Co.*, 597 F.2d 240, 240 (10th Cir. 1979) (dismissal for lack of subject-matter jurisdiction bars second suit between same parties regarding same transaction); *Eaton v. Weaver Mfg. Co.*, 582 F.2d 1250, 1255-56 (10th Cir. 1978) (dismissal of first complaint for lack of jurisdiction barred second complaint, unless problem has been cured); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir. 1977) (second complaint was barred because first complaint was dismissed for lack of jurisdiction); *Acree v. Air Line Pilots Assoc.*, 390 F.2d 199, 203 (5th Cir. 1968) (district court's dismissal for lack of jurisdiction precluded complaint); *Leung Gim v. Brownell*, 238 F.2d 77, 78 (9th Cir. 1956) (second complaint is res judicata where first complaint contained same allegations and was dismissed for lack of jurisdiction); *Estevez v. Nabers*, 219 F.2d 321, 324 (5th Cir. 1955) (holding first complaint's dismissal for lack of jurisdiction preclusive of second complaint); *Catholic Soc'y of Religious & Literary Educ. v. Madison County*, 74 F.2d 848, 850 (4th Cir. 1935) (holding second complaint precluded because first complaint dismissed for lack of jurisdiction); *Fico v. Industrial Comm'n*, 186 N.E. 605, 606-07 (Ill. 1933) (holding second complaint barred because of first complaint's dismissal for lack of jurisdiction); 46 AM. JUR. 2D *Judgments* § 627 (1994) (when complaint is dismissed for lack of jurisdiction, subsequent complaint on same issue is barred by res judicata); RESTATEMENT (SECOND) OF JUDGMENTS § 49, cmt. b (1980) (discussing contract co-obligators: where complaint against one is dismissed, complaint against other still stands). *But cf. Rand v. United States*, 48 F. 357, 358 (D. Me. 1888) (second complaint was not barred merely because first complaint dismissed for lack of jurisdiction), *aff'd*, 53 F. 348 (1st Cir. 1891); *Weissmann v. Euker*, 147 N.Y.S.2d 101, 105 (App. Div. 1955) (same).

The underlying cause of action is not itself barred under this doctrine, so it does not preclude the IRS from issuing a valid notice for the same tax year or preclude the taxpayer from petitioning the Tax Court in response to that notice. See *Estevez*, 219 F.2d at 324 (dismissal of first complaint for lack of jurisdiction does not bar second complaint on its merits); *Ripperger v. A.C. Allyn & Co., Inc.*, 37 F. Supp. 373, 374 (S.D.N.Y.) (underlying cause of action is not barred even though court dismissed complaint for lack of jurisdiction), *aff'd*, 113 F.2d 332 (2d Cir. 1940). If the statute of limitations has run at the time the IRS mails the subsequent notice, the taxpayer can raise that as an affirmative defense in the ensuing litigation. See TAX CT. R. 39 ("[A] party shall set forth in the party's pleading any matter constituting an avoidance or affirmative defense, including . . . the statute of limitations . . ."); cf. FED. R. CIV. P. 8(c) ("In pleading to a preceding pleading,



court dismissed the case for lack of jurisdiction over the subject matter.<sup>120</sup>

As in all courts, dismissal for lack of subject-matter jurisdiction is not a decision on the merits of the case<sup>121</sup> and therefore results in a dismissal without prejudice.<sup>122</sup> In the context of the Tax Court, this means that, theoretically, the IRS can mail the taxpayer another notice. Again, the taxpayer may petition the Tax Court and contest the IRS's determinations.<sup>123</sup> However, in

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a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense.").

<sup>120</sup> *Equitable Trust Co. v. Commodity Futures Trading Comm'n*, 669 F.2d 269, 272 (5th Cir. 1982) (dismissing complaint on merits); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1980) (general rule of claim preclusion does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case . . . because of the limitations on the subject matter jurisdiction of the courts").

<sup>121</sup> *See* I.R.C. § 7459(d) (1996) (if Tax Court dismisses case for lack of jurisdiction, Tax Court cannot enter order in amount of deficiency); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 11 (1982) ("A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action."); FED. R. CIV. P. 41(b) (regarding involuntary dismissal).

<sup>122</sup> That is, the plaintiff is free to bring the underlying issue to a court of competent jurisdiction. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a) (1982) (dismissal for lack of subject-matter jurisdiction is not determination on merits); RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. a (1982) (noting that when action is dismissed for lack of jurisdiction, issue will not be drawn into question, because party seeking adjudication will pursue in another, competent forum).

The Tax Court had held in a few cases that it did not have jurisdiction over a motion under I.R.C. section 7430 for litigation costs if it had dismissed the underlying case for lack of jurisdiction. *See Fuller v. Commissioner*, 51 T.C.M. (CCH) 336, 337 (1986) (holding that, because court lacked jurisdiction, it could not consider motion for fees); *see also Sanders v. Commissioner*, 813 F.2d 859, 862 (7th Cir. 1987) (applying the rationale of *Fuller*). However, in *Weiss v. Commissioner*, 88 T.C. 1036, 1039 n.8 (1987), the Tax Court rejected its prior reasoning and overruled *Fuller*.

<sup>123</sup> The IRS is prohibited from sending a second statutory notice for the tax year once the taxpayer has filed a Tax Court petition. I.R.C. § 6212(c)(1). However, if the first notice was invalid, it does not trigger this rule. *See* I.R.M. ¶ (12)634.1(8) (March 1, 1984) (permitting notices returned due to incorrect address to be re-mailed within statutory period); *cf. Scar v. Commissioner*, 814 F.2d 1363, 1370 (9th Cir. 1987) (I.R.C. § 6212(a) requirements must be met by statutory notice; if not, Tax Court lacks jurisdiction, and IRS may send second notice). The IRS can assert an increased deficiency in the Tax Court litigation, I.R.C. § 6214(a) (1996), but will bear the burden of proof on the increased amount. TAX CT. R. 142(a). By contrast, the taxpayer bears the burden of proof on most matters raised in the statutory notice. *See id.* (noting that burden of proof is generally on petitioner except as otherwise provided by statute or determined by court). Thus, the prohibition on subsequent notices where the taxpayer has petitioned the Tax Court must be in the pursuit of the idea that if the IRS has failed to notify the taxpayer of the full claim after having up to three years to consider the issues, the IRS should bear the burden of proof on the additional claim.

practice, the statute of limitations on assessment probably will have expired by that time,<sup>124</sup> effectively prohibiting the IRS from assessing and collecting any deficiency.<sup>125</sup>

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The IRS is not prohibited under the Code from sending a second statutory notice if the taxpayer has filed a refund suit. *See Pfeiffer Co. v. United States*, 518 F.2d 124, 128 (8th Cir. 1975) (holding that IRS has alternative of assessing additional tax if taxpayer does not petition the Tax Court liability or counterclaiming in refund suit); 3 CASEY, *supra* note 26, § 11.9 (Supp. 1995) (filing of refund suit in district court or Court of Claims does not automatically bar the IRS from issuing notice of deficiency for the same taxable year); *cf.* I.R.C. § 7422(e) (1996) (IRS's mailing of statutory notice to taxpayer stays proceedings in cases relating to that subject matter in district court or Claims Court). The government's claim for unassessed taxes in a refund action is not regarded as a compulsory counterclaim that would prohibit the issuance of a statutory notice under the doctrine of issue preclusion. *See Hemmings v. Commissioner*, 104 T.C. 221, 234-35 (1995) (listing cases in which courts have held that government claims for unassessed additional taxes in refund actions are not compulsory counterclaims).

<sup>124</sup> *See, e.g., Reddock v. Commissioner*, 72 T.C. 21, 27-28 (1979) (finding that notice was returned undelivered to IRS and re-mailed after statute of limitations expired; although petition was filed within 90 days of timely original mailing, Tax Court lacked jurisdiction); *see also Andrews, supra* note 14, at 663 n.50 (when three-year limitation on assessment is implicated, it often expires by final Tax Court decision).

The Tax Court generally takes two years from the time the petition was filed to issue an opinion. *See Levine et al.*, 630 T.M., "Tax Court Litigation," at A-6. Even if the IRS mailed the statutory notice two years after the return was filed and the taxpayer filed the petition immediately, a three-year statute would likely have expired by the time the Tax Court rendered its decision. *Cf. Pyo v. Commissioner*, 83 T.C. 626, 639-40 & 640 n.12 (1984) (grant of motion to dismiss based on invalid notice would normally finalize tax liability, but new notice had been issued under six-year limitations period of § 6501(e)(1)). Theoretically, the IRS could mail a second statutory notice to the taxpayer as a protective measure, if the IRS knew in time that validity was being contested. If the first notice was valid, the second notice would be invalid under section 6212(c)(1), but if the first one was invalid, the second one could be considered on its own merits. *See Mitchell v. Commissioner*, 59 T.C.M. (CCH) 486, 487 (1990).

The statute of limitations is an affirmative defense, and is not jurisdictional, so the mailing of a valid notice after the statute of limitations has run does not preclude Tax Court jurisdiction. *E.g., Robinson v. Commissioner*, 57 T.C. 735, 737 (1972); *Worden v. Commissioner*, 67 T.C.M. (CCH) 2835, 2836-37 (1994).

<sup>125</sup> *See* I.R.C. § 6401(a) (defining amounts collected after statute of limitations expired as overpayments); I.R.C. § 6501 (setting forth statutes of limitations on assessment).

Theoretically, the IRS could attempt to protect itself by serving a request to admit on the taxpayer under Tax Court Rule 90, asking the taxpayer to admit the validity of the notice. However, that would not bind the Tax Court because a court can consider subject-matter jurisdiction *sua sponte*, and parties cannot confer subject-matter jurisdiction on a court by consent. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 398 (1975) (stating that parties may not confer jurisdiction on court where "case or controversy" is not presented); *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) (finding that parties can never consent to federal subject-matter jurisdiction); *Brannon's of Shawnee, Inc. v. Commissioner*, 69 T.C. 999, 1004 (1978) (citing *Nat'l Comm. to Secure Justice, Etc. v. Commissioner*, 27 T.C. 837, 839 (1957), and finding that courts must deal with questions of jurisdiction even if not raised

The statute of limitations problem arises because of current law on tolling. The IRS must mail a statutory notice within the limitations period for assessment of tax, generally three years.<sup>126</sup> Normally, the issuance of a statutory notice tolls the statute of limitations on assessment until the prohibited period ends, plus sixty days. If a petition is filed, the statute of limitations is tolled until the Tax Court decision becomes final, plus sixty days.<sup>127</sup> One commentator has described this tolling as a procedural benefit to the IRS.<sup>128</sup> However, the Tax Court's determination that the notice was invalid means that the notice was not sufficient to allow an assessment based on it, or even to toll the statute of limitations.<sup>129</sup> There is some dispute over whether the language of Code section 6503 means that a Tax Court *petition* is sufficient to toll the statute, despite an invalid notice.<sup>130</sup> The majority of cases hold that it is not.<sup>131</sup> Since

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by either party); *cf.* FED. R. CIV. P. 12(h)(3) (subject-matter jurisdiction challenge may be raised by court at any time). Of course, if the taxpayer denies that the statutory notice is valid, the denial will put the IRS on notice to send a second notice within the statutory period. The taxpayer may contest the subsequent statutory notice as a second notice prohibited under section 6212(c)(1). However, if the first statutory notice was void, the subsequent notice cannot be considered a second notice prohibited by that section. I.R.M. ¶ (12)634.1(8) (Mar. 1, 1984).

<sup>126</sup> See *supra* note 35 and accompanying text (IRS must mail statutory notice within period of limitations on assessment; statute of limitations period varies in certain situations).

<sup>127</sup> I.R.C. §§ 6213(a), 6503(a)(1) (1996).

<sup>128</sup> Ferrari, *supra* note 27, at 414.

<sup>129</sup> See, e.g., *Reddock v. Commissioner*, 72 T.C. 21, 26 (1979) (finding that, where notice was not mailed within 3-year statute of limitations, IRS lacked power to make assessment or issue notice that would toll statute of limitations); *Atlas Oil & Ref. Corp. v. Commissioner*, 22 T.C. 552, 558 (1954) (suspending statute of limitations only for taxable years properly before court, not for years based on invalid statutory notice), *overruled on other grounds sub nom.* *Woods v. Commissioner*, 92 T.C. 776, 778 (1989).

<sup>130</sup> The dispute stems from the ambiguous language of section 6503(a)(1). It provides:

*The running of the period of limitations provided in section 6501 or 6502 . . . on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 . . . , shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.*

I.R.C. § 6503(a)(1) (emphases added). The legislative history of section 277 of the 1939 Internal Revenue Code provides in part as follows:

[T]he Board [of Tax Appeals] may dismiss [an] appeal on the ground that the petition was not filed within the 60-day period or[, for example,] because the paper filed within the period was not sufficient to constitute a petition. The decision dismissing the appeal may not be made until months after the proceeding was begun and there is some question whether in such cases the running of the statute of limitations on assessment is actually suspended during the pendency of the proceeding. It is specifically provided in section 277 that the running of the statute shall be suspended, if any proceeding is placed on the docket of the Board, until the decision of the Board in respect thereof becomes final and for 60 days thereafter.

S. Rep. No. 70-960 (1928), *reprinted in* 1939-1 C.B. (Pt. 2) 409, 431. This seems to indicate Congress's intent that the statute of limitations be tolled during the pendency of the Tax Court proceeding, even if the proceeding was later dismissed for lack of jurisdiction, at least because of inadequacies in the petition. The language of section 277 of the 1939 Internal Revenue Code is essentially identical to the language of section 6503(a). *See* *Strong v. Commissioner*, 62 T.C.M. (CCH) 1081, 1082 (1991) (finding no substantive difference between § 277 and § 6503(a)(1)), *aff'd in part and reversed in part*, 79 F.3d 1154 (9th Cir. 1996) (unpublished disposition).

<sup>151</sup> *See* *Strong v. Commissioner*, 96-1 U.S.T.C. ¶ 50,223 (IRS conceded that § 6503 tolling provision requires valid statutory notice; Court of Appeals agreed), *aff'g in part and rev'g in part* 62 T.C.M. (CCH) 1081 (1991); *Midland Mortgage Co. v. United States*, 576 F. Supp. 101, 107 (W.D. Okla. 1983) (invalid notice does not toll statute of limitations; any proceeding based on such notice also fails to toll statute of limitations); *Atlas Oil & Ref. Corp. v. Commissioner*, 22 T.C. 552, 558 (1954) (proceeding on fiscal year taxes, over which Tax Court lacked jurisdiction, did not toll statute of limitations under § 277 of 1939 Code); *see also* *Andrews*, *supra* note 14 at 663 n.50 (citing *Midland Mortgage Co. v. United States*, 576 F. Supp. 101 (W.D. Okla. 1983)) (same). *But cf.* *Kahn v. United States*, 590 F.2d 48, 52 (2d Cir. 1978) (indicating that one of Congress's purposes was that statute be tolled if there was technical defect in petition; statute was tolled until after Tax Court decision became final following decision on appeal, although taxpayer did not file bond securing the deficiency); *United States v. Shahadi*, 340 F.2d 56, 58 (3d Cir. 1965) (finding that Congress intended that statute of limitations be suspended in any situation "where action is taken by the taxpayer to have deficiencies redetermined by proceedings in the Tax Court"); *American Equitable Assur. Co. v. Helvering*, 68 F.2d 46 (2d Cir. 1933) (petition to Board of Tax Appeals tolled statute of limitations although Board dismissed petition for lack of jurisdiction); *United States v. Galvin*, 199 F. Supp. 4, 5 (E.D. N.Y. 1961) (petition to Tax Court tolled statute of limitations although petition dismissed for not being timely filed); *Eversole v. Commissioner*, 46 T.C. 56, 63-64 (1966) (filing petition with Tax Court tolled statute although petition was dismissed for lack of jurisdiction, applying § 277 of 1939 Code); *Parker v. Commissioner*, 30 B.T.A. 342, 349 (1934) (filing petition with Board of Tax Appeals tolled statute during pendency of proceeding, even if case eventually dismissed for lack of jurisdiction, applying § 402 of Revenue Act of 1928), *aff'd sub nom.* *Helvering v. Parker*, 84 F.2d 838 (8th Cir. 1936).

Based on the language and legislative history of section 6503(a), the majority rule that the petition does not toll the statute for the duration of the Tax Court proceeding is probably not correct. Congress seemed concerned about the prejudice to the IRS arising from taxpayer motions to dismiss for lack of jurisdiction in Tax Court. The better rule would seem to be that the statute is tolled once the petition is filed, and that the tolling relates back to the day the notice was mailed, even if the Tax Court later declares the

the statute is not tolled by a petition in response to an invalid notice,<sup>132</sup> the limitations period may have run while the Tax Court considered the motion to dismiss. Thus, although in theory the IRS can mail a valid notice to the taxpayer once it discovers that the original notice was not valid, in practice the statute of limitations probably will have expired.

Although at first blush it may seem counterintuitive for a taxpayer to invoke a court's jurisdiction and then move to dismiss for lack of jurisdiction, the taxpayer has every incentive to do so.<sup>133</sup> The incentives are the opposite of those in general

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notice invalid. This provides the IRS with an opportunity to send the taxpayer a valid statutory notice.

The statute would be tolled until the Tax Court decision is final, I.R.C. § 6503, which normally is when the time for all appeals has run, I.R.C. § 7481(a). An interesting question is whether a taxpayer can attack subject-matter jurisdiction collaterally, such as through an injunction against assessment, and if so, whether the collateral attack has any effect on the statute of limitations. Since the statute would probably begin to run again as soon as the time for all appeals had run, it could expire before the collateral decision on the validity of the notice. This might create a new mechanism for taxpayers to defeat the IRS by alleging invalidity of the notice. However, this mechanism is harder than a direct attack in Tax Court since courts seem relatively unwilling to grant injunctions. *See supra* note 32.

<sup>132</sup> Theoretically, the IRS can protect its interest by mailing a second, corrected, notice, if it learns of a potential defect in the notice within the statutory period. *Cf. Ward v. Commissioner*, 907 F.2d 517, 522 n.7 (5th Cir. 1990) (Form 872-A, extending statute of limitations indefinitely, is terminated by the mailing of a valid statutory notice; IRS can ensure sufficient notice by sending second one, and would not risk expiration of statute's extension). However, in a case where the notice is not returned undelivered to the IRS, but is received, taxpayers can petition the Tax Court and strategically wait until the statute has run before filing a motion to dismiss. If the IRS sends a timely second notice, the taxpayer can contest it on the ground that the notice is a second notice prohibited by section 6212(c)(1), but if the taxpayer wins the motion to dismiss, the taxpayer must lose the latter argument by estoppel. Even serving the taxpayer with a request to admit the validity of the notice will have little effect since subject-matter jurisdiction cannot be waived. *See supra* note 111 and accompanying text (discussing taxpayers' array of jurisdictional challenges).

Interestingly, some cases have held that if the IRS acts in a way that indicates that the IRS believes the statutory notice is null and void, it will be bound by that action. *See, e.g., Eppler v. Commissioner*, 188 F.2d 95, 98 (7th Cir. 1951) (holding that, where Commissioner's first notice was returned for failure to deliver and Commissioner re-sent notice to taxpayer's business address, second sending effectively withdrew or abandoned first notice, restarting 90-day period); *Reddock v. Commissioner*, 72 T.C. 21, 27-28 (1979) (finding that, where notice of deficiency was not timely, Commissioner lacked power to make assessment or issue notice of deficiency); *see also St. Joseph Lease Capital Corp. v. Commissioner*, 71 T.C.M. (CCH) 3140 (1996) (citing *Eppler* but deciding that second notice did not indicate first notice was abandoned).

<sup>133</sup> This may be analogized to a plaintiff, who chose the forum, moving to transfer venue under 28 U.S.C. section 1404(a). *See, e.g., Ferens v. John Deere Co.*, 494 U.S. 516, 528 (1990) (applying law of transferor court with respect to plaintiff-initiated transfers does

civil litigation. In general civil litigation, the plaintiff invokes the court's jurisdiction to obtain damages from the defendant. The civil plaintiff has an incentive to pick the proper jurisdiction for suit and maintain the case there. Conversely, in tax litigation, the IRS initiates the tax controversy process. The taxpayer is forced to respond by suing or she will forfeit the amount claimed by the IRS in the statutory notice.<sup>134</sup> The taxpayer, who is the formal plaintiff in the litigation, is functionally defending against a deficiency asserted by the IRS.<sup>135</sup> Dismissal of a Tax Court case based on an invalid statutory notice generally means that the taxpayer will never have to pay the deficiency. This creates the incentive for the nominal plaintiff, the taxpayer, to seek dismissal of a Tax Court case after invoking the court's jurisdiction.

Thus, judicial invalidation of a statutory notice generally precludes the IRS from assessing and collecting the deficiency, even if the IRS is correct on the merits.<sup>136</sup> However, if a Tax Court

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not contravene policy against forum shopping).

<sup>134</sup> Cf. *Boddie v. Connecticut*, 401 U.S. 371, 376-77 (1971) ("Resort to the judicial process by [welfare recipients seeking divorces] is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court."); *Powell v. Commissioner*, 791 F.2d 385, 391 (5th Cir. 1986) (holding that if IRS takes arbitrary position forcing taxpayer to file suit, then taxpayer should be permitted to recover cost of suing).

<sup>135</sup> See *Estate of Mueller v. Commissioner*, 101 T.C. 551, 556 (1993) (explaining reversal of usual procedures and shifting of burdens in Tax Court). *But cf.* *Sanders v. Commissioner*, 813 F.2d 859, 862 (7th Cir. 1987) (Reynolds, J. concurring) (disagreeing with majority's rationale that taxpayer "prevailed" by achieving motion to dismiss for lack of jurisdiction because taxpayer was party who brought case to "wrong" court — notwithstanding that result was exactly what taxpayer sought).

<sup>136</sup> An invalid notice may have another effect as well. A taxpayer can claim an overpayment in her Tax Court petition. See, e.g., *Taisei Fire & Marine Ins. Co. v. Commissioner*, 104 T.C. 535, 546 (1995) (noting that petitioners filed amended petition asking for determination of overpayment); *Barton v. Commissioner*, 97 T.C. 548, 548 (1991) (noting that taxpayer claimed overpayment in petition). However, the Tax Court will not allow a credit or refund unless it determines as part of its decision that the tax to be refunded was paid either: (1) after the mailing of the statutory notice; (2) within the applicable period under certain subsections of section 6511 and before the statutory notice was mailed, if certain other requirements are met; or (3) within the period that would be applicable under section 6511. I.R.C. § 6512(b)(3) (1996). Thus, if the taxpayer has not paid the tax, timeliness of her overpayment claim is determined by deeming the date the statutory notice was mailed to be the date a refund claim was filed, for purposes of the two-year and three-year limitation periods of section 6511. I.R.C. § 6512(b)(3)(B). For a discussion of these provisions, see Leandra Lederman Gassenheimer, *Applying the Refund Statutes to Delinquent Returns*, 68 TAX NOTES 1639 (1995) (discussing applications of §§ 6511,

case is dismissed for lack of jurisdiction because the taxpayer's petition was untimely, the taxpayer does not suffer a proportionate penalty.<sup>137</sup> In the latter situation, the IRS can assess, but the taxpayer retains the remedy (after paying the deficiency) of pursuing a refund, first administratively and then in the refund courts.<sup>138</sup>

A taxpayer may use this approach even if her own Tax Court petition is untimely. Normally, an untimely petition requires dismissal for lack of jurisdiction on that basis,<sup>139</sup> precluding the taxpayer from pre-assessment, pre-payment litigation of the deficiency.<sup>140</sup> However, the case law establishes that if the petition

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6512).

The fact that the Tax Court can hold a notice invalid and dismiss the case for lack of jurisdiction raises the interesting question of whether the notice would no longer be valid as a "deemed claim" under section 6512 for purposes of the statute of limitations on refund claims. Presumably it would be invalid for this purpose as well. The taxpayer could then pursue the remedy of filing an actual claim with the IRS, unless the statute of limitations on refund claims has lapsed in the interim. If at the time this issue arises, the taxpayer can no longer file a timely refund claim under section 6511 (because, for example, the issue relates to amounts paid with a timely original return filed more than three years earlier, *see* § 6511(b)), the taxpayer may be in the position of arguing that the notice was *valid*. Of course, even if the IRS and the taxpayer both argue that the notice was valid, the court could hold it invalid, and, because the notice is "jurisdictional," would have to dismiss the case.

<sup>137</sup> *See infra* note 139 and accompanying text (citing cases that discuss various consequences of dismissal for lack of jurisdiction based on untimely filing of petition).

<sup>138</sup> *See supra* note 44 (outlining procedure for taxpayers who fail to petition Tax Court after receiving statutory notice).

<sup>139</sup> *See, e.g., O'Brien v. Commissioner*, 62 T.C. 543, 548 (1974) (petition not timely filed must be dismissed for lack of jurisdiction); *McCormick v. Commissioner*, 55 T.C. 138, 141-42 (1970) (dismissing case for lack of jurisdiction because petition was not timely filed). The prohibited period ends when the dismissal order is entered and the statute of limitations was tolled until then; this allows the IRS to assess the deficiency following the dismissal. The taxpayer's only remedy is to pursue a refund of the tax, once she pays it. *See Pietanza v. Commissioner*, 92 T.C. 729, 735-36 (1989) (requiring taxpayers to pay full assessment and file claim for refund before disputing assessment through suit for refund), *aff'd*, 935 F.2d 1282 (3d Cir. 1991) (unpublished table opinion); *cf. O'Brien*, 62 T.C. at 548 ("dismissal for lack of timely filing does not affect the validity of the underlying notice and assessment, if any"). Although Tax Court Rule 36(a) provides the IRS with 45 days from the date of service of the taxpayer's petition in which to file motions with respect to it, this does not restrict the IRS's right to move to dismiss for lack of jurisdiction at any time. *See Andrews, supra* note 14, at 663 n.48 (citing *Brown v. Commissioner*, 78 T.C. 215, 217-18 (1992) for proposition that either party may move for dismissal for lack of jurisdiction at any time); *see also supra* notes 111-25 and accompanying text (discussing taxpayer's ability to make motion to dismiss for lack of jurisdiction at any time).

<sup>140</sup> *See supra* note 44 (explaining post-payment refund procedures).

was not timely, and the statutory notice was invalid, the court must dismiss for lack of jurisdiction on the ground of the invalid notice<sup>141</sup> and not because of the untimely petition.<sup>142</sup> This approach favors the taxpayer by collaterally estopping the IRS from asserting that the notice was valid.<sup>143</sup> Furthermore, it maintains the Tax Court as a forum to contest the validity of the notice even in cases when the taxpayer did not receive the notice in time to file a timely petition.

### B. *Insufficient Service of Process*

As one case states, "Service of process' is a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action. Service of process must comply with both constitutional and [any additional] statutory requirements."<sup>144</sup> Accordingly, if a defendant is improperly served, a

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<sup>141</sup> On cross-motions to dismiss for lack of jurisdiction, based on both an allegedly invalid statutory notice and an allegedly untimely petition, the Tax Court should first decide whether the notice is valid. *Shelton v. Commissioner*, 63 T.C. 193, 195 (1974) (stating that there are sufficient number of supporting cases to conclude that court may determine validity of notice of deficiency and dismiss on that ground even though petition was not timely filed); *see also Heaberlin v. Commissioner*, 34 T.C. 58, 59 (1960) (finding lack of jurisdiction based on invalid statutory notice, even though petitioner did not file timely petition); *Carbone v. Commissioner*, 8 T.C. 207, 210 (1947) (deciding issue of invalid statutory notice before passing on other issues). *But cf. Pietanza*, 92 T.C. at 743 (Ruwe, J., dissenting) (declaring that basis of dismissal for lack of jurisdiction should be for petitioner's failure to allege or invoke jurisdiction when both petitioner and respondent seek same result).

Generally, the Tax Court places the burden of proof on the moving party. *Id.* at 736; *Casqueira v. Commissioner*, 42 T.C.M. (CCH) 656, 658 (1981). Where motions to dismiss were made by both parties, the Tax Court in one case required the IRS to prove the existence of a statutory notice and the date it was mailed. *Pietanza*, 92 T.C. at 736-37.

A taxpayer's amendment to her petition after the period for filing the petition has expired will not confer jurisdiction on the Tax Court if the original petition did not. TAX CT. R. 41(a).

<sup>142</sup> *Pietanza*, 92 T.C. at 735-36; *King v. Commissioner*, 88 T.C. 1042 (1987); *Keeton v. Commissioner*, 74 T.C. 377, 379 (1980); *O'Brien*, 62 T.C. at 548; *Heabertin*, 34 T.C. at 59; *Violette v. Commissioner*, 67 T.C.M. (CCH) 2715 (1994); *see also Zenco Eng'g v. Commissioner*, 75 T.C. 318, 320 (1980) (valid notice is prerequisite for dismissal on grounds of untimely petition), *aff'd*, 673 F.2d 1332 (7th Cir. 1981). *But cf. Reddock v. Commissioner*, 72 T.C. 21, 28 (1979) (granting petitioner's motion for reconsideration based on IRS's invalid original notice).

<sup>143</sup> *See supra* notes 111-16 and accompanying text (discussing petitioning Tax Court and subsequently moving to dismiss for lack of jurisdiction).

<sup>144</sup> *R. Griggs Group, Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1103 (D. Nev. 1996) (citations omitted).



federal court lacks personal jurisdiction over that defendant.<sup>145</sup> However, unlike subject-matter jurisdiction, which is the competency of a court to hear and decide a matter, service is an individual right which, therefore, can be waived.<sup>146</sup>

Procedural due process<sup>147</sup> requires two things before deprivation of a legally protected interest: notice and an opportunity to be heard.<sup>148</sup> The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in part, "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law."<sup>149</sup> The United States Supreme Court has held that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the

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<sup>145</sup> Printed Media Servs., Inc. v. Solna Web, Inc., 11 F.3d 838, 843 (8th Cir. 1993).

<sup>146</sup> Cf. Insurance Corp. Of Ireland, Ltd. v. Compagnie de Bauxites des Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); FED. R. CIV. P. 4(d) (discussing waiver of service of process); FED. R. CIV. P. 12(h)(1) (discussing waiver of defenses).

<sup>147</sup> One case, in distinguishing procedural and substantive due process, stated the following:

The present case . . . involves substantive, not procedural, due process. In other words, [appellant] does not contend that the government and its officials could not deny his promotion without first according him fair notice and hearing. Rather, [appellant] argues that he could not constitutionally be denied promotion at all. He asserts a categorical substantive due process right to promotion. . . . Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. The substantive Due Process Clause is not concerned with the garden variety issues of common law contract. Its concerns are far narrower, but at the same time, far more important. Substantive due process "affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

Charles v. Baesler, 910 F.2d 1349, 1352-53 (6th Cir. 1990) (quoting Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Cardozo, J.))).

<sup>148</sup> Cf. Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). To provide due process, a notice must "be of such nature as reasonably to convey the required information." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). See also Grannis, 234 U.S. at 397-98 (finding summons sufficient although recipient's name was misspelled).

<sup>149</sup> U.S. CONST. amend. V.

pendency of the action and afford them an opportunity to present their objections.”<sup>150</sup>

Taxpayers have generally focused on compliance with section 6212 of the Code rather than the constitutional sufficiency of notice. Section 6212 provides that “notice of a deficiency . . . if mailed to the taxpayer at his last known address, shall be sufficient . . . .”<sup>151</sup> Many taxpayers have argued that a statutory notice not mailed to the taxpayer’s “last known address”<sup>152</sup> was invalid. Courts have generally held that despite failure to send to the taxpayer’s last known address, or to send a notice by certified or registered mail, as provided by section 6212(a),<sup>153</sup> the statutory notice is valid if the IRS can prove that the taxpayer received the notice in time to file a timely petition<sup>154</sup> or

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<sup>150</sup> *Mullane*, 339 U.S. at 314 (applying Due Process Clause of Fourteenth Amendment). The Fourteenth Amendment provides, in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

<sup>151</sup> I.R.C. § 6212(b)(1) (1996).

<sup>152</sup> *Cf. Shaffer v. Heitner*, 433 U.S. 186, 192 (1977) (defendants were given notice of suit via “certified mail directed to their last known addresses”).

<sup>153</sup> I.R.C. § 6212(a).

<sup>154</sup> *See, e.g., McKay v. Commissioner*, 886 F.2d 1237, 1239 (9th Cir. 1989) (approving notice by personal delivery); *Clodfelter v. Commissioner*, 527 F.2d 754, 757 (9th Cir. 1975) (emphasizing actual notice); *Commissioner v. Stewart*, 186 F.2d 239, 241 (6th Cir. 1951) (rejecting strict interpretation of statute); *Miller v. Commissioner*, 94 T.C. 316, 330 (1990) (validating actual notice under safe harbor provision); *Mulvania v. Commissioner*, 81 T.C. 65, 69 (1983) (holding notice valid where 74 days remained to file petition), *aff’d*, 769 F.2d 1376 (9th Cir. 1985); *Frieling v. Commissioner*, 81 T.C. 42, 53 (1983) (observing that purpose of actual notice was met); *Goodman v. Commissioner*, 71 T.C. 974, 977-78 (1979) (validating improperly addressed notice upon actual receipt); *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. 367, 377 (1974) (validating notice mailed to last known address; in addition, receipt of notice 13 days after mailing provided sufficient time to file petition), *aff’d*, 538 F.2d 334 (9th Cir. 1976) (unpublished table decision); *Zaun v. Commissioner*, 62 T.C. 278, 280 (1974) (validating timely received oral notice); *Budlong v. Commissioner* 58 T.C. 850, 852 (1972) (finding notice valid where mailed to last known address; in addition, taxpayers received notice when 53 days remained to file petition); *Robinson v. Commissioner*, 57 T.C. 735, 737 (1972) (validating notice not mailed to last known address but received in sufficient time to file petition); *Brzezinski v. Commissioner*, 23 T.C. 192, 195 (1954) (noting timely petition is indicative of adequate notice). *But cf. Loooper v. Commissioner*, 73 T.C. 690, 698-99 (1980) (holding notice not valid where taxpayer was not expecting it, it was erroneously addressed, and taxpayer received it when only 17 days remained to file petition).

Recent cases have held that attempted delivery by the United States Postal Service to the taxpayer constituted actual, and therefore sufficient, notice, even if the taxpayer refused to accept the notice of deficiency, and even if the notice was not mailed to the taxpayer’s last known address. *See, e.g., Erhard v. Commissioner*, 87 F.3d 273, 274-75 (9th Cir. 1996) (finding actual, physical receipt sufficient, even without opening envelope or

learned of the notice and acknowledged it by filing a timely petition.<sup>155</sup>

Conversely, courts have interpreted the language "shall be valid" in section 6212 to mean that the last known address rule is a safe harbor;<sup>156</sup> it protects the IRS from the burden of having to prove actual notice in every case.<sup>157</sup> Thus, a notice is valid if sent to the taxpayer's last known address,<sup>158</sup> even if the

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reading contents); *Patmon & Young Prof'l Corp. v. Commissioner*, 55 F.3d 216, 218 (6th Cir. 1995) ("notice of the notice" is sufficient). At least one case has held that actual physical receipt of the notice of deficiency itself was required under section 6212, not just notice of its contents. *See Mulvania v. Commissioner*, 769 F.2d 1376 (9th Cir. 1985) (holding notice invalid because not timely mailed to taxpayer's last known address although taxpayer's representative had received it and discussed it with taxpayer), *aff g* 47 T.C.M. (CCH) 1187 (1984); *cf. Andrews, supra* note 14, at 662 n.45 (actual notice appears to require not just knowledge but actual receipt of the original or a copy of the statutory notice because issuance of a notice is essential for Tax Court jurisdiction).

<sup>155</sup> *See, e.g., Scheidt v. Commissioner*, 967 F.2d 1448, 1450 (10th Cir. 1992); *Borgman v. Commissioner*, 888 F.2d 916 (1st Cir. 1989) (holding notice valid where IRS mailed it to taxpayer's former address, it was forwarded, and taxpayer received it five days later), *aff g* 48 T.C.M. (CCH) 1170 (1984); *King v. Commissioner*, 857 F.2d 676, 679 n.4 (9th Cir. 1988) (validating notices actually timely received); *Mulvania*, 769 F.2d at 1378 (implying that if taxpayer had timely petitioned, lack of receipt of misaddressed notice might have been harmless error); *Pugsley v. Commissioner*, 749 F.2d 691, 693 (11th Cir. 1985) (refusing to extend 90-day period because notice was forwarded).

<sup>156</sup> *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982) (acknowledging sufficiency of mailing to last known address); *DeWelles v. United States*, 378 F.2d 37, 39 (9th Cir. 1967) (showing of non-receipt insufficient if statute complied with); *Zenco Eng'g Corp. v. Commissioner*, 75 T.C. 318, 321-22 (1980) (noting that word "receipt" does not appear in statute), *aff d*, 673 F.2d 1332 (7th Cir. 1981). *But see Delman v. Commissioner*, 384 F.2d 929, 933 (3d Cir. 1967) (considering other courts' analogy to service of process).

<sup>157</sup> *See, e.g., Balkissoon v. Commissioner*, 995 F.2d 525, 528 (4th Cir. 1993) (validating notice not sent by certified or registered mail); *Jones v. United States*, 889 F.2d 1448, 1450 (5th Cir. 1989) (approving notice mailed, but not received); *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985) (indicating that burden is on taxpayer to update address); *Berger v. Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968) (validating notice not sent by certified or registered mail); *O'Connor v. Commissioner*, 67 T.C.M. (CCH) 1966, 1967 (1994) (indicating that failure to receive is immaterial).

Congress rejected a bill that would have required actual notice because of the burden it would have imposed on the Commissioner. *See Revenue Act of 1924*, ch. 234, sec. 274(a) 43 Stat. 253, 297, 65 Cong. Rec. 2969-70 (1924) (proposed amendment by Rep. Allen).

<sup>158</sup> I.R.C. § 6212(b)(1) (1996). The IRS is generally entitled to treat the address on a taxpayer's return as her last known address, absent "clear and concise notification" from the taxpayer of a new address. *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. 367, 374 (1974), *aff d*, 538 F.2d 334 (9th Cir. 1976); *see also Wallin v. Commissioner*, 744 F.2d 674, 676 (9th Cir. 1984) (requiring "clear and concise" notification of new address). A subsequently filed return with a new address generally provides such notification. *Id.*; *see also Cyclone Drilling, Inc. v. Kelley*, 769 F.2d 662, 664 (10th Cir. 1985) (defining "last known address" as address to which IRS reasonably believes taxpayer wishes notice to be

taxpayer never actually received it.<sup>159</sup> One commentator has argued that the “last known address” rule “falls far below the constitutional due process required in normal civil suits, where reasonable efforts must be made to give the defendant actual notice.”<sup>160</sup> In fact, however, constitutional doctrine establishes

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sent); *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984) (requiring “clear and concise” change of address); *Abeles v. Commissioner*, 91 T.C. 1019, 1038 (1988) (finding no such clear notice); Rev. Proc. 90-18, 1990-1 C.B. 491 § 2.02 (stating that the IRS will mail notice to the address on the most recently filed and properly processed return unless the taxpayer provides the IRS with clear and concise written notification of another address).

The address of the taxpayer’s representative is the taxpayer’s last known address if the taxpayer directs on a power of attorney form that *originals* be sent to her representative. By contrast, the failure to send a copy of the notice to a taxpayer’s representative pursuant to a power of attorney on file requesting that *copies* of all correspondence be sent to the representative will not invalidate an otherwise proper notice. *McDonald v. Commissioner*, 76 T.C. 750, 752 (1981); *Houghton v. Commissioner*, 48 T.C. 656, 661 (1967); *Allen v. Commissioner*, 29 T.C. 113, 117-18 (1957); *see also* *Mickens v. United States*, 425 F. Supp. 732, 733 (E.D. Mo. 1977) (finding that mailing original to taxpayer and omitting copy to attorney constituted valid notice).

Some of the cases arise in the context of divorced spouses. In the case of a joint income tax return filed by husband and wife, a single, joint, statutory notice is adequate unless the IRS has been notified by either spouse that separate residences have been established. Then, in lieu of the single joint notice, a duplicate original of the joint notice must be sent by certified mail or registered mail to each spouse at his or her last known address. *McComb v. Commissioner*, 61 T.C.M. (CCH) 2702, 2704 (1991), *aff’d*, 978 F.2d 710 (5th Cir. 1992).

Inconsequential errors in the address generally do not affect its validity. *Clodfelter v. Commissioner*, 57 T.C. 102, 107 (1971), *aff’d*, 527 F.2d 754, 756 (9th Cir. 1975).

<sup>159</sup> *See* I.R.C. § 6212(b)(1) (not requiring actual notice); *Patmon & Young Prof'l Corp. v. Commissioner*, 55 F.3d 216, 217 (6th Cir. 1995) (holding actual receipt of notice without prejudice is sufficient); *Cool Fuel*, 685 F.2d at 312 (noting goal of statute to provide actual notice, but finding proper mailing alone sufficient); *Rappaport v. United States*, 583 F.2d 298, 301 (7th Cir. 1978) (finding proper mailing alone is sufficient notice). This generous statutory interpretation echoes the constitutional doctrine that a notice meets due process requirements if it is reasonably calculated to reach the particular defendant, whether or not in fact it does.

In *Bocuto v. Commissioner*, 277 F.2d 549, 552 (3d Cir. 1960), the IRS mailed a statutory notice to the taxpayer’s last known address on November 13, 1958 but it was returned undelivered. It was handed to the taxpayer at an IRS office on January 21, 1959, and the taxpayer signed a receipt showing that the personal delivery related to the notice mailed on November 13, 1958. The court held that, assuming it was properly addressed, notice had been given on November 13, 1958 and the 90-day period ran from that date. *Compare id. with Tenzer v. Commissioner*, 285 F.2d 956, 956-58 (9th Cir. 1960) (IRS sent notice by mail and then personally served a copy 28 days later; personal service indicated an abandonment of the mailing, so new 90-day period began to run).

<sup>160</sup> *Johnson, supra* note 5, at 287 n. 15 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

that lack of actual notice is not a due process violation so long as service is made under a statute that provides for a constitutional notification procedure and the method used was reasonably calculated under the circumstances to reach the particular defendant.<sup>161</sup>

Mailing a statutory notice to a taxpayer's last known address is constitutionally sufficient notice, as long as it is reasonably designed to reach that taxpayer.<sup>162</sup> The problem with section

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<sup>161</sup> CASAD, *supra* note 76, § 2.03[1][c], at 2-38 ("Actual notice is neither necessary nor sufficient. Due process requires compliance with an officially prescribed method of invoking the court's jurisdiction over the defendant which, when followed according to its own terms, is reasonably calculated to provide actual notice."). Mailing to the taxpayer's last known address should meet this standard in most cases. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (approving notice "by mail or other means as certain to ensure actual notice" but not requiring actual notice); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950) (calling the mail "an efficient and inexpensive means of communication" and not requiring actual notice); RESTATEMENT (SECOND) OF JUDGMENTS § 2 cmt. d (1982) (referring to "notice by mail or other means likely to afford [the defendant] actual notice."). However, mail is not a method reasonably calculated to reach a transient taxpayer with no fixed abode, for example.

Due process requires that notice be "reasonably calculated" to reach the particular interested party. *Mullane*, 339 U.S. at 319. In *Mullane*, the court held that a trustee's service by publication on numerous beneficiaries of the trust was insufficient but that mailing to the interested parties would be sufficient because "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all." *Id.*

In *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972), the Supreme Court held invalid, on due process grounds, notice of pending forfeiture proceedings mailed to an automobile owner's home address, listed in the records of the Secretary of State, in accordance with the Illinois vehicle forfeiture statute. The statute authorized service of notice by certified mail to the address listed in the records of the Secretary of State, but in *Robinson* the State knew that the owner of the automobile was not at the address to which the notice was mailed because he was confined in the Cook County jail.

Similarly, a few recent decisions interpreting section 6212 have held that if the taxpayer notifies the IRS that she will be temporarily away from her last known address, and that a notice sent there will not reach her, the IRS has an equitable due diligence obligation to ascertain where the taxpayer is reachable. *Gaw v. Commissioner*, 45 F.3d 461 (D.C. Cir. 1995); *Ward v. Commissioner*, 907 F.2d 517, 521-24 (5th Cir. 1990); *Mulder v. Commissioner*, 855 F.2d 208, 211 (5th Cir. 1988).

<sup>162</sup> Due process does not require actual notice. *Mullane*, 339 U.S. at 319; see also *New York v. Chemical Bank*, 470 N.Y.S.2d 280, 283 (Sup. Ct. 1983) (ruling that receipt of actual notice need not be proven; due process standards require only that process be served by legally approved method reasonably calculated to make defendant aware of proceedings even if summons is never actually received); *infra* note 164 and accompanying text (discussing application of due process doctrine to statutory notice).

What could be a constitutional problem in the tax area is the notion that *actual* notice to the taxpayer suffices to satisfy due process regardless of the method used. Procedural

6212; however, is that it merely authorizes notice sent by certified or registered mail to the taxpayer's last known address.<sup>163</sup> Due process may require that the statutory notice be served under a statute that provides for a constitutionally sufficient method in *all* cases, and that the particular method used was reasonably calculated to reach the *particular* taxpayer in the taxpayer's service circumstances.<sup>164</sup> However, several cases have held that allowing the taxpayer to pay the assessment, claim a refund and then sue for one if it is not granted provides due process<sup>165</sup> so that section 6212 is not constitutionally

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due process requires use of a reasonable notification method; actual notice will not cure use of an unreasonable method. See CASAD, *supra* note 76, § 2.03[1][c] at 2-38. Federal courts have generally construed Federal Rule of Civil Procedure 4(d)(1) liberally to validate service at a defendant's abode where the defendant has received actual notice of the lawsuit. *Id.*, § 2.03[1][d] at 2-40 n.94. In the tax area, the follow-up refund procedure cures any constitutional problem. See *supra* note 44; *infra* notes 164-66 and accompanying text (discussing statutory notice and due process).

<sup>163</sup> See *supra* notes 147-50 and accompanying text (discussing notice element of due process).

<sup>164</sup> See CASAD, *supra* note 76, § 2.03[1][c] at 2-38 (stating that due process requires compliance with officially prescribed method of invoking jurisdiction which, when followed, is reasonably calculated to provide actual notice); *Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928) (finding general trend towards sustaining validity of process if it is reasonably probable that actual notice will be received).

<sup>165</sup> The United States Supreme Court has found that the availability of a post-deprivation remedy can satisfy due process in cases where there was a necessity for quick action or it was impractical to provide a meaningful pre-deprivation hearing. See *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (holding state tort law remedy for post-deprivation negligent seizure of property suffices under Fourteenth Amendment due process clause) *overruled on other grounds sub nom. Daniels v. Williams*, 474 U.S. 327 (1986); see also, e.g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600 (1950) (seizure and destruction of drugs without a pre-seizure hearing permissible under Fifth Amendment due process clause); *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315 (1908) (ruling seizure and destruction of unwholesome food without a pre-seizure hearing permissible under Fourteenth Amendment due process clause). Jeopardy assessments, authorized by section 6861(a), are constitutional under this line of cases. See *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931) (assessments do not infringe constitutional prohibitions against delegation of taxing power); *Continental Prods. Co. v. Commissioner*, 20 B.T.A. 818, 829 (1930) (noting that assessments have been before courts several times with no decision invalidating them). Section 7429 of the Code, enacted in 1976, nonetheless provides for expedited administrative and judicial review of jeopardy assessments. I.R.C. § 7429.

Tax deficiency cases do not seem to fit the *Parratt* paradigm because there is no apparent necessity for quick action or impracticality of a meaningful pre-deprivation hearing. However, the IRS's need to collect revenue may justify an exception to general due process protections. *Cf. Phillips v. Commissioner*, 283 U.S. 589, 595 (1931) (holding that summary proceedings for governmental need satisfy due process with post-seizure

defective.<sup>166</sup> Thus, the availability of a pre-payment forum to litigate disputes with the IRS is apparently a matter of legislative grace.<sup>167</sup>

In accordance with case law upholding notices either sent to the taxpayer's last known address *or* actually received by the taxpayer, courts have generally invalidated statutory notices in cases in which the IRS did not send the notice to the taxpayer's last known address and the taxpayer did not receive it in time to petition the Tax Court.<sup>168</sup> This results in a dismissal of the

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judicial proceeding). *But cf.* Connecticut v. Doehr, 501 U.S. 1, 4 (1991) (Connecticut statute authorizing "prejudgment attachment of real estate without prior notice and a hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking the attachment post a bond" violates due process clause of Fourteenth Amendment).

A cause of action can itself be a species of property entitled to due process protections. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); *Mullane*, 339 U.S. at 313; *see also* Martinez v. California, 444 U.S. 277, 281-82 (1980) (state tort claim is arguably a species of property protected by the due process clause). However, the loss of the opportunity to petition the Tax Court does not by itself result in loss of a cause of action against the IRS because of the availability of the refund fora. *See supra* note 44 (explaining refund procedures).

<sup>166</sup> *See, e.g.*, Flora v. United States, 357 U.S. 63, 75-76 (1958), *aff'd on reh'g*, 362 U.S. 145 (1960); *Phillips*, 283 U.S. 589 at 596; Morse v. IRS, 635 F.2d 701, 702 (8th Cir. 1980); Berger v. Commissioner, 404 F.2d 668, 674 (3d Cir. 1968); Brown v. Lethert, 360 F.2d 560, 562 (8th Cir. 1966); Cohen v. United States, 297 F.2d 760, 772 (9th Cir. 1962).

<sup>167</sup> *See Phillips v. Commissioner*, 283 U.S. 589 (1931). The fact that the Board of Tax Appeals did not exist prior to 1924, and was not created to remedy any perceived constitutional problem, is consistent with that holding.

One court called post-payment access to the refund fora a "right without a remedy" in a case where the deficiency was very large. Crum v. Commissioner, 635 F.2d 895, 900 (D.C. Cir. 1980); *see also* Kennedy v. United States, 403 F. Supp. 619, 622 (W.D. Mich. 1975), *aff'd*, 556 F.2d 581 (6th Cir. 1977) (prepayment of deficiency and penalties of approximately four million dollars would result in taxpayer's bankruptcy). However, even inability to pay does not give rise to a constitutional violation based on inadequate notice. Courts have consistently found the remedy of paying the tax and suing for a refund constitutionally sufficient even where the taxpayer alleged that she did not have the resources to pay the tax and then sought a refund. Lewin v. Commissioner, 569 F.2d 444, 445 (7th Cir. 1978). The due process clause of the Fourteenth Amendment has been interpreted to prevent states from denying potential litigants access to established adjudicatory procedures when that would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *see also Logan*, 455 U.S. at 430 & n.5 (citing *Boddie*). *But see Davidson v. Cannon*, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting) (arguing that failure of meaningful post-deprivation remedy violates due process).

<sup>168</sup> *See, e.g.*, Violette v. Commissioner, 67 T.C.M. (CCH) 2715 (1994) (holding statutory notice invalid when taxpayer received misaddressed notice after 90-day period expired and he filed late petition). Adequate time to petition the Tax Court is relevant, not for due

process reasons, *see supra* notes 160-61 and accompanying text, but in order to curb potential abuses caused by noncompliance with the statutory notice rules. In this context, where the IRS has violated the statutory provisions for attempting to notify the taxpayer, the focus should be on whether the taxpayer received actual notice of the deficiency in time to petition the Tax Court.

One line of cases provides an alternative remedy for misaddressed, delayed notices, holding that the time within which the taxpayer may file a petition begins to run when the notice is *actually received* by the taxpayer, rather than the date on which it was mailed. *E.g.*, *Gaw v. Commissioner*, 45 F.3d 461, 468 (D.C. Cir. 1995); *Powell v. Commissioner*, 958 F.2d 53, 57 (4th Cir. 1992); *McPartlin v. Commissioner*, 653 F.2d 1185, 1192 (7th Cir. 1981); *Crum*, 635 F.2d at 901; *Johnson v. Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980); *DiViaio v. Commissioner*, 539 F.2d 231, 234 (D.C. Cir. 1976); *Tenzer v. Commissioner*, 285 F.2d 956, 958 (9th Cir. 1960); *Arlington Corp. v. Commissioner*, 183 F.2d 448, 451 (5th Cir. 1950); *Kennedy v. United States*, 403 F. Supp. 619, 624 (W.D. Mich. 1975), *aff'd*, 556 F.2d 581 (6th Cir. 1977); *see also* *Boren v. Riddell*, 241 F.2d 670, 673-74 (9th Cir. 1957) (holding that 90-day period begins to run when taxpayer receives actual notice even though actual notice was not delivered by method prescribed by statute); *Budlong v. Commissioner*, 58 T.C. 850, 853-54 (1972) (noting that petition was untimely in any case, because even if statutory notice was invalid, which it was not, taxpayer filed more than 90 days after receiving actual notice); *Estate of McKaig v. Commissioner*, 51 T.C. 331, 337 (1968) (90-day period began to run when IRS provided taxpayer's attorney with a copy of the notice, which had been returned undelivered); *cf.* *Wallin v. Commissioner*, 744 F.2d 674, 677 (9th Cir. 1984) (remanding case to Tax Court with instructions to accept as timely taxpayer's petition, filed after the 90-day period, because IRS failed to exercise reasonable diligence in ascertaining taxpayer's last known address). *But cf.* *Roszkos v. Commissioner*, 850 F.2d 514, 517 (9th Cir. 1988) (actual notice to taxpayer does not transform void statutory notice into valid one); *Pyo v. Commissioner*, 83 T.C. 626, 639 (1984) (holding that any actual notice to taxpayers was rendered ineffective due to misleading cover letter accompanying late notice that informed taxpayers that 90-day period had already run).

Cases providing for a new 90-day period recognize the value to the taxpayer of a prepayment forum, but they are problematic. *Cf.* *Roszkos v. Commissioner*, 87 T.C. 1255, 1266 n.14 (1986) (reviewed by the full court) (commending Ninth Circuit for its "concern for equity and fairness in providing a forum without payment of the tax" for taxpayer, but concluding that judicially requiring as much is troublesome), *vacated and remanded*, 850 F.2d 514, 518 (9th Cir. 1988). A timely petition is a jurisdictional requirement in Tax Court. TAX CT. R. 13(c); *Johnson v. Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980); *Shipley v. Commissioner*, 572 F.2d 212, 213 (9th Cir. 1977); *Andrews v. Commissioner*, 563 F.2d 365, 366 (8th Cir. 1977); *Gradsky v. Commissioner*, 218 F.2d 703, 704 (6th Cir. 1954) (*per curiam*); *Stebbins' Estate v. Helvering*, 121 F.2d 892, 893-94 (D.C. Cir. 1941); *Blum v. Commissioner*, 86 T.C. 1128, 1131 (1986). Section 6213 provides that the filing period runs from the date the notice is *mailed*. *See, e.g.*, *Winchell v. Commissioner*, 45 T.C.M. (CCH) 1376 (1983) (noting that filing period begins to run from mailing date of notice, not date of receipt by taxpayer). While section 6213 is silent as to other methods of delivering notice (by hand as opposed to mail, for instance), some courts have indicated that any form of actual notice should trigger the 90-day filing period. *See Berger*, 404 F.2d at 673; *Dolezilek v. Commissioner*, 212 F.2d 458, 461 (D.C. Cir. 1954) (Miller, J., dissenting) (arguing that Congress's intent was to permit 90-day period to run from mailing of notice sent by mail and to run from actual receipt of notice delivered by some other method). *But see id.* at 459 (holding that 90-day period begins to run on date of mailing even though ineffective and actual notice not achieved until 45 days later). Such inconsistent results may



case for lack of "subject-matter" jurisdiction, with the harsh practical consequence that the IRS may be permanently barred from assessing the deficiency.

The remedy of invalidating the notice and dismissing the case for lack of subject-matter jurisdiction improperly melds the notifying function of the statutory notice with its jurisdictional function in Tax Court. Section 6212(a) provides that the notice shall be "sufficient" if mailed to the taxpayer's last known address. This appears to refer solely to the notifying function of the notice, that is, the sufficiency of "service," not the subject-matter jurisdictional "validity" of the notice. Thus, the Tax Court should not dismiss a case for lack of subject-matter jurisdiction when it was only service of the notice upon the taxpayer that was insufficient.<sup>169</sup>

### C. *Inadequate Pleading and Allocation of Burden of Proof*

Section 6212, the section that authorizes statutory notices, does not specify the form or contents of the notice. The IRS has a series of forms it generally uses for statutory notices,<sup>170</sup> but the IRS need not use any particular form for the notice.<sup>171</sup> Section 7522 provides in part that the IRS must "describe the basis for" deficiencies stated in a statutory notice.<sup>172</sup> However,

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justify an amending section 6213. See *Roszkos*, 87 T.C. at 1266 & n.14 (using date of actual notice as trigger for 90-day period when statutory notice was not mailed to taxpayer's last known address is at odds with language of § 6212).

<sup>169</sup> In district court, the difference between the two dismissals is that the plaintiff can serve process again, so the federal forum is still open, whereas if the court lacks subject-matter jurisdiction, that closes that forum. In Tax Court, however, the IRS can theoretically re-mail the statutory notice, and the taxpayer can repetition the Tax Court. The reason why the subject-matter jurisdiction dismissal preserves the Tax Court on remailing but not the district court is because the Tax Court's jurisdiction is based on a valid notice, whereas district court jurisdiction is not based on proper service of process. This is another illustration of the statutory notice playing more than one role in tax litigation.

<sup>170</sup> See I.R.M. ¶ 4463.1(3) (Sept. 14, 1984), 4463.2 (Aug. 1, 1981). Where no jeopardy assessment is involved, the forms include Letter 531 for income tax deficiencies; Form 5601 (Notice of Deficiency), used by Service Centers; Form 8369 (Notice of Deficiency/Notice of Deficiency — Waiver), used by District Offices; and Letter 902 (DO) for income, estate and gift cases and certain special cases. KAFKA & CAVANAGH *supra* note 101 § 3.07, at 3-23. These forms generally inform the taxpayer of the taxpayer's right to petition the Tax Court within 90 days of the date the notice was mailed.

<sup>171</sup> *Scar v. Commissioner*, 814 F.2d 1363, 1367 (9th Cir. 1987); *Abrams v. Commissioner*, 787 F.2d 939, 941 (4th Cir. 1986); *Jarvis v. Commissioner*, 78 T.C. 646, 655-56 (1982).

<sup>172</sup> Section 7522 was added to the Code in 1988 as part of the Taxpayer Bill of Rights.

section 7522 does not contain an enforcement mechanism.<sup>173</sup> In fact, it specifically provides that failure to comply with the rule will not invalidate the statutory notice.<sup>174</sup>

Commentators have long complained about the inadequacy of the explanation portion of many statutory notices.<sup>175</sup> The Tax Court has also complained:

Here, we have a vague notice of deficiency, that is, a notice of deficiency in which the Commissioner makes a determination that may be based on any one of a number of grounds but in which he fails to advise the taxpayer of the grounds on which he relies. For years, such notices of deficiency have created problems in proceedings in this Court.<sup>176</sup>

Inadequate pleading in tax cases may hamper the judge's ability to decide the issues and may result in a failure of proof.<sup>177</sup> Because the taxpayer generally bears the burden of persuasion in tax cases,<sup>178</sup> the IRS's failure to plead its case adequately may be especially detrimental to the taxpayer.<sup>179</sup> As one commentator points out, "The great number of cases which are lost because of a failure of proof, results in a body of law which if properly read stands only as a monument to remind

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*See* Pub. L. 100-647, 102 Stat. 3735 (1988). It was effective for mailings made on or after January 1, 1990. *Id.*

<sup>173</sup> I.R.C. § 7522 (1996).

<sup>174</sup> *Id.* § 7522(a).

<sup>175</sup> *See, e.g.,* Paul, *supra* note 77, at 512 (describing statutory notice as informal letter written by one of Internal Revenue Commissioner's many subordinates; contrasting content to notices in other types of litigation; and concluding that practice is "astonishing and startling"); Cook & Dubroff, *supra* note 22, at 645 (explaining that dispute over informational notices has existed for 50 years, and that taxpayer's position is supported by most commentators).

<sup>176</sup> *Estate of Allensworth v. Commissioner*, 66 T.C. 33, 34 (1976).

<sup>177</sup> Paul, *supra* note 77, at 507-08.

<sup>178</sup> *See* TAX CT. R. 142(a) (stating that burden of proof is generally on taxpayer, but noting exceptions).

<sup>179</sup> *See* Cook & Dubroff, *supra* note 22, at 649 (arguing that notices' vagueness sometimes prevents drafting petition which complies with Tax Court rules; taxpayer may be forced to not only plead facts to sustain her burden of proof, but also to discover what facts must be proved).

the taxpayer that he has the burden of proof in tax controversies."<sup>180</sup> Furthermore:

[I]f the [IRS's] procedure were a criterion for pleading in other causes of action, it would suffice for the complainant to set forth some meagre facts referring back perhaps to extrinsic papers and reports and concluding with the statement that the defendant is indebted to the plaintiff in a certain amount. The defendant would, if such were the case, know as much about the nature of the claim against him as many taxpayers who receive deficiency letters.<sup>181</sup>

By contrast, in federal district court, the Federal Rules of Civil Procedure require the plaintiff to make "a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>182</sup> The defendant must be able to ascertain the plaintiff's legal theory and the transaction from which the claim arises.<sup>183</sup> Conspicuously absent from the required elements of the statutory notice of deficiency, however, are the core allegations that define the complaint in a "notice pleading" regime. Those allegations would normally inform the taxpayer of the tax-generating transaction and the IRS's legal theory. In fact, statutory notices often do not even identify the critical transaction or legal theory.<sup>184</sup>

In response to taxpayers' challenges to uninformative notices, courts have uniformly held that there is almost no required content for the statutory notice.<sup>185</sup> The Tax Court has held that the statutory notice need not contain an explanation of how the deficiency was determined or even the Code sections

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<sup>180</sup> Paul, *supra* note 77, at 508-09.

<sup>181</sup> *Id.* at 512.

<sup>182</sup> Conley v. Gibson, 355 U.S. 41, 47 (1957) (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2)).

<sup>183</sup> *Cf. id.* at 47-48 ("Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the [Federal] Rules [of Civil Procedure] to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.").

<sup>184</sup> See *supra* text accompanying notes 173, 175-176, 181; *infra* text accompanying notes 185-188, 194.

<sup>185</sup> See, e.g., Olsen v. Helvering, 88 F.2d 650, 651 (2d Cir. 1937) (finding that anything that communicates IRS's intent to assess is sufficient); Donohue v. Commissioner, 37 T.C.M. (CCH) 954, 954 (1978) (mutilated notice containing no date, address, year or deficiency was sufficient to confer jurisdiction on Tax Court).

on which the IRS has based its determination.<sup>186</sup> If the statutory notice does contain an explanation, the IRS is generally not bound by it.<sup>187</sup> One of the only protections a taxpayer has is that, in unreported income cases, courts generally shift the burden of going forward to the IRS if the taxpayer alleges that the notice was arbitrary and without rational foundation.<sup>188</sup>

If the IRS raises in Tax Court "new matter" not contained in the notice, the IRS will bear the burden of persuasion on that

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<sup>186</sup> Ferrari, *supra* note 27, at 421-22 & n.90; *see, e.g.*, Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 388 n.25 (5th Cir. 1995); Pasternak v. Commissioner, 990 F.2d 893, 897 (6th Cir. 1993); Abatti v. Commissioner, 644 F.2d 1385, 1389 (9th Cir. 1981); Barnes v. Commissioner, 408 F.2d 65, 68 (7th Cir. 1969); Campbell v. Commissioner, 90 T.C. 110, 115 (1988); Stevenson v. Commissioner, 43 T.C.M. (CCH) 289 (1982).

One judge, objecting to the Tax Court's upholding a particular statutory notice, stated:

[U]nder the majority opinion, the following qualifies as a valid statutory notice of deficiency within the meaning of sections 6211 and 6212 of the Code.

Dear Taxpayer:

There is a rumor afoot that you were a participant in the Amalgamated Hairpin Partnership during the year 1980. Due to the press of work we have been unable to investigate the accuracy of the rumor or to determine whether you filed a tax return for that year. However, we are concerned that the statute of limitations may be about to expire with respect to your tax liability for 1980.

Our experience has shown that, as a general matter, taxpayers tend to take, on the average, excessive (unallowable) deductions, arising out of investments in partnerships comparable to Amalgamated that aggregate some \$10,000. Our experience has further shown that the average investor in such partnerships has substantial taxable income and consequently has attained the top marginal tax rate.

Accordingly, you are hereby notified that there is a deficiency in tax in the amount of \$7,000 due from you for the year 1980 in addition to whatever amount, if any, you may have previously paid.

Sincerely yours,

Commissioner of Internal Revenue

Scar v. Commissioner, 81 T.C. 855, 869 (1983) (Sterrett, J., dissenting), *rev'd*, 814 F.2d 1363 (9th Cir. 1987).

<sup>187</sup> Standard Oil Co. v. Commissioner, 43 B.T.A. 973, 998 (1941), *aff'd*, 129 F.2d 363 (7th Cir. 1942). However, in the Tax Court, the IRS bears the burden of persuasion on "new matter" requiring different evidence from the matters covered in the notice. *See* TAX CT. R. 142(a); Achiro v. Commissioner, 77 T.C. 881, 889 (1981) (while burden of proof is generally on petitioner, the IRS bears the burden on new matter).

<sup>188</sup> *See infra* notes 208-13 and accompanying text.

issue.<sup>189</sup> Courts distinguish new matter from a mere "new theory" that clarifies the original determination in the notice without being inconsistent with it or increasing the amount of the deficiency.<sup>190</sup> In general, if the assertion requires the presentation of different or additional evidence, it is new matter.<sup>191</sup> Thus, the more broadly worded the notice, the less likely that an issue raised after the mailing of the notice will be treated as new matter.<sup>192</sup> This may encourage the IRS to draft broadly worded notices<sup>193</sup> that, as a result, do not inform the taxpayer of the IRS's theory of the case.<sup>194</sup>

If the statutory notice is merely an *inchoate* complaint, the IRS's answer to the taxpayer's petition can complete the IRS's pleading. In Tax Court, this means that the statutory notice and answer together should raise the issues the IRS intends to litigate and the IRS's theories on those issues.<sup>195</sup> If the IRS's an-

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<sup>189</sup> TAX CT. R. 142(a).

<sup>190</sup> See, e.g., *Achiro*, 77 T.C. at 890; *Estate of Jayne v. Commissioner*, 61 T.C. 744, 748-49 (1974); *McSpadden v. Commissioner*, 50 T.C. 478, 492-93 (1968).

<sup>191</sup> *Achiro*, 77 T.C. at 890; *Estate of Falese v. Commissioner*, 58 T.C. 895, 898-99 (1972).

<sup>192</sup> Courts often make statements like "if a deficiency notice is broadly worded and the Commissioner later advances a theory not inconsistent with that language, the theory does not constitute new matter . . ." *Abatti v. Commissioner*, 644 F.2d 1385, 1390 (9th Cir. 1981).

<sup>193</sup> See *Gassenheimer*, *supra* note 100, at 86; *Cook & Dubroff*, *supra* note 22, at 647-48 (asserting that Tax Court's burden of proof rules have encouraged vague deficiency notices).

<sup>194</sup> Cf. I.R.M. ¶ 4464.23(7) (July 23, 1990) ("As a general rule the explanatory paragraphs with respect to disputed issues [in statutory notices] should cite Code sections sparingly. . . . Code subsections generally should not be cited since they may unnecessarily limit or narrow the Commissioner's position.").

<sup>195</sup> See *Achiro*, 77 T.C. at 891 ("[I]f respondent does not indicate in the notice of deficiency that he is relying on section 482, but alerts the taxpayer of his reliance on section 482 formally in pleadings far enough in advance of trial so as not to prejudice the taxpayer or take him by surprise at trial, then the burden of proof shifts to respondent . . . if respondent raises section 482 at such a late date that the principles of fair play and justice would be abrogated by permitting him to rely on section 482, then he will not be allowed to rely on section 482 at all."); cf. *Johnsen v. Commissioner*, 83 T.C. 103, 119-21 (1984) (noting that where a party would be prejudiced by an adverse party raising a theory for the first time on brief, the theory is not properly before the court), *rev'd*, 794 F.2d 1157 (6th Cir. 1986).

In *Commissioner v. Transport Mfr. & Equip. Co.*, 478 F.2d 731 (8th Cir. 1973), the court stated:

[T]he longer the Commissioner delays in not expressly advising the taxpayer of the intended theories, the more reason there is to conclude that the taxpayer has not received fair notice and has been substantially prejudiced so as to deny

swer to the taxpayer's petition were to flesh out the statutory notice and inform the taxpayer of the IRS's legal theories, the taxpayer would be positioned for trial.<sup>196</sup> In fact, the "new matter" rule, placing the burden of proof on the IRS, contemplates a matter raised by the IRS for the first time in an answer.<sup>197</sup> In *Muserlian v. Commissioner*,<sup>198</sup> the court stated that the IRS "is normally given three opportunities to advise Petitioner and the Court of the nature of his defense in the statutory notice of deficiency, in the Answer, and in the Amendment to the An-

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the Commissioner consideration of theories raised for the first time in post-trial briefs. The Commissioner may avoid this uncertainty and discharge his duty of informing the taxpayer by expressly notifying the taxpayer of the intended theories in the deficiency notice and the Commissioner's answer.

*Id.* at 736.

<sup>196</sup> The taxpayer should be permitted to amend her petition, if necessary. See *Campbell v. Commissioner*, 90 T.C. 110, 115 (1988).

<sup>197</sup> See TAX CT. R. 36(b) (providing that "the answer shall contain a clear and concise statement of every ground, together with the facts in support thereof, on which the Commissioner relies and has the burden of proof"). The Tax Court Rule on burden of proof provides: "The burden of proof shall be upon the petitioner . . . and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, *pleaded in the answer*, it shall be upon the respondent." TAX CT. R. 142(a) (emphasis added).

It is not clear from the language of Rule 142(a) whether "pleaded in the answer" refers back to "new matter," compare *Achiro*, 77 T.C. at 890 ("if the assertion *in the amended answer* either alters the original deficiency or requires the presentation of different evidence, then respondent has introduced new matter." (emphasis added)) with *Abatti*, 644 F.2d at 1390 (recognizing that determination of whether something is new matter "depends on whether the basis for the deficiency advanced *at trial* or in an amended answer is 'inconsistent with some position necessarily implicit in the determination itself . . .'" (emphasis added)) (quoting *Sorin v. Commissioner*, 29 T.C. 959, *aff'd per curiam*, 271 F.2d 741 (2d Cir. 1959)). However, the language of Tax Court Rule 36(b) should clear up any confusion. See *Cook & Dubroff*, *supra* note 22, at 682 ("The Board [of Tax Appeals's] original rules directed the Commissioner to 'set forth any new matters of fact and any propositions of law' in the answer. . . . Now the Commissioner is directed to plead affirmatively only when he has the burden of proof.") (quoting B.T.A. Rule 9 (July 1924 ed.)). Tax Court Rule 36(b) provides, in part:

The answer shall be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. It shall contain a specific admission or denial of each material allegation in the petition . . . . In addition, the answer shall contain a clear and concise statement of every ground, together with the facts in support thereof, on which the Commissioner relies and has the burden of proof . . . .

TAX CT. R. 36(b).

<sup>198</sup> 58 T.C.M. (CCH) 100 (1989), *aff'd*, 932 F.2d 109 (2d Cir. 1991).

swer."<sup>199</sup> However, in many cases, the IRS asserts a new theory or raises new matter after it has filed its answer, and the court does not require it to amend its answer even if the IRS plans to litigate that matter at trial.<sup>200</sup> In those cases, the taxpayer will be unable to ascertain the IRS's theory from the pleadings.

Therefore, in some cases, the taxpayer does not learn of the IRS's theory until just before trial;<sup>201</sup> at trial;<sup>202</sup> or even until the trial is over, from the IRS's post-trial brief.<sup>203</sup> The doctrine of "surprise and prejudice" theoretically should protect taxpayers from issues raised by the IRS so late that the taxpayer is prejudiced. Courts have sometimes found prejudice and prohibited the IRS from litigating an issue or relying on a ground that was not pleaded, and was raised for the first time late in the proceedings.<sup>204</sup> However, a vague notice may enable the IRS to avoid that problem if the court finds that the IRS's ultimate theory was consistent with the statutory notice.<sup>205</sup> In one case, the court did not find prejudice to the taxpayer,<sup>206</sup> although:

[T]he record shows that the taxpayers had repeatedly asked the Commissioner to state his theory of the case but as of

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<sup>199</sup> *Id.* at 107.

<sup>200</sup> *See, e.g.,* Estate of Falese v. Commissioner, 58 T.C. 895, 898-99 (1972); *see also* TAX CT. R. 41(b) (failure to amend pleadings to conform to the evidence presented at trial does not affect trial of issues tried by express or implied consent of the parties).

<sup>201</sup> *See, e.g.,* Stewart v. Commissioner, 714 F.2d 977, 985-90 (9th Cir. 1983) (stating that taxpayer received adequate notice of new theory raised in trial memorandum filed one day before trial); *Abbati*, 644 F.2d at 1390 (9th Cir. 1981); *Schaefer v. Commissioner*, 63 T.C.M. (CCH) 2684, 2689 (1992) (holding new matter asserted in IRS's trial memorandum mailed to taxpayer 18 days before trial did not unduly prejudice taxpayer).

<sup>202</sup> *See, e.g.,* Estate of Falese, 58 T.C. at 899 (noting that government took a new position at trial).

<sup>203</sup> *See, e.g.,* Hicks v. Commissioner, 37 T.C.M. (CCH) 1540 (1978) (asserting theory for first time on brief).

<sup>204</sup> *See, e.g.,* Ross Glove Co. v. Commissioner, 60 T.C. 569, 594-95 (1973) (Tax Court would not consider issue not raised in statutory notices or IRS's amended answer, where taxpayer would be prejudiced by late notice of issue); Estate of Horvath v. Commissioner, 59 T.C. 551, 556-57 (1973) (taxpayer was surprised and substantially prejudiced when IRS raised new issue in opening statement; IRS could not rely on new ground); Riss v. Commissioner, 57 T.C. 469 (1971), *aff'd*, 478 F.2d 1160 (8th Cir. 1973); *see also* Robertson v. Commissioner, 55 T.C. 862, 865 (1971) (new issue not raised in the pleadings will ordinarily not be heard by court); Frenz v. Commissioner, 44 T.C. 485, 490-91 (1965) (same), *aff'd*, 375 F.2d 662 (6th Cir. 1967).

<sup>205</sup> *See* Cook & Dubroff, *supra* note 22, at 647-48 (noting collateral benefits that government receives by submitting vague notice).

<sup>206</sup> *Abbati*, 644 F.2d at 1385.

two weeks before trial, counsel for the Commissioner could not define it. And the taxpayers were not told of the intent to rely on [the relevant code section] until five days before trial.<sup>207</sup>

One possible remedy for inadequate pleading is to require the IRS to bear the burden of going forward with the evidence on an issue not adequately pleaded. The Tax Court has shifted the burden of going forward from the IRS to the taxpayer in one major line of cases, the “naked assessment” cases.<sup>208</sup> If the taxpayer alleges that a statutory notice involving unreported income is arbitrary, capricious and lacking in factual foundation — a so-called naked assessment<sup>209</sup> — the IRS bears the burden of coming forward with some evidence connecting the taxpayer to the alleged tax-generating activity.<sup>210</sup> Judge Learned Hand applied this exception as early as 1934, stating that any result other than upholding the taxpayer’s challenge of an arbitrary assessment “would invert the ordinary rules of procedure by imposing a burden of establishing a negative upon the [taxpayer].”<sup>211</sup> Courts continue to recognize “the obvious difficulties

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<sup>207</sup> *Id.* at 1391 (Chambers, J., dissenting).

<sup>208</sup> Shifting the burden of going forward is a “middle ground” between invalidating the notice, as in *Scar v. Commissioner*, 814 F.2d 1363 (9th Cir. 1987), and providing no remedy at all for a defective notice. Similarly, in *Greenberg’s Express, Inc. v. Commissioner*, 62 T.C. 324 (1974), the Tax Court held that if a taxpayer presented substantial evidence of unconstitutional conduct, it would shift the burden of going forward to the IRS. In that case, the taxpayers claimed that the IRS had selected their returns for audit discriminatorily based on their alleged connections to persons purportedly involved in organized crime. *Id.* at 325. The court held that the Tax Court would not “look behind a deficiency notice to examine the evidence used or the propriety of respondent’s motives or of the administrative policy or procedure involved in making his determinations.” *Id.* at 327; *cf.* *Eaton v. Weaver Mfr. Co.*, 582 F.2d 1250, 1254 (10th Cir. 1978) (plaintiffs argued that federal court could not “look behind the face of” state court judgment to determine what findings might support application of *res judicata*). The *Greenberg’s Express* court reasoned that the Tax Court trial is a *de novo* proceeding in which the administrative record is irrelevant. *Greenberg’s Express*, 62 T.C. at 329.

<sup>209</sup> A naked assessment exists where respondent could not present “some predicate evidence connecting the taxpayer to the charged activity.” *Anastasato v. Commissioner*, 794 F.2d 884, 887 (3d Cir. 1986); *see also* *United States v. Janis*, 428 U.S. 433, 442 (1976); *Dellacroce v. Commissioner*, 83 T.C. 269, 280 (1984).

<sup>210</sup> *See, e.g.*, *Anastasato*, 794 F.2d at 886; *Weimerskirch v. Commissioner*, 596 F.2d 358, 360 (9th Cir. 1979); *Gerardo v. Commissioner*, 552 F.2d 549, 553 (3d Cir. 1977); *Dellacroce v. Commissioner*, 83 T.C. 269, 280 (1984); *Llorente v. Commissioner*, 74 T.C. 260 (1980), *aff’d in part and rev’d in part*, 649 F.2d 152 (2d Cir. 1981).

<sup>211</sup> *Taylor v. Commissioner*, 70 F.2d 619, 621 (2d Cir. 1934), *aff’d sub nom. Helvering v.*



in proving nonreceipt of income."<sup>212</sup> Once the government comes forward with appropriate evidence, the case continues, with the burden of persuasion remaining on the taxpayer.<sup>213</sup> If the government fails to come forward with even minimal evidence, then the statutory notice loses the presumption of correctness.<sup>214</sup>

#### IV. DISTINGUISHING JURISDICTIONAL SUFFICIENCY FROM PLEADING SUFFICIENCY

Judge Learned Hand stated that "the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does that unequivocally is good enough."<sup>215</sup> Since then, courts have struggled with the various "jurisdictional" challenges to notices that do not comply with statutory requirements, and with the appropriate remedies for notices that fall short.<sup>216</sup> Nonetheless, they have failed to separate the role of the statutory notice in establishing Tax Court jurisdiction from its other roles in tax litigation.

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Taylor, 293 U.S. 507 (1935).

<sup>212</sup> *Anastasato*, 794 F.2d at 887-89. This approach was also applied in a case where the IRS had relied solely on computerized matching of a 1099 Form with the taxpayer's return and the presumption of correctness. *See Portillo v. Commissioner*, 932 F.2d 1128, 1133-34 (5th Cir. 1991) (holding notice was valid but the deficiency assessment was arbitrary, thereby shifting burden of going forward to the IRS).

<sup>213</sup> *See Suarez v. Commissioner*, 61 T.C. 841, 844 (1974).

<sup>214</sup> *See Carson v. United States*, 560 F.2d 693, 696 (5th Cir. 1977) ("The tax collector's presumption of correctness has a herculean muscularity of Goliathlike reach, but we strike an Achilles' heel when we find no muscles, no tendons, no ligaments of fact.")

[C]ourts in most jurisdictions state that most presumptions operate only to shift the burden of producing evidence, but have no effect on the assignment of the burden of persuasion. Furthermore, these same courts often state that, since only the burden of producing evidence is shifted, once that burden has been satisfied by the opponent of the presumption, the presumption drops out of the case entirely or "bursts." This "bursting bubble" theory, attributed first to the great nineteenth century evidence scholar, Thayer, is at least the prevailing, articulated rule about presumptions.

Broun, *supra* note 98, at 701 (footnotes omitted).

<sup>215</sup> *Olsen v. Helvering*, 88 F.2d 650, 651 (2d Cir. 1937).

<sup>216</sup> *See supra* note 148 and accompanying text (explaining the "notice" requirement that is an element of due process of law); *supra* notes 200-06 and accompanying text (describing the pleading role of the statutory notice); *infra* notes 220-65 and accompanying text (detailing the jurisdictional aspect of the statutory notice).

In *Bell v. Hood*,<sup>217</sup> the United States Supreme Court drew a helpful distinction between jurisdictional pleading errors and mere content errors that do not affect jurisdiction. In that case, the Court held that a federal district court had subject-matter jurisdiction under 28 U.S.C. section 1331<sup>218</sup> over a complaint that sought recovery based on alleged constitutional violations even if the complaint failed to state a claim for which relief could be granted.<sup>219</sup> Thus, the plaintiffs' mere allegation that their claim was founded on constitutional violations was sufficient to obtain a federal forum that could adjudicate the dispute on the merits, even if the alleged violations were insufficient under federal law to state a claim for which relief could be granted.<sup>220</sup>

In reversing the lower courts<sup>221</sup> and holding that the District Court had jurisdiction over the claim, the Supreme Court found that even *less* specifically drafted allegations would suffice to invoke subject-matter jurisdiction so long as the complaint sought recovery under the Constitution or federal law.<sup>222</sup> The Court stated, "The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of

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<sup>217</sup> 327 U.S. 678 (1946). In *Bell*, the plaintiff sought to recover damages from agents of the Federal Bureau of Investigation (FBI). *Id.* at 679. The plaintiffs alleged that the defendants had searched their homes and seized papers without search warrants. *Id.* at 679 n.1. The plaintiffs also alleged that the defendants had arrested some of the plaintiffs without arrest warrants. *Id.* The complaint alleged that jurisdiction was predicated on questions arising under the Fourth and Fifth Amendments to the United States Constitution. *Id.* at 679.

<sup>218</sup> Section 1331 provides federal district courts with original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States.

<sup>219</sup> *Bell*, 327 U.S. at 682.

<sup>220</sup> The Court acknowledged limited exceptions for allegations of federal claims that are either frivolous or not material. *Id.* at 682-83. The significance of the holding in *Bell* was that the plaintiffs did not have to sue in state court; the federal forum was open to them and to future plaintiffs attempting to establish the legal sufficiency of claims based on federal law. *Id.* at 684.

<sup>221</sup> In *Bell*, the defendant FBI agents moved to dismiss the complaint for failure to state a cause of action and also moved for summary judgment on the ground that the searches and seizures were valid. *Id.* at 680. After hearing the motions, the district judge dismissed the suit for lack of federal jurisdiction on the ground that the action did not arise under the Constitution or the laws of the United States. *Id.* The Court of Appeals affirmed on the same ground and denied plaintiffs' motion to direct the district court to give plaintiffs leave to amend their complaint to make it appear more clearly that the action was grounded on rights allegedly arising from the United States Constitution. *Id.*

<sup>222</sup> *Id.* at 682.

action on which the court can grant relief as well as to determine the issues of fact arising in the controversy."<sup>223</sup> The Court further noted that "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of jurisdiction."<sup>224</sup>

On remand in *Bell*, the district court dismissed the case for failure to state a claim.<sup>225</sup> However, the relaxed criteria pronounced by the court in *Bell* for establishing jurisdiction enabled later plaintiffs to bring *Bivens v. Six Unknown Named Federal Agents*<sup>226</sup> in a federal district court. This case went the other way on the same underlying pleading sufficiency issue as that involved in *Bell*,<sup>227</sup> holding that the plaintiffs had stated a claim. Thus, the distinction between a dismissal for lack of jurisdiction and one for failure to state a claim was meaningful. It preserved the possibility of a federal forum to determine the issue of the sufficiency of the claim in light of evolving social circumstances and judicial sensibilities.

The distinction between the minimal elements necessary for subject-matter jurisdiction and the elements necessary to state a claim can inform tax law on statutory notices of deficiency. Judge Learned Hand's statement that "the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does that unequivocally is good enough"<sup>228</sup> is correct with respect to jurisdiction, and therefore the "validity" of the notice. For the Tax Court to assert subject-matter jurisdiction over the lawsuit, the notice need contain only enough information for the taxpayer to be able to petition the Tax Court and assign as errors the determi-

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.* This doctrine was applied by the Supreme Court as recently as 1994. See *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional."); see also *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1050 (1995) ("Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements . . .").

<sup>225</sup> *Bell v. Hood*, 71 F. Supp. 813, 821 (S.D. Cal. 1947).

<sup>226</sup> 403 U.S. 388 (1971).

<sup>227</sup> The issue in both *Bell* and *Bivens* was the availability of damages recovery for violations of the Fourth and Fifth Amendments by federal officers. See *Bivens*, 403 U.S. at 395-96; *Bell*, 327 U.S. at 684.

<sup>228</sup> *Olsen v. Helvering*, 88 F.2d 650, 651 (2d Cir. 1937).

nations in the notice. Thus, the case law is correct in requiring only that a statutory notice inform the taxpayer of the amount of the deficiency, the tax year involved, and the IRS's intent to assess if the taxpayer takes no action.<sup>229</sup> By contrast, other errors or insufficiencies in a statutory notice are not properly jurisdictional.<sup>230</sup>

The application of this distinction between jurisdictional adequacy and pleading sufficiency is well illustrated by *Scar v. Commissioner*.<sup>231</sup> In *Scar*, the IRS mailed the taxpayers a statutory notice that contained the Scars' names and address, the correct tax year,<sup>232</sup> showed a deficiency of \$96,600, and a statement that the deficiency was arrived at by multiplying \$138,000 by seventy percent.<sup>233</sup> An attached explanation showed an income adjustment in the amount of \$138,000 for a tax shelter in which

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<sup>229</sup> See, e.g., *Geiselman v. United States*, 961 F.2d 1, 5 (1st Cir. 1992) (describing minimum requirements of notice as including amount of deficiency and tax year involved); *Estate of Yaeger v. Commissioner*, 889 F.2d 29, 35 (2d Cir. 1989) (notice must generally identify taxpayer, tax year, and amount of deficiency, but that no formal requirements for notice have been statutorily defined to date); *Alford v. Commissioner*, 800 F.2d 987, 988 (10th Cir. 1986) (finding that no particular form is required for statutory notice of deficiency); *Commissioner v. Stewart*, 186 F.2d 239 (6th Cir. 1951); *Olsen*, 88 F.2d at 651 (explaining that any notice that informs taxpayer of deficiency is sufficient); *Campbell v. Commissioner*, 90 T.C. 110, 115 (1988) (no particular form is required for valid notice of deficiency, and respondent need not explain how deficiency was determined); *Foster v. Commissioner*, 80 T.C. 34, 229-30 (1983) (holding that burden of proof not shifted to Commissioner if he fails to identify in notice specific expenditures which are disallowed), *aff'd in part and vacated in part*, 756 F.2d 1430 (9th Cir. 1985). *But cf.* *Donohue v. Commissioner*, 37 T.C.M. (CCH) 954, 956 (1978) (mutilated notice containing no date, address, year or deficiency was sufficient to confer jurisdiction on Tax Court). These cases reflect the reality that at the point at which the IRS mails the statutory notice, the IRS is under the pressure of the statute of limitations.

<sup>230</sup> In *Stump v. Sparkman*, 435 US. 349 (1978), a non-tax case, the United States Supreme Court distinguished among actions that are clearly erroneous but within jurisdiction, those that are in excess of jurisdiction, and those that are in the clear absence of jurisdiction. *Id.* at 356 & n.7. Even egregious errors, such as the errors in the notice in *Scar v. Commissioner*, 814 F.2d 1363 (9th Cir. 1987), do not render the notice insufficient to confer subject-matter jurisdiction. *Cf.* *Hannan v. Commissioner*, 52 T.C. 787, 790 n.8 (1969) (IRS's assertion in Tax Court that it erroneously determined a deficiency cannot deprive the Tax Court of jurisdiction).

<sup>231</sup> 814 F.2d 1363 (9th Cir. 1987).

<sup>232</sup> An incorrect tax year in a statutory notice is grounds for invalidating the notice. See, e.g., *Miles Prod. v. Commissioner*, 987 F.2d 273, 276 (5th Cir. 1993) ("It is well established that a deficiency notice is invalid if based upon incorrect taxable periods."); *Century Data Sys., Inc. v. Commissioner*, 80 T.C. 529, 532 (1983) (Tax Court lacks jurisdiction to redetermine deficiency for incorrect taxable years).

<sup>233</sup> *Scar*, 814 F.2d at 1365.

the Scars had never invested, the Nevada Mining Partnership.<sup>234</sup> Instead, they had claimed deductions of \$26,966 in connection with a videotape tax shelter, Executive Productions, Inc.<sup>235</sup> A statement attached to the notice explained that "[i]n order to protect the government's interest and since your original income tax return is unavailable at this time, the income tax is being assessed at the maximum rate of seventy percent."<sup>236</sup>

In their petition to the Tax Court, the Scars alleged that they had never been involved with the Nevada Mining Partnership.<sup>237</sup> A few months later, after filing an answer denying the allegations of the petition, the IRS conceded that the statutory notice was incorrect in that regard, and sought leave from the Tax Court to amend its answer.<sup>238</sup> The IRS also sent the Scars a revised statement of income tax changes referring to Executive Productions, Inc., and specified a deficiency of \$10,374.<sup>239</sup>

The Scars filed a motion to dismiss for lack of jurisdiction, alleging that the Commissioner had failed to make a "determination" of tax due before issuing the statutory notice,<sup>240</sup> as contemplated by section 6212.<sup>241</sup> The IRS responded that the

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1364-65.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1365.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See I.R.C. § 6212 (1996). Unlike the "last known address" mailing element of section 6212, the "determination" language is not permissive. However, the statute does not define what constitutes a determination. See *id.* Early Board of Tax Appeals cases held that the determination requirement contemplates "a thoughtful and considered determination." *Couzens v. Commissioner*, 11 B.T.A. 1040, 1159-60 (1928) (explaining that rationale for requiring a "reasoned" determination is that if the statutory notice "were, say, a mere formal demand for an arbitrary amount as to which there were substantial doubt, the Board [of Tax Appeals] might easily become merely an expensive tribunal to determine moot questions and a burden might be imposed on taxpayers of litigating issues and disproving allegations for which there had never been any substantial foundation"); see also *In re Terminal Wine Co.*, 1 B.T.A. 697, 700 (1925). Two circuits currently apply a standard of a "reasoned" determination. See *Sealy Power, Ltd. v. Commissioner*, 46 F.3d 382, 399-400 (5th Cir. 1995); *Portillo v. Commissioner*, 932 F.2d 1128, 1132 (5th Cir. 1991); *Scar*, 814 F.2d at 1369.

Despite the possibility that section 6212 requires a "considered" or "reasoned" determination, the Tax Court has held that it generally will not "look behind" the statutory notice and examine the underlying administrative process. *E.g.*, *Greenberg's Express v. Commissioner*, 62 T.C. 324, 328 (1974); see also *supra* note 200 and accompanying text.

notice was inaccurate, but maintained that it was sufficient to confer Tax Court jurisdiction.<sup>242</sup> At the hearing on the motion to dismiss for lack of jurisdiction, counsel for the IRS explained that the Scars' 1978 return had been placed in "suspense status" because it was associated with a tax shelter project.<sup>243</sup> The project was identified only by a "freeze code" number. IRS agents had transposed digits in the freeze code number when using the IRS's computer and had therefore obtained the proposed adjustment language for the Nevada Mining Partnership.<sup>244</sup>

In a court-reviewed opinion, the Tax Court upheld the validity of the statutory notice and accompanying documents, finding that the notice satisfied the formal requirements of section 6212(a).<sup>245</sup> The Tax Court refused to imbue the word "determines" with substantive content.<sup>246</sup> On appeal, however, the Ninth Circuit reversed. The Ninth Circuit acknowledged that it is not the existence of an actual deficiency that confers jurisdiction, since it is the Tax Court's duty to determine that.<sup>247</sup> However, the Ninth Circuit majority found that the Commissioner's "determination" of a deficiency is the necessary element for Tax Court jurisdiction.<sup>248</sup> The majority found that the notice on its face reflected the absence of a determination, so that the Tax Court had no jurisdiction over the case.

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There is a tension between these two principles. However, at least one case has held that although a reasoned and considered determination is required, the notice need not state the basis for the determination or how the deficiencies were determined. *Powers v. Commissioner*, 100 T.C. 457, 475 (1993). This implies that a technically valid notice gives rise to a presumption of a thoughtful and considered determination.

<sup>242</sup> *Scar*, 814 F.2d at 1365.

<sup>243</sup> *Scar v. Commissioner*, 81 T.C. 855, 859 (1983), *rev'd*, 814 F.2d 1363 (9th Cir. 1987).

<sup>244</sup> *Id.*

<sup>245</sup> No other judge joined the court's opinion, delivered by Judge Tannenwald. *Scar*, 81 T.C. at 856. Two concurrences, one opinion concurring in part and dissenting in part, and three dissents were filed. *Id.* at 865 (Chabot, J., concurring); *id.* at 867 (Swift, J., concurring); *id.* at 867 (Whitaker, J., concurring in part and dissenting in part); *id.* at 868 (Fay, J., dissenting); *id.* at 869 (Sterrett, J., dissenting); *id.* at 869 (Goffe, J., dissenting).

<sup>246</sup> *Id.* at 864. The court also permitted the IRS to amend its answer, in part because the underlying issue was already the subject of a case pending with respect to the Scars' 1977 taxable year. The IRS amended its answer, asserting in it that the Scars had the burden of disproving the correctness of the Commissioner's revised determinations. The Scars renewed their summary judgment motion, which was denied. The Tax Court entered a decision, pursuant to a stipulation, that the Scars owed \$10,377 in additional tax.

<sup>247</sup> *Scar*, 814 F.2d at 1369 n.10.

<sup>248</sup> *Id.*

Judge Hall, a former Tax Court judge,<sup>249</sup> filed a strong dissent. She pointed out that the taxpayers had conceded that the notice met the formal requirements of stating the amount of the deficiency and the taxable year involved.<sup>250</sup> She argued that the statutory notice is "nothing more than 'a jurisdictional prerequisite of a taxpayer's suit seeking the Tax Court's redetermination of [the IRS's] determination of tax liability.'"<sup>251</sup> Judge Hall further pointed out that although the Scars' original return was "unavailable," that did not mean that the IRS had not considered data related to the videotape tax shelter.<sup>252</sup> She argued that due to computerization, the IRS no longer operates from original paper returns,<sup>253</sup> so, it was conceivable that the IRS had enough computer information to match information regarding both the videotape tax shelter and the Scars' suspect 1977 return<sup>254</sup> to their 1978 return, but not enough information to determine the exact deficiency amount without calling up the original return from storage.<sup>255</sup> Judge Hall further noted that the errors were in a form that the IRS is not required to send with the basic statutory notice.<sup>256</sup>

The dispute between the Ninth Circuit majority and Tax Court dissenters<sup>257</sup> on the one hand, and the Tax Court majority and Judge Hall on the other, reflects an underlying disagreement over the functions of the statutory notice in Tax Court. The Ninth Circuit focused on the role of the statutory notice in the Tax Court pleadings, and correctly found that the notice was inadequate to perform that function. Judge Hall and the Tax Court majority, by contrast, looked at the notice as merely a

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<sup>249</sup> See CCH Tax Court Reporter, Topical Law Reports, at ¶ 9216 (1996) (noting that Judge Hall served on Tax Court from 1972-81).

<sup>250</sup> *Scar*, 814 F.2d at 1371 (Hall, J., dissenting).

<sup>251</sup> *Id.* at 1372 (quoting *Stamm v. Commissioner*, 84 T.C. 248, 252 (1985)).

<sup>252</sup> *Id.* at 1374 n.4.

<sup>253</sup> *Id.*

<sup>254</sup> The Scars also claimed deductions and credits with respect to Executive Productions, Inc. on this 1977 return. They received a notice of deficiency with respect to this return, and petitioned the Tax Court. The Tax Court found a deficiency of \$10,410. *Id.* at 1364 n.2.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Judges Fay, Goffe, and Sterrett dissented from the court's decision to uphold the statutory notice. *Scar v. Commissioner*, 81 T.C. 855, 868-75 (1983), *rev'd*, 814 F.2d 1363 (9th Cir. 1987).

jurisdictional prerequisite to a Tax Court hearing — the “ticket to Tax Court” — the content of which is largely irrelevant. Separating the jurisdictional role of the notice from its substantive pleading role in Tax Court litigation resolves this dispute.

Judge Hall correctly argued that the merits of the deficiency should not be litigated in the form of a motion to dismiss for lack of jurisdiction, but rather should be argued before the court once jurisdiction has been established.<sup>258</sup> This argument echoes the Supreme Court’s decision in *Bell v. Hood* that pleading sufficiency should not be decided on a motion to dismiss for lack of jurisdiction.<sup>259</sup> The Tax Court majority and Judge Hall are correct in finding that the statutory notice in *Scar* was jurisdictionally sufficient and therefore valid. The statutory notice in *Scar* was addressed to the Scars, contained the amount of the deficiency, the tax year involved, and the IRS’s intent to assess if the Scars took no action. Jurisdictionally, that is all that is necessary.<sup>260</sup> The egregious content errors in the Scars’ statutory notice are troublesome but are not jurisdictional. The content errors in the *Scar* notice should instead have been corrected during the litigation.<sup>261</sup>

Section 6212 does not seem to require any particular type of determination. It appears that the mailing of the notice is itself

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<sup>258</sup> *Scar*, 814 F.2d at 1373; *cf.* *Bell v. Hood*, 327 U.S. 678 (1946) (explaining that allegations of constitutional violations by federal officers are sufficient to confer jurisdiction on federal court even if complaint fails to state a claim for which relief can be granted).

<sup>259</sup> *See supra* note 224 and accompanying text.

<sup>260</sup> *See supra* note 226 and accompanying text (stating that requirements for sufficient notice are met if taxpayer, year, and amount are identified).

<sup>261</sup> *Cf. Scar*, 814 F.2d at 1375 (Hall, J., dissenting) (stating that alternative remedies for errors in statutory notice would be informal clarification or removing presumption of correctness).



evidence that the IRS made the determination of deficiency contemplated by the statute.<sup>262</sup> In addition, the statement in section 7522, that failure to include the requisite specificity in a statutory notice is not grounds for invalidating the notice,<sup>263</sup> implies that Congress does not view content errors as jurisdictional. So long as the IRS pleads its case sufficiently in advance of trial so as to avoid surprise or prejudice to the taxpayer<sup>264</sup> and bears the burden of proof on any new matter,<sup>265</sup> the taxpayer should be positioned to defend the IRS's determinations.

Confusing jurisdiction and substance creates troubling case law and perverse pleading incentives. Judge Hall noted in *Scar* that if an erroneous explanation invalidates a statutory notice, the IRS has an incentive not to disclose its theory in the notice.<sup>266</sup> *Scar* does not require the IRS to demonstrate that a statutory notice was based on a taxpayer's return,<sup>267</sup> or even require that the IRS actually base a notice on the taxpayer's return. Thus, *Scar* may effectively operate as a message on what *language* the IRS should avoid in drafting statutory notices, not what *process*.<sup>268</sup> In addition, because the remedy applied in *Scar*

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<sup>262</sup> In one case, the Tax Court held that although section 6212 requires a reasoned and considered determination, the notice need not state the basis for the determination or how the deficiencies were determined. *Powers v. Commissioner*, 100 T.C. 457, 475 (1993). This implies that an otherwise valid notice gives rise to a presumption of a thoughtful and considered determination. The Tax Court might hold that where, as in *Scar*, the notice evidences on its face absence of a reasoned determination, the notice is invalid. However, this distinction makes little sense; the IRS can avoid inquiry into the determination process merely by being uninformative in the statutory notice. See *supra* text accompanying notes 171-73 (section 6212 does not specify form or contents of notice); *supra* text accompanying notes 192-94 (IRS has incentive to word statutory notices broadly).

<sup>263</sup> See I.R.C. § 7522 (1996) (inadequate description in notice is not grounds for invalidation).

<sup>264</sup> See *supra* notes 188, 194-202 and accompanying text (where statutory notice is sufficient, burden of proof is generally on taxpayer).

<sup>265</sup> See *supra* text accompanying note 102 (explaining that IRS bears burden of proof on "new matter").

<sup>266</sup> *Scar*, 814 F.2d at 1374 (Hall, J., dissenting).

<sup>267</sup> *Clapp v. Commissioner*, 875 F.2d 1396, 1402 (9th Cir. 1989); *Campbell v. Commissioner*, 90 T.C. 110, 114 (1988).

<sup>268</sup> See I.R.M. ¶ 4464.3(2)(d) (Dec. 2, 1988) (stating that when statutory notice must be sent out without return at hand, deficiency determination will be based on return information provided in transcript; "[s]ince accurate return information is being used in the determination of the deficiency, it is inappropriate to make reference within the notice that the tax return is not on-hand").

for an IRS pleading error was so severe, few cases have followed it,<sup>269</sup> and even the Ninth Circuit has basically limited *Scar* to its facts.<sup>270</sup>

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<sup>269</sup> Most subsequent "determination" cases have distinguished *Scar*. See, e.g., *Sealy Power, Ltd. v. Commissioner*, 46 F.3d 382, 388 (5th Cir. 1995) (rejecting argument that Final Partnership Administrative Adjustment (FPAA) was "broadly drafted and that the Commissioner's review was faulty"; FPAA on its face reflected "determination" within meaning of *Scar*); *Kantor v. Commissioner*, 998 F.2d 1514, 1522 (9th Cir. 1993) (notice not facially infirm was jurisdictionally valid); *Campbell v. Commissioner*, 90 T.C. 110, 111 (1988) (making "determination" despite explanatory document relating to another taxpayer attached to statutory notice containing correct taxpayers' names and amounts of deficiency and additions to tax); *Walsh v. Commissioner*, 69 T.C.M. (CCH) 2128, 2129-30 (1995), *aff'd*, 83 F.3d 437 (11th Cir. 1996) (reference in statutory notice to adjustment based on examination of partnership return was erroneous but did not invalidate notice for lack of determination; court noted that same condo investment and same taxpayers' counsel were involved in *Stinnett v. Commissioner*, 66 T.C.M. (CCH) 750 (1993)); *Burnside v. Commissioner*, 68 T.C.M. (CCH) 21, 22 (1994) (taxpayer had not filed tax returns prior to IRS's determinations; statutory notices based on information from California State Board of Equalization were not invalid); *Stinnett*, 66 T.C.M. at 753 (reference in notice to examination of partnership return was erroneous and may have been confusing but did not invalidate notice for failure to make determination); *Watson v. Commissioner*, 65 T.C.M. (CCH) 1856, 1857 (1993) (notice stating that original return was unavailable and tax was being assessed at maximum rate of 50% was not invalid where IRS identified correct partnership, and worksheet attached to return used tax tables, resulting in 19.7% effective tax rate); *Caldwell v. Commissioner*, 59 T.C.M. (CCH) 581 (1990) (statutory notice not invalid where accompanying explanatory forms referenced partnership in which taxpayers had not invested).

Only a few cases have followed *Scar*. One is *Toll v. Commissioner*, 940 F.2d 1536 (9th Cir. 1991) (unpublished table decision), a Ninth Circuit case. In *Toll*, a statutory notice sent to the Tolls and one sent to the Leavitts informed them that a proposed deficiency was being assessed at a 70% rate because the original return was unavailable. In contrast to *Scar*, the notice did refer to the correct tax shelter, but the Ninth Circuit found the failure to review the returns fatal to jurisdiction. *Toll* cited *Kong v. Commissioner*, 60 T.C.M. (CCH) 696 (1990). Similarly, in *Pearce v. Commissioner*, 946 F.2d 1543 (5th Cir. 1991), the Court of Appeals, citing its decision in *Portillo v. Commissioner*, 932 F.2d 1128 (5th Cir. 1991), held notices of transferee liability invalid where the IRS did not consider all of the available information related to the decedent and did not physically examine the return prior to sending the notices. In particular, the IRS ignored the filing status designation of the decedent's return, applied an incorrect tax rate, and ignored claimed exemptions. *Pearce*, 946 F.2d at 1543, *rev'g* 95 T.C. 250 (1990); see also *Sealy Power*, 46 F.3d at 387-88 n.27 (agreeing with *Pearce*, but distinguishing it on its facts). In *Portillo*, the Fifth Circuit had held that the IRS could not rely on the computerized matching of the 1099 Form of a payor with the payee-taxpayer's return to benefit from the presumption of correctness of the statutory notice. The court found the notice arbitrary and erroneous where the payor could not substantiate the amounts reported in the 1099. *Portillo*, 932 F.2d at 1134.

<sup>270</sup> In *Clapp v. Commissioner*, 875 F.2d 1396 (9th Cir. 1989), the court stated:

Appellants' argument for greater substantive review of the Commissioner's "determination" mistakes the nature of the notice of deficiency. The notice of

## V. PROPOSAL

The statutory notice serves three primary functions: laying a foundation for subject-matter jurisdiction; notifying the taxpayer of an alleged deficiency in tax for a particular tax year; and allocating burdens and framing the issues in ensuing tax litigation. In analyzing defects in statutory notices, courts should distinguish among these three functions.

For subject-matter jurisdiction, the amount of the deficiency, the tax year involved, the IRS's intent to assess if the taxpayer takes no action, and sufficient information to identify the taxpayers is all that should be required.<sup>271</sup> Only if one of these items is missing should the Tax Court dismiss the case for lack of jurisdiction. This accommodates the time pressure that the statute of limitations on assessment imposes on the IRS.

For service purposes, as under current law, the notice should be sufficient under section 6212 if it is mailed to the taxpayer's last known address or if it results in actual notice to the taxpayer in time to file a Tax Court petition. However, if neither of these occur, the Tax Court should dismiss the action for insufficient service of the notice. The IRS would then be required to re-mail the notice in order to pursue assessment of the deficiency. The improperly mailed notice would have tolled the statute of limitations for the pendency of the Tax Court action plus sixty days, preserving the IRS's ability to pursue the action. Re-sending the notice would give the taxpayer the chance to elect the Tax Court as a forum.

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deficiency does not result in final liability on the part of the taxpayer. . . . The notice of deficiency merely hails [sic] the taxpayer into court. The Tax Court has as its purpose the redetermination of deficiencies, through a trial on the merits, following a taxpayer petition. It exercises *de novo* review . . . . The existence of remedies for an inaccurate determination of deficiency makes greater substantive review of the Commissioner's "determination" inappropriate.

*Id.* at 1403.

<sup>271</sup> See *supra* note 232 and accompanying text (discussing case law requiring only that statutory notice contain amount of deficiency, tax year involved, and IRS's intent to assess if taxpayer takes no action).

Requiring minimal content for jurisdictional purposes<sup>272</sup> is consistent with *Bell v. Hood* and should avoid windfalls to taxpayers like the Scars. However, *Scar v. Commissioner* and section 7522 reflect the fact that without specificity in statutory notices, the taxpayer will be substantively handicapped in any ensuing litigation. *Bell v. Hood* indicates by analogy that this specificity is a pleading requirement, not a jurisdictional requirement. In accordance with section 7522, and because the taxpayer functionally defends the IRS's claim, the IRS should be required to allege more in Tax Court than the minimal elements of notice sufficient to establish Tax Court jurisdiction. "Notice pleading" in this context should require that the statutory notice be sufficiently specific for the taxpayer to draft a petition responsive to the IRS's claim and underlying legal theory. If the notice contains information that appears to relate to another taxpayer, as in *Scar*, the taxpayer may have trouble complying with Tax Court pleading rules.<sup>273</sup>

Tax Court Rule 41(b) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The Court, upon motion of any party at any time, may allow such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues; but failure to amend does not affect the result of the trial of these issues.<sup>274</sup>

This rule may cause problems for the taxpayer who is surprised at trial with a new issue raised by the IRS. As one court stated, "Trial by ambush may produce good anecdotes for lawyers to exchange at bar conventions, but tends to be counter-productive in terms of judicial economy."<sup>275</sup>

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<sup>272</sup> See *supra* note 229 and accompanying text (arguing that statutory notice containing deficiency amount, tax year involved, and IRS's intent to assess if taxpayer takes no action should be sufficient to confer jurisdiction).

<sup>273</sup> See *Campbell*, 90 T.C. at 114 (explaining that Tax Court Rule 34(b) requires clear and concise assignments of each and every error committed by Commissioner in determination of deficiency and clear and concise statements of facts on which taxpayer bases assignments of error).

<sup>274</sup> TAX CT. R. 41(b); *cf.* FED. R. CIV. P. 15(b) (providing rule similar to Tax Court Rule 41(b)).

<sup>275</sup> *Cf.* *United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc).

If the IRS does not include enough in the statutory notice to make clear its theory of the case, it should do so in the answer. If the IRS does not make its position clear in the answer, the taxpayer should be allowed to seek clarification<sup>276</sup> through a motion for a more definite statement under Tax Court Rule 51.<sup>277</sup> Tax Court pleading rules include a liberal amendment policy.<sup>278</sup> The option to amend could be converted into a requirement if the taxpayer so moves under Rule 51. As under current law, the IRS would bear the burden of persuasion on new matter.<sup>279</sup> In addition, the court should allow the taxpayer

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<sup>276</sup> Cf. *Scar v. Commissioner*, 814 F.2d 1363, 1375 (9th Cir. 1987) (Hall, J., dissenting) (stating possible remedies for errors in *Scar* include informal clarification or removal of the presumption of correctness); see also *Brohn v. Commissioner*, 64 T.C.M. (CCH) 1350, 1351-52 (1992) (denying summary judgment motion alleging invalidity of notice that contained erroneous explanation of adjustments where, after taxpayer filed petition, IRS acknowledged erroneous explanation and explained adjustments in two letters to taxpayer's counsel).

<sup>277</sup> Tax Court Rule 51(a) provides in part:

If a pleading to which a responsive pleading is permitted or required is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, then the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired . . . .

TAX CT. R. 51(a). This tracks the language of Federal Rule of Civil Procedure 12(e).

Prior to 1974, Tax Court Rules allowed a taxpayer to make a motion for a more definite statement where no responsive pleading was required. See *Cook & Dubroff*, *supra* note 22, at 651-52 (motion for more definite statement served as principal remedy for vague statutory notices). Taxpayers used this device as a remedy for inadequate statutory notices. *Commissioner v. Licavoli*, 252 F.2d 268, 272 (6th Cir. 1958), *aff g* 15 T.C.M. 998 (1956); *Estate of Allensworth v. Commissioner*, 66 T.C. 33, 34 (1976); *Cook & Dubroff*, *supra* note 22, at 651-52 & n.75. Currently, Rule 51(a) similarly authorizes a motion for a more definite statement where a responsive pleading is permitted or required. TAX CT. R. 51(a).

<sup>278</sup> A party to a Tax Court case may amend her pleading once at any time before the adverse party serves a responsive pleading. TAX CT. R. 41(a). If the pleading is one to which no responsive pleading is permitted and the case has not been placed on a trial calendar, then the pleader may amend the pleading at any time within 30 days after it is served. *Id.* Otherwise, a party may amend her pleading only by leave of the court or by written consent of the adverse party. *Id.*; cf. FED. R. CIV. P. 15(a) ("A party may amend the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.").

<sup>279</sup> See TAX CT. R. 142(a) (burden of proof rests on respondent for all new matter).

to amend her petition within a reasonable time after the Commissioner informs her of how the deficiency and additions to tax were determined, if necessary.<sup>280</sup>

Tax Court Rule 31 provides, "The purpose of the pleadings is to give the parties and the Court fair notice of the matters in controversy and the basis for their respective positions."<sup>281</sup> This rule should trump Rule 41(b) because of the practical reality that the taxpayer, who generally bears the burden of proof,<sup>282</sup> may be unduly burdened by issues raised by the IRS for the first time at or just before trial. The IRS should be required to plead any theory it argues at trial.<sup>283</sup> The IRS's case would then be limited to theories and matters raised in the statutory notice, answer, or amended answer.<sup>284</sup>

### CONCLUSION

Tax litigation should not be a game with arbitrary winners and losers. Instead, the procedural provisions of the Code should serve the end of providing a fair forum where the IRS can pursue tax deficiencies and the taxpayer can refute the IRS's assertions.

Tax litigation is comparable to general civil litigation except that, because of the particular role of the government in tax litigation, the taxpayer, who brings the case, functionally defends a claim asserted by the IRS. Looking at tax procedure through

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<sup>280</sup> See *Campbell v. Commissioner*, 90 T.C. 110, 114 (1988) ("Petitioners, should it be necessary, and other taxpayers who petition this court under similar circumstances, will be allowed to amend their petition . . . within a reasonable period after respondent informs them of the manner in which the deficiency and additions to tax were determined.").

<sup>281</sup> TAX CT. R. 31(a).

<sup>282</sup> TAX CT. R. 142(a).

<sup>283</sup> See *Tauber v. Commissioner*, 24 T.C. 179, 184 (1955) ("The Commissioner must properly plead and prove any such alternative issue as the one he has in mind, which is upon a new theory different from and inconsistent with the determination of the deficiencies."); see also *Hull v. Commissioner*, 87 F.2d 260, 261 (4th Cir. 1937); *Estate of Hibbs v. Commissioner*, 16 T.C. 535, 546 (1951) (IRS bears burden of proof on issues in its own pleadings); cf. *Johnsen v. Commissioner*, 83 T.C. 103, 119-21 (1984) (where a party would be prejudiced by an adverse party raising a theory for the first time on brief, the theory is not properly before the court), *rev'd*, 794 F.2d 1157 (6th Cir. 1986).

<sup>284</sup> Cf. *Schaefer v. Commissioner*, 63 T.C.M. (CCH) 2684, 2689 (1992) ("It is well settled that as a general rule respondent is required to inform petitioner of all of the theories that he intends to rely on at trial in the notice of deficiency, an answer, or an amended answer."); *supra* text accompanying note 198 (quoting *Muserlian*).

the lens of civil procedure illuminates many of the current problems surrounding Tax Court jurisdiction and the role of the statutory notice in tax litigation.

*Bell v. Hood* provides an appropriate analogy for separating the minimal jurisdictional allegations of a statutory notice from pleading in the Tax Court case. Although there is a need for more specific statutory notices, dismissal of the entire case is not the appropriate solution for content errors or omissions in a notice. Similarly, defects in service of the notice do not affect subject-matter jurisdiction and should not warrant dismissal for lack of subject-matter jurisdiction.

Separating out the jurisdictional elements of the statutory notice from the content needed for the litigation to proceed and from the mailing rules of the service function should enable courts to structure tax litigation more fairly. Tax litigation would proceed without the all-or-nothing stakes that currently exist when a taxpayer refutes a vague or uninformative statutory notice by making a motion to dismiss for lack of subject-matter jurisdiction.

