SFRs and Problems in Tax Administration and Enforcement

By Camilla E. Watson

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When the IRS prepares substitutes for returns (SFRs) for a married couple, it prepares separate returns for each of the parties and considers them married filing separately. It will then send separate notices of deficiency to the parties. If only one of the spouses petitions the Tax Court, this could be problematic for both, even if the court’s decision is favorable to the petitioner. The problems identified in this report, while narrow in scope, highlight broader issues in the administration of the tax system. This report proposes reforms to correct the problems in the SFR process, but these proposals apply more broadly to address general problems in the administration of the tax system.

I. Introduction

In her 2014 annual report to Congress, National Taxpayer Advocate Nina Olson advised Congress to consider enacting a Taxpayer Bill of Rights (TBOR) to clarify and reinforce existing taxpayer rights, to make them more accessible to taxpayers, and to prevent government overreaching. She proposed the codification of 10 “rights” so fundamental that the mere fact she is offering such a proposal in the 21st century highlights the depth of basic problems in tax administration.

Many of these problems stem from the fact that the IRS is inadequately funded to properly collect

Today, the IRS is an institution in crisis. In my view, however, the real crisis is not the one generating headlines. The real crisis facing the IRS — and therefore taxpayers — is a radically transformed mission coupled with inadequate funding to accomplish that mission. As a consequence of this crisis, the IRS gives limited consideration to taxpayer rights or fundamental tax administration principles as it struggles to get its job done.

— Nina Olson, national taxpayer advocate

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2Section 7803(c)(2)(B) requires the taxpayer advocate to submit two reports, an “Objectives Report” and an “Annual Report,” to Congress each year.
32014 Objectives Report, supra note 1, at vi-vii. Olson also had called for a TBOR in her fiscal 2007 and 2011 annual reports to Congress. Although there have been three TBORs (in 1988, 1996, and 1998), their provisions are scattered in the Internal Revenue Code. Olson proposes to expand and unify the provisions to make them more accessible to taxpayers.
4The proposed rights are the rights to: (1) be informed, (2) be assisted, (3) be heard, (4) pay no more than the correct amount of tax, (5) an appeal, (6) certainty, (7) privacy, (8) confidentiality, (9) representation, and (10) a fair and just system. Id. On June 10, 2014, Olson and IRS Commissioner John Koskinen announced that the IRS intends to embrace these rights and to join with the national taxpayer advocate to encourage Congress to codify them. See William Hoffman, “Koskinen and Olson Unveil IRS’s New Taxpayer Bill of Rights,” Tax Notes, June 16, 2014, p. 1219. See also IR-2014-72. Koskinen and Olson doubted whether the TBOR could be properly enforced because of inadequate IRS funding and tax code complexity. But Olson was optimistic that if the TBOR is enacted, these rights will become so fundamental that Congress will be forced to increase IRS funding.
taxes and to serve the needs of most taxpayers.\textsuperscript{5} Indeed, Olson has raised this issue for the past several years in her reports to Congress, ranking inadequate funding of the IRS among the top three “most serious problems encountered by taxpayers.”\textsuperscript{6} Inadequate funding has had a ripple effect. One aspect of that effect is that the IRS has been forced to rely more heavily on automation in its enforcement efforts. Olson is concerned that the use of automation will increase both the IRS’s margin of error and the risk that taxpayers will be inadequately informed of their rights.\textsuperscript{7} If so, this could result in taxpayers being deprived of due process in the tax enforcement and collection process. In her 2011 annual report, Olson raised specific concerns about the questionable results and serious taxpayer burdens, including identity theft, that have resulted from automated enforcement assessments, particularly in the automated substitute for return process.\textsuperscript{8}

In her 2014 report, Olson expressed the hope that a codified TBOR would “more clearly expose the gaps in our statutory or administrative construct (i.e., where we lack remedies for violations of our rights).”\textsuperscript{9} While there are many gaps, some fundamental ones lie in the substitute for return (SFR) process when married taxpayers are involved.

Consider the following hypothetical: A married couple files a timely joint tax return that apparently is lost in the mail or lost by the IRS, and as a result, they are considered nonfilers for that tax year. They do not receive any preliminary notices from the IRS and consequently, they make no response. The IRS then prepares separate SFRs for each party and sends separate 30-day letters\textsuperscript{10} to the parties, asking that they respond within 30 days. Again, the parties do not receive the notices, and thus they make no response. The IRS then sends each party a statutory notice of deficiency\textsuperscript{11} proposing to assess a deficiency based on the SFR. The husband receives the notice but the wife does not. The husband then petitions the Tax Court, identifying himself as a joint filer. The Tax Court ultimately decides in his favor, holding that he has no deficiency and that he owes no late filing, late payment, or other penalties.\textsuperscript{12}

The parties may consider themselves home free at this point, but the unofficial position of the IRS is that the Tax Court’s decision applies only to the husband because he alone was before the court. Therefore, it is free to assess and collect against the wife, and since the return is considered filed late, the parties may not use any carryovers from prior returns.

Although narrowly drawn, this hypothetical highlights wide gaps in the law of “fundamental tax administration.” It also raises concerns about the meaning of the term “joint and several liability,” and what it means to file a joint tax return.\textsuperscript{13}

\section*{II. What Constitutes a Tax Return?}

Section 6011 provides that all taxpayers liable for any tax must report their financial transactions each year to the IRS \textsuperscript{7} “on a return or statement according to the forms and regulations” prescribed by the IRS. The significance of the tax return is twofold. First, it implicitly provides the consent necessary for the IRS to assess the tax liability immediately and to start the collection process to collect any unpaid amounts.\textsuperscript{14} Otherwise, the IRS must use the deficiency procedure, which involves considerably more time, effort, and expense.\textsuperscript{15} Second, the filing procedural and jurisdictional significance. See infra notes 15 and 32 for a discussion of the 90-day letter; see also infra text accompanying notes 51-62.

\textsuperscript{11}See supra note 10.

\textsuperscript{12}This hypothetical is based on an ongoing case in which I served as pro bono adviser to the taxpayers. The opinions expressed in this report are mine and not necessarily those of the taxpayers. The issue of notice is discussed infra at Section II.\textsuperscript{13}See infra text accompanying notes 143-148.

\textsuperscript{14}Section 6201(a). The term “assessment” is a defined term that means that the taxpayer’s tax liability is recorded in a summary record of assessment maintained by the IRS. The record must identify the taxpayer, the amount and character of the tax assessed, and the tax period at issue. Section 6203. When the taxpayer files a return, the amount of tax liability on the return is automatically assessed without the IRS having to use the cumbersome deficiency procedure. The IRS may not start the collection process until there has been an assessment, except under extraordinary circumstances. See infra note 15.

\textsuperscript{15}If there has been no return filed or if the IRS determines that there is a deficiency, the IRS must use the deficiency (Footnote continued on next page.)
of the return triggers the statute of limitations for assessment.\footnote{16} Implicit in this second significant factor is that for each taxpayer there can be only one return.\footnote{17}

A. The Validity of a Return

The issue of the validity of a tax return arises in three situations: (1) when the taxpayer fails to sign the return or adds additional language to the jurat (the written declaration that verifies the return is made under penalties of perjury),\footnote{18} (2) when the taxpayer files the wrong form,\footnote{19} and (3) when the taxpayer fails to file a return and the IRS prepares a return for the taxpayer. Section 6020(b) authorizes the commissioner to prepare an SFR for a person who is required to file a return but who either fails to do so or who files a false or fraudulent return.\footnote{20} In either case, the IRS may prepare the return and determine the taxpayer’s tax liability using information supplied from third-party sources such as information returns.\footnote{21} If the taxpayer fails to cooperate in the preparation of the SFR, the amount of tax liability stated on it will invariably be higher than it would have been if the taxpayer had prepared an original return, not only because the IRS will not concern itself with otherwise allowable deductions, credits, and other tax offsets, but also because in the case of a married taxpayer, the IRS will compute the tax using the married filing separately rates instead of the more favorable married filing jointly rates.\footnote{22} This inflated proposed tax liability is designed to encourage the taxpayer to file an original return.

The general factors for determining what constitutes a valid tax return emanate from Beard v. Commissioner\footnote{23} and in the case of taxpayer-prepared returns, these factors are well settled.\footnote{24} But in cases involving an SFR, questions of the validity of the return continue to arise.

B. Section 6020 Returns

There are two types of returns under section 6020. A section 6020(a) return is one in which the taxpayer has cooperated with the IRS in preparing the return. Upon signing by the taxpayer, it is considered the taxpayer’s original return. A section 6020(b)(1) return is one in which the taxpayer has not cooperated with the IRS, and for that reason it is not considered the taxpayer’s return unless the taxpayer decides to adopt the SFR by signing it as her return. But a section 6020(b)(1) return, even unsigned by the taxpayer, is considered a return for some purposes. For instance, section 6020(b)(2) states that an SFR is “prima facie good and sufficient for all legal purposes.” Thus, a taxpayer is responsible for the correctness of the section 6020(b) return.

Footnote continued in next column.

1040 that contains only the taxpayer’s name, taxpayer identification number, address, and filing status. It does not constitute a valid section 6020(b) SFR. Instead, it is created to allow the taxpayer’s account to be opened in the IRS’s master file. See IRM section 4.75.22.7.1 (substitute for return package).

21 Usually these sources are forms W-2 and 1099. For a discussion of the history of SFRs, see Camp, “The Never-Ending Battle,” Tax Notes, Apr. 17, 2006, p. 373, 374-376.

22 Compare section 1, with section 1(a). There are other advantages to filing a joint return. For instance, it allows the spouses to take advantage of deductions that otherwise would have been denied to the benefit of only one party, and thus it allows a type of income averaging for the spouses.

23 See, e.g., Germantown Trust Co. v. Commissioner, 309 U.S. 304 (1940); Hartford-Connecticut Trust Fund Co. v. Eaton, 34 F.2d 128 (2d Cir. 1929).

24 But in the case of taxpayer-prepared returns, these factors are well settled. For instance, section 6020(b)(2) states that an SFR is “prima facie good and sufficient for all legal purposes.” Thus, a taxpayer is responsible for the correctness of the section 6020(b) return.

Footnote continued in next column.
SFR as if she had prepared it herself. However, the broad language of section 6020(b)(2) does not quite mean what it says because for some purposes, an SFR is not considered the taxpayer’s return unless the taxpayer approves and signs it as a return under penalties of perjury, in accordance with the Beard factors. Because an SFR that has not been accepted and signed by the taxpayer is not the taxpayer’s return, the taxpayer is free to voluntarily file an original return after the issuance of a section 6020(b)(1) SFR. The taxpayer may elect to file a joint return with her spouse, even though the SFR was issued solely in the name of the individual taxpayer with the filing status of married filing separately.

C. The Purpose of an SFR

Under the general rule, the IRS may not begin the collection process until there has been an assessment of a deficiency. When the taxpayer files an original return, the amount of tax liability reported on the return is automatically assessed because by filing the return, the taxpayer consents to the assessment. Any amount due that is not reported on the return, however, is a deficiency, and as a general rule, can be assessed only through the deficiency procedure, which begins with a notice of deficiency. In the case of a nonfiler, the entire tax liability plus the additions to tax are a deficiency because nothing has been reported on an original return. In that situation, the IRS usually will prepare an SFR to encourage the taxpayer to file an original return so it can start the assessment process.

Because the section 6020(b) SFR is not considered the taxpayer’s original return the taxpayer has not implicitly consented to be assessed, so the IRS may not summarily assess a deficiency against the taxpayer but instead must use the deficiency procedure. Thus, the IRS must issue a notice of deficiency, based on the SFR (unless the taxpayer has signed a waiver of those restrictions) and may assess a deficiency against the taxpayer after the required 90-day period has passed without the taxpayer either having appealed successfully to the IRS or having filed a petition in the Tax Court.

Since the section 6020(b)(1) SFR is not considered the taxpayer’s filed return, the preparation of such an SFR does not start the running of the statute of limitations on assessment and collection. While additions to tax for failure to timely pay the tax liability may apply to an SFR, the addition to tax for failure to timely file does not stop the continuing accrual of the 5 percent (25 percent maximum) late-filing penalty. Thus, the penalty for failure to timely file the return stops accruing only when the taxpayer either files an original return or accepts and signs the SFR under penalties of perjury.

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25Reg. section 301.6020-1(a)(2).
26Id. at reg. section 301.6020-1(b)(3). These penalties begin to run when a return is filed. But the SFR must be subscribed in accordance with section 6020(b) and must be sufficient to provide the basis for calculating additions to tax. Otherwise, the Tax Court will not impose the section 6651(a)(2) addition to tax for failure to timely pay the tax liability shown on the return. See, e.g., Cabraca v. Commissioner, 120 T.C. 162 (2003), aff’d in unpublished op., No. 03-3157 (3d Cir. Feb. 10, 2004); Rhodes v. Commissioner, T.C. Memo. 2003-133; Sparlin v. Commissioner, T.C. Memo. 2003-124.
27See reg. section 301.6020-1(b)(3), which states that SFRs under section 6020(b) “shall be good and sufficient for all legal purposes except insofar as any Federal statute expressly provides otherwise” (emphasis added).
28Section 6013(a) allows a husband and wife to file a joint return, subject to exceptions, even though one spouse has neither income nor deductions.
29See Millspa v. Commissioner, 91 T.C. 926 (1988), acq. in result AOD-1992-03. Under normal rules, a taxpayer who has filed a separate return may elect to file a joint return with his spouse under section 6013(b)(1), subject to exceptions in section 6013(b)(2). Those exceptions apply to a taxpayer who has filed a separate return. If the taxpayer has not filed a return at all, the exceptions do not apply and the taxpayer is free to file separately or jointly.
30This frequently is referred to as “self-assessment” but, as Bryan Camp points out, this technically is incorrect because only the IRS can assess a tax liability. See Camp, supra note 17, at 531.
 Courts disagree whether a section 6020(b) SFR is considered a return for purposes of discharging tax liabilities in bankruptcy. The Bankruptcy Code allows a debtor to discharge some debts, even some federal income taxes. But it provides an exception from discharge if the debtor fails to file a tax return, files a fraudulent return, or files a late return within two years of filing the bankruptcy petition. Before 2005, courts generally agreed that an unsigned SFR did not constitute a valid return for discharge purposes.

However, some courts held that if specific factors and conditions were met, an agreement between the taxpayer and the IRS might constitute a “constructive return” for bankruptcy purposes. But in 2005, Congress added a provision to the Bankruptcy Code that clarified that “the term ‘return’ means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).” Such term includes a return prepared pursuant to section 6020(a) . . . but does not include a return made pursuant to section 6020(b).”

As a result of these actions, an SFR that is not signed by the taxpayer is not considered the taxpayer’s return for purposes other than the assessment of a deficiency and corresponding penalties. But an SFR is not needed to assess the deficiency because if no return is filed, the IRS may simply issue a notice of deficiency, follow the deficiency procedure, and assess the deficiency. Indeed, the IRS will have to follow the deficiency procedure regardless of whether an SFR is prepared. Thus, the real utility of an SFR is threefold: first, it allows the IRS to impose the penalties under section 6651(a)(2) and (a)(3) for failure to timely pay the amount of tax shown on the “return” and for failure to pay the estimated tax; second, it operates to preclude the taxpayer from obtaining a discharge of the taxes in bankruptcy if the taxpayer does not cooperate with the IRS in the preparation of the SFR and sign it as the taxpayer’s return; and finally, if the taxpayer should file a petition in the Tax Court, it helps the IRS meet its burden of persuasion by providing an indication to the court of how it derived its figures in the absence of an original taxpayer-prepared return.

Acceptance of Overassessment. However, the agreement had to meet the factors derived from Germantown Trust Co. v. Commissioner, 309 U.S. 304 (1940).

44See 11 U.S.C. section 523(a)(19), added by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), P.L. 105-8, 199 Stat. 23. Before this addition, the majority of courts that had considered the issue had held that a return filed post-assessment did not constitute a return for 11 U.S.C. section 523(a)(1)(B) purposes. Only the Eighth Circuit, in In re Colson, 446 F.3d 836 (8th Cir. 2006), held that a post-assessment return constituted a “return” for purposes of discharging the debtor’s tax liability. See also Casano v. IRS, 473 B.R. 504 (E.D.N.Y. 2012) (discussing the 2005 BAPCPA addition).

47See supra note 40.

48The rationale for the ruling is that section 6065 requires a tax return to be verified under penalties of perjury. Id.

49But see Camp, supra note 40 (arguing that the IRS misconstrued Beard and section 6065, and thus was wrong in issuing Rev. Rul. 2005-59). The term “deficiency,” like the term “assessment,” is a defined term. See supra notes 14-15.

50See discussion, supra note 15.
III. The Problem of Notice

The notice process in the assessment of a deficiency is statutorily defined and requires the IRS to send a notice of the deficiency via certified or registered mail to the taxpayer’s last known address. The IRS then is precluded from assessing or collecting the deficiency until the expiration of 90 days from the date of mailing of the notice, unless the taxpayer signs a waiver of the restrictions or files a petition in the Tax Court. In the former case, the IRS may assess immediately without further regard to the restrictions; in the latter case, the IRS may not assess or collect until the decision of the Tax Court is final. If the taxpayer neither signs a waiver nor files a petition in the Tax Court, the deficiency will be assessed when the 90-day period expires, and the collection process will begin. The taxpayer has far fewer rights once the deficiency has been assessed. Thus, notice of a proposed deficiency is very important.

The 90-day period for filing a petition in the Tax Court is a firm limit. Once it expires without the taxpayer having filed a Tax Court petition, the tax liability may be assessed and the collection process may begin upon issuance of a notice and demand for payment.

The notice of deficiency must be mailed to the taxpayer’s last known address. In the case of a joint return filed by a husband and wife, a single joint notice of deficiency may be sent unless the IRS has received notice that the parties have separate residences. In the case of an SFR, however, a notice of deficiency will be sent to each spouse separately because the IRS will presume they are separate taxpayers.

A. Last Known Address

The statutory requirement of mailing a notice of deficiency to the taxpayer’s last known address is noteworthy because the statute does not require the taxpayer to actually receive the notice for it to be valid. Thus, it is the mailing of the notice that is statutorily significant. It determines the validity of the notice, the time frame for filing the petition in the Tax Court, the tolling of the statute of limitations on assessment, and the accrual of penalties and interest.

The last known address generally is the address on the taxpayer’s most recently filed and properly processed tax return unless the taxpayer notifies the IRS of a different address. An incorrectly addressed notice of deficiency may be valid nonetheless, if the taxpayer receives the notice in sufficient time to file a petition in the Tax Court. If so, the incorrectly addressed notice is regarded as a harmless error.

51 See section 6212 (notice of deficiency). Section 6212(a) requires that the notice inform the taxpayer of his right to contact the local office of the taxpayer advocate if he should need assistance. The notice must contain the address and phone number of the appropriate taxpayer advocate office. Id.
52 Section 6213(a).
53 Id. at section 6213(d).
54 Id. at section 6213(a).
55 Id.
56 Id. at section 6213(c).
57 The taxpayer is entitled to receive notice from the IRS at least 30 days before a proposed levy. This notice informs the taxpayer the IRS intends to levy and that the taxpayer may challenge the proposed levy. The taxpayer then has 30 days from the date of the notice to request such a hearing. If there is an adverse determination, the taxpayer may seek judicial review in the Tax Court. See sections 6320, 6330, and 6331. But if the Tax Court initially heard the taxpayer’s deficiency case and decided against the taxpayer, her chance of prevailing in a CDP review in the Tax Court will be slim. See also infra text accompanying notes 156-163.
58 There are some exceptions, however, such as bankruptcy, in which a taxpayer is precluded under the automatic stay from filing a Tax Court petition during the 90-day period. In that case, the 90-day period is suspended for the duration of the stay and for 60 days afterward. Section 6213(f). The 90-day period also is extended for some excise taxes. Further, the 90-day period is extended to 150 days if the notice is addressed to a taxpayer out of the country. Section 6213(a).
59 See section 6213(c); see also supra note 15.
60 Section 6212(b).
If a notice of deficiency is returned to the IRS as refused/undeliverable, it is examined to determine whether it was sent to the taxpayer's last known address. If so, the IRS considers its duty done, and generally, no further effort will be expended to locate the taxpayer before the expiration of the 90-day period. If, however, the IRS is made aware of a new address, even though it is not the taxpayer's official "last known address," the IRS usually will send a "courtesy copy" of the notice to the taxpayer at the new address. However, this copy will not restart the running of the 90-day period.

In 2012, Olson pointed out that the IRS was using "mid-20th century technology" in determining the last known address. Specifically, she complained that the IRS was not searching beyond its databases for last known addresses and she recommended that Congress amend the Internal Revenue Code to provide a discrete definition of the term "last known address" and to require the IRS to mail duplicate notices to credible alternate addresses such as those determined through searches of department of motor vehicle records and real estate records. But Congress has failed to act on this recommendation and the Internal Revenue Manual currently states: "In no event should databases or information outside of IRS systems be consulted for addresses. Alternative addresses, to the extent that they are used, must have been provided to the IRS by the taxpayer or his representative (or other agent)."

B. Automated Enforcement Assessments

The automated SFR (ASFR) process is largely run by computers with little human involvement. Thus, computers scan the third-party reporting information and send out the 30-day and 90-day letters. Computers also determine the taxpayer's last known address to which those notices are mailed.

Olson, in her 2011 report, complained that the IRS's use of automated enforcement assessments — particularly the ASFR program — was inefficient, unfair to taxpayers, and a "drain on IRS collection resources." Specifically, she noted that the automated enforcement assessments discouraged communication with taxpayers and resulted in lengthy case resolutions. She further noted an inordinately high number of defaulted assessments with ASFR returns in the preceding fiscal year (2010) and that most of the collections from ASFR assessments were through prepaid credits, such as carryovers from previous tax years, estimated taxes, and taxes withheld from wages.

Olson complained that the automated system frequently generated assessments under old and incorrect addresses, which resulted in lack of taxpayer notice of the assessment. The IRS became aware of that problem in 1998 and took steps to alleviate it by requiring address verification. In 2004, however, it returned to the old method of sending notices without adequate address verification, and the number of ASFR assessments rose 484 percent in the following year. Despite the rise in assessments, from fiscal 2006 through fiscal 2011, the IRS collected less than 10 percent of the delinquency amounts established through the ASFR process.

Olson proposed that the IRS make a greater effort to work directly with taxpayers to avoid ASFRs and

69See IRM section 8.2.2.3.2 (undeliverable or unclaimed appeals issued statutory notice of deficiency). A notice of deficiency is considered undeliverable if the taxpayer has moved and left no forwarding address or if the notice is returned marked "unclaimed" or "refused." IRM section 4.8.9.21.
70Id.
71Id. If the notice was not sent to the last known address, it must be reissued and sent to the correct address. This will restart the running of the 90-day period. Id.
722012 NTA Annual Report, supra note 6, Legislative Recommendations 4, at 526.
73Id.
74IRM section 4.8.9.8.2.5. The IRS's current policy is based on Abeles v. Commissioner, 91 T.C. 1019 (1988), in which the Tax Court took the agency to task for using the address on the return under examination rather than the address on the most recently filed return. The Tax Court noted that a search of the IRS computer database would yield the address of the most recently processed return, unless the taxpayer has given clear and concise notification of a different address. Id. at 1035. According to the court, "The state of the IRS's computer capabilities is such that a computer search of the information retained with respect to a specific taxpayer, including their last known address, may be performed by respondent's agent without unreasonable effort or delay." Id. at 1033.
75See Camp, supra note 40, at 1512, n.12.
762011 NTA Annual Report, supra note 6, MSP 5, at 93.
77Id.
78Id.
79Id. at 98.
80Id. at 98. After a 1998 study showed that there were high numbers of cases in which taxpayers had received no actual notice of the ASFR assessment, the IRS in 1999 began to require confirmed addresses for ASFR assessments. It did this primarily through postal tracer checks to verify addresses with the post office. Id.
81Id.
82Id. at 94, 98. The number of SFRs generated through the ASFR process increased nearly 900 percent from fiscal 2002 to fiscal 2011. Id. at 93. According to the NTA Report, in fiscal 2011, the IRS abated about two-and-a-half times as many ASFR assessed deficiency dollars as it collected and it wrote off as not collectible approximately four times the amount collected.
the ASFR process. She suggested a “one-stop service” to resolve ASFR cases more efficiently. This would require greater emphasis on taxpayer contact, enhanced customer service, and direct communication with taxpayers to ensure that they are aware of the IRS notice and what it means and that they are informed of their rights. Olson suggested that the process be simplified to avoid errors made by the IRS in adjusting taxpayers’ accounts to reflect their original returns. The chance of error on the part of the IRS is increased because the ASFR process does not involve direct IRS personnel interaction with taxpayers. Indeed, tax practitioners have reported that their clients are being billed for taxes, penalties, and interest that they do not owe.

C. Reasons for Lack of Timely Notice

Reduced taxpayer contact from automation exacerbates the lack of notice problem, particularly among the poor, who tend to be mobile and might not always leave forwarding addresses, sometimes because of foreclosure evictions. Some taxpayers might not speak English or may be unable to comprehend the legal jargon in the notice; they may lack education or representation.

To be clear, there are people who may purposely avoid receiving notice from the IRS. But there are also honest taxpayers who do not purposely avoid such notice but who also might not receive notice for reasons other than being poor, itinerant, or uneducated. For instance, they may have been displaced from their homes by a natural disaster: Notifying the IRS of a change of address may not have been foremost in their minds at the time. There are those who are mentally ill who may suffer from ailments ranging from depression to schizophrenia, which may render them incapable of either comprehending the notice or being able to perform their legal duty within the required time frame. Also, there are taxpayers who may have been hospitalized or away from home temporarily for job purposes or temporarily out of the country for an extended period, whether for business, family, or vacation purposes.

There is also the problem of nondelivery of the notice. Sometimes mail becomes lost, destroyed, or delayed in transit through no fault of the taxpayer. In the case of an SFR, in which separate returns are prepared for married (or formerly married) taxpayers, the parties frequently may be living apart, so the notice might not be delivered to the correct address. An insidious problem in this case is that there may be acrimony between the spouses or former spouses so that the person who receives a notice addressed to the other party might not inform the other party of the notice in a timely manner — or at all.

For whatever reason, if a taxpayer fails to receive timely notice or cannot comprehend the notice, the consequences may be dire, particularly in the case of an SFR, because the balance due is usually inaccurate and inflated. By the time the deficiency has been assessed and the collection process begins, the size of the tax debt may dwarf the original obligation because of the accumulation of penalties and interest. Even though the taxpayer may not have owed the initial amount, by that time it does not matter because once the 90-day period has passed and the taxpayer hasn’t responded, the IRS will assess the inflated amount and begin the collection process, which may lead to wage garnishment or property liens. It should be observed that while the IRS may have had difficulty in locating

84The NTA Report notes that in fiscal 2010, taxpayers disagreed with 83 percent of ASFR assessments. Id. at 99 (citing IRS response to Taxpayer Advocate Service information request (July 13, 2011)). This means that more IRS resources will have to be spent to collect those amounts, if indeed they are collectible.

85For instance, Olson noted that taxpayers generally are not informed that the ASFR process can be halted with a self-reported tax return. Id. at 99.

86Id. at 97.

87Id. at 102.

88Id. at 100, n.52; see also infra text accompanying notes 152-155. Olson bases this on anecdotal evidence from tax practitioners whose clients have filed original returns showing that they are entitled to refunds, yet they still are being charged penalties and interest for nonpayment. Id.

89See Carlton M. Smith, “Let the Poor Sue for a Refund Without Full Payment,” Tax Notes, Oct. 5, 2009, p. 131. They may be more prone to theft due to broken mailboxes or from extended family members who may be desperate for funds. Identity theft is a problem here because the notice generally bears the TIN, which is usually the taxpayer’s Social Security number, and the notice may contain other personal information. See 2011 NT A Annual Report, supra note 6, at 98-99. In fact, identity theft may be the primary motivating factor in the theft of tax notices.

90The required 90-day period is extended to 150 days for taxpayers located out of the country. See section 6213(a). But that may not always be sufficient.

91According to Olson, approximately 10 percent of the IRS’s mail is returned. See 2011 NT AAnnual Report, supra note 6, at 21. In the ongoing case referred to in supra note 12, the U.S. Postal Service inexplicably failed to deliver portions of the taxpayers’ mail until months later.

92See Abeles v. Commissioner, 91 T.C. 1019 (notice sent to primary TIN). See Mannella v. Commissioner, 631 F.3d 115 (3d Cir. 2011), aff’g in part and rev’g in part 132 T.C. 196 (2009) (husband hid notice of intent to levy from wife, affecting her ability to file for relief as an innocent spouse).

93See section 6321 (authority for liens); section 6331 (authority for levies against wages and other property).
the taxpayer to send notice of the assessment process, it seems to have greater success locating the taxpayer for collection.

IV. Refund Actions

Once the tax has been assessed, if there is no relief for the taxpayer in a collection due process hearing95 (or in a later Tax Court appeal), the taxpayer’s only recourse is to pay the tax liability and file a claim for refund. But this is a back-end remedy that is inadequate for many taxpayers.

If a taxpayer has overpaid her tax liability, she may file a claim for refund with the IRS.96 If that claim is denied or not acted on within a period of six months,97 she may file a suit for refund in either the federal district court or the U.S. Court of Federal Claims.98 However, this is not always as simple as it sounds.

A. Problems With Refund Claims

An overpayment may arise in several ways — for example, from a mistake on the return, a carryforward or carryback of a tax credit, or through an involuntary payment made because of an excessive collection action. In the latter case, it may not be simply a matter of making an overpayment. An enforced collection action may take some time to complete, and usually during that time, the taxpayer’s property is subject to a lien so she might be unable to sell, transfer, or mortgage her property. Also, her wages and salary may be garnished, which could adversely affect her credit rating and her relationships with her employer and coworkers. Wage garnishment could cause her to lose funds that she might desperately need. A considerable amount of time may elapse from the time the enforced collection action is completed, to the filing of the claim for refund to the filing of a suit (if the refund claim is denied), to the court’s decision and possible appeal. During that period, the taxpayer may be unfairly deprived of her funds.

Another problem is that the refund claim must be filed within the statutory period. This period is the later of three years from the date the return is filed or two years from the date of payment.99 The claim must be filed with the IRS and it must meet the requirements of a valid claim.100 If the claim is either denied or not acted upon within six months, the taxpayer may file suit in either the federal district court or the U.S. Court of Federal Claims. However, a jurisdictional requirement for filing a refund suit in either of those courts is that a claim must first be filed with the IRS.101 Thus, no suit may be maintained until such a claim has been filed. The statutory period for filing a suit for refund is the earlier of two years from the date of the notice of disallowance of the claim or two years from the expiration of six months after the claim has been filed with the IRS if no action has been taken on the claim within that time.102 If the taxpayer fails to file suit within the statutory period, the claim becomes stale and the taxpayer may not recover her money.

A hidden danger for the taxpayer in filing a refund claim, however, is that the IRS may consider all items during that tax year, regardless of the statute of limitations, to determine whether there

95See section 6320(b); see supra note 57 and discussion, infra text accompanying notes 156-162.
96Section 6402(a); section 6511(b)(1). An overpayment is defined generally as the excess of the amount of tax paid over the amount of tax owed. However, an overpayment may include a “statutory overpayment,” defined as the amount of “tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.” Section 6401. Normally, an individual filing a claim for refund of income taxes will do so on Form 1040X. If an amount has been overwithheld from the taxpayer’s wages, however, the taxpayer may file a claim for refund of the overwithheld amount on the original Form 1040 for that tax year. Some forms of overpayment may not require the making of a separate claim for refund, such as a math error on the return that produces an overpayment. If such an error is discovered by the IRS, it will voluntarily refund the amount of the overpayment to the taxpayer.
97See section 6532(a)(1).
98See section 7422. In the case of tax refund claims, the government has waived its sovereign immunity to allow civil suits by taxpayers. 28 U.S.C. section 1346(a).
99Section 6511(a). If no return is filed, the statutory period for filing a refund claim is two years from the date of payment. Id. In determining this period, the same rules apply for determining when a return is filed. Generally, a return is deemed filed when it is received by the IRS. But if the return is filed before the due date (without regard to extensions), it is deemed filed on the due date. This is the “early return rule.” See section 6501(b)(1). A return filed by the due date (with regard to extensions) but received by the IRS after the due date is considered filed on the date of the postmark. This is called “the mailbox rule.” See section 7502.
100The claim must meet both the notice and procedural requirements. The notice requirements demand that the claim clearly establish in detail each ground on which the refund claim is based and it must be sufficient to notify the IRS of the basis of the claim. Also, the claim must be filed by or on behalf of the taxpayer who made the overpayment, and it must be verified and filed with the proper IRS office. Section 6402(a); reg. section 301.6402-2. Note that the anti-assignment statute prevents the taxpayer from selling or assigning the claim. See 31 U.S.C. section 3727.
101See section 7422(a) (authorizing civil suits against the government).
102Section 6532 (a)(1). The two-year period may be extended if there is an extension agreed to between the taxpayer and the IRS. Id. at section 6532(a)(2). The period may be shortened if the taxpayer files a written waiver of the notice of disallowance. In that case, the two-year period will begin on the date the waiver is filed. Id. at section 6532(a)(3).
has been an overpayment.103 If an item is discovered that would increase the tax liability for that year, that item may be used to offset the potential refund. On the other hand, if an item that decreases tax liability for that year is discovered, the IRS does not have to refund that amount if it is not covered by the refund claim.104

Finally, if the taxpayer files a suit for refund, the court may consider only the items covered by the initial refund claim because the claim is a jurisdictional requirement for suit, so the issues before the court are defined by the refund claim.105 Thus, care must be taken in drafting the claim.

B. Problems With Refund Suits

1. The Flora rule

To file a refund suit in the federal district court or in the Court of Federal Claims, the taxpayer must have fully paid the tax liability in accordance with the rule established in Flora v. United States.106 There is no hardship exception to this rule.107 Thus, if the taxpayer’s wages are being garnished by the IRS as part of an enforced collection action and the tax liability is being paid in installments, the taxpayer may not bring a suit for refund until the full amount of the tax has been collected. The problem is that the statute of limitations may expire before the entire amount is collected, precluding the taxpayer from filing a refund suit for the amount collected before the expiration of the statute. Thus, if the tax was wrongfully collected, the taxpayer may be without a remedy to reclaim those amounts. The U.S. Supreme Court, in deciding Flora, recognized this problem but reasoned that any inequity would be counterbalanced by the taxpayer’s right to be heard, before payment, in the Tax Court.108

But if, through no fault of her own, the taxpayer fails to receive adequate notice (or fails to comprehend the notice) in sufficient time to file a petition in the Tax Court, the Flora full-payment rule remains inequitable. Admittedly, a taxpayer who has not received adequate notice can challenge the underlying deficiency in a CDP hearing,109 but she may face problems obtaining that hearing.110 However, that remedy may not be suitable for all taxpayers, and thus the full-payment rule should be relaxed for any taxpayer who, through no fault of her own, has failed to receive adequate notice and whose tax liability was wrongfully or illegally collected. Otherwise, the taxpayer is without a remedy for a wrongful or illegal action of the government. This is a matter of basic fairness and due process.

2. The Cheesecake Factory case

Congress established two routes for a taxpayer to challenge the IRS in court. One is through the Tax Court, in which a taxpayer may bring suit to challenge a deficiency in tax without first having to pay the tax liability. The second is through a refund suit in either the federal district court or the Court of Federal Claims. Each route has separate jurisdictional requirements.

Although the Tax Court has deficiency jurisdiction, it also has incidental jurisdiction to determine that an overpayment has been made and that the taxpayer is entitled to a refund. The Tax Court has exclusive jurisdiction for the tax years covered by the notice of deficiency.111 By permitting incidental refunds, Congress has allowed all issues concerning the tax year in question to be heard in a single proceeding. Once the Tax Court assumes jurisdiction, it extends to “the entire subject of the correct tax for the particular year.”112

In Cheesecake Factory Inc. v. United States,113 the Court of Federal Claims granted the government’s motion to dismiss the taxpayer’s refund suit on the ground that the taxpayer chose to litigate in the Tax Court and thus it was precluded from filing a refund suit for the same tax year.114 The interesting aspect of Cheesecake Factory is that the taxpayer was 103 See Lewis v. Reynolds, 284 U.S. 281 (1932) (defining an overpayment).
104 See Rev. Rul. 81-87, 1981-1 C.B. 580. Of course, the Lewis v. Reynolds doctrine applies to the taxpayer as well as the government, so if the IRS proposes a deficiency during an earlier period, the taxpayer may use an overpayment for that period to offset the amount of the deficiency, even though the taxpayer might otherwise be unable to recover the overpayment.
105 This is known as the “substantial variance” doctrine. The grounds raised in the complaint cannot vary substantially from the grounds set forth in the refund claim. See Ottawa Silica Co. v. United States, 699 F.2d 1124 (Fed. Cir. 1983).
106362 U.S. 145 (1960), aff'g on rehrg. 357 U.S. 63 (1958). If, however, the tax is divisible, such as excise taxes, the payment of one tax will fulfill the full payment rule. See Steele v. United States, 280 F.2d 89 (8th Cir. 1960); but see Korobkin v. United States, 988 F.2d 975 (9th Cir. 1993) (penalty on abusive tax shelter transactions is not a divisible tax, despite statute’s wording imposing penalty on “such activity”). The courts are divided whether the full payment rule includes interest and penalties. Compare Horkey v. United States, 715 F. Supp. 259, 260 (1989) (payment of penalty required), with Kell-Strom Tool Co. Inc. v. United States, 205 F. Supp. 190, 194 (D. Conn. 1962) (payment of interest and penalties not required); Shore v. United States, 9 F.3d 1524 (Fed. Cir. 1993) (payment of interest and penalties not required).
107 See Curry v. United States, 744 F.2d 852 (7th Cir. 1985).
108362 U.S. at 175-176.
109 See infra text accompanying notes 156-163.
110Id.
111 Section 6512(a).
113Id.
114The government based its argument on section 6512(a), which limits a taxpayer’s ability to bring a suit for a refund or credit of income tax for a tax year with respect to which the taxpayer has filed a petition in the Tax Court.
requesting a refund of an overpayment of interest and penalties on an alleged underpayment. These amounts are not subject to the deficiency procedures, and thus according to the taxpayer, could not have been raised in the Tax Court.\textsuperscript{115}

The Court of Federal Claims, however, noted that the Tax Court’s jurisdiction extends to the “entire subject of the correct tax for the particular year.”\textsuperscript{116} Consequently, it decided that even if those issues could not have been raised before the Tax Court, a court with refund jurisdiction remains barred from hearing the case.\textsuperscript{117} Thus, the taxpayer in this case was left without a remedy because it chose to bring suit in the Tax Court. It is very poor tax administration policy when substantive outcomes depend on choice of process.\textsuperscript{118}

V. The Problem of SFRs and Joint Returns

If a taxpayer receives a notice of deficiency based on an SFR, she has three choices. First, she can do nothing. The IRS then will assess the full amount stated on the SFR and begin the collection process to collect that amount. Second, she can adopt the SFR as her return by signing it. It then will be considered her original return for all purposes, and the tax due on the return will be assessed immediately. Third, she can prepare and file an original return if she disagrees with the amount of the tax liability stated on the SFR, which generally will be the case. Because a section 6020(b) return is not considered the taxpayer’s original return, she is free to elect her filing status on the original return in accordance with the Internal Revenue Code.\textsuperscript{119} Therefore, a married taxpayer may file a joint return at this point, even though an SFR has been prepared for the taxpayer with the status of married filing separately.

She also may file an original return after she has filed a petition in the Tax Court. Even though the notice of deficiency is issued in the taxpayer’s name alone, she may elect to file a joint return with her spouse.\textsuperscript{120} But if the parties are married and only one party petitions the Tax Court — because the other party did not receive a notice of deficiency, did not understand the notice, or opted to ignore the notice — the nonfiling party may have a very difficult time later.

A. What Is the Effect of the Tax Court’s Decision?

In the initial hypothetical, a married couple filed a return that could not be located by the IRS and they were issued separate SFRs. Only the husband received a notice of deficiency; the wife, for whatever reason, did not receive one.\textsuperscript{121} The husband filed a timely petition in the Tax Court, and informed the court that he had filed a joint return with his wife, a copy of which he presented to the court.\textsuperscript{122} He explained that the initial return was timely mailed, and the Tax Court held in his favor that he does not owe further tax, penalties, or interest. What does that decision mean for both the husband and the wife? What does it mean if there are carryovers of overpayments from prior tax years?

At first blush, these seem to be simple questions with simple answers: the tax return was timely filed; the parties owe no further tax or additions to tax. Any carryover from a prior tax year may be used to the extent allowable, and the decision should apply equally to the wife because when a husband and wife file a joint tax return, they are considered to be one taxpayer/economic unit.\textsuperscript{123}

\textsuperscript{115}Id. at 692, 696. The interest might have been contestable in the Tax Court under section 7481(c), which allows an interest overpayment to be re-litigated if the case is brought within one year. Id.

\textsuperscript{116}Id. at 692.

\textsuperscript{117}Id. at 695.


\textsuperscript{119}See Millsap v. Commissioner, 91 T.C. 926, 938 (1988), acq. in result only AOD 1992-03 (holding that returns prepared under section 6020(b) do not preempt or preclude a taxpayer’s right to contest the deficiency determined by the IRS, including selecting a filing status under section 6013). Despite the Millsap decision, the IRS has continued to claim that a section 6020(b) SFR constitutes a separate return, thereby precluding a married taxpayer from filing a joint return after notice of deficiency has been issued following the preparation of an SFR. See Fesssey v. Commissioner, T.C. Memo. 2010-191 (Tax Court, citing Millsap, rejected government’s argument that preparation of an SFR under section 6020(b) constitutes a separate return for purposes of triggering the section 6013(b)(2) statute of limitations). This is also the position the government took initially (in the past 18 months) in the ongoing case referred to at supra notes 12 and 91.

\textsuperscript{120}Id.; see also Phillips v. Commissioner, 851 F.2d 1492 (D.C. Cir. 1988).

\textsuperscript{121}The wife should be very concerned at this point because if she has received an SFR, she also should have received a notice of deficiency. If her notice has been misaddressed or lost in the mail, this is not necessarily grounds for relief. If the notice has been issued and is determined later to be valid (see supra text accompanying notes 67-68), the clock could be running on her assessment and her period for filing a petition in the Tax Court may expire or be shortened. See supra note 15.

\textsuperscript{122}We would also have to assume that the parties, in filing their initial return, did not send the return certified mail, return receipt requested or they cannot locate a copy of the return receipt (also known as the “green card”). While the IRS does not accept a return receipt as proof positive that the taxpayer filed a return, nevertheless, a copy of the return bearing a date close to the alleged date of the receipt should place the burden on the government to disprove the taxpayer’s assertion.

\textsuperscript{123}Section 6013(a); reg. section 1.6013-1(a)(1).
and the principle of joint and several liability applies.\textsuperscript{124} In reality, however, the situation is much more complicated because despite the Tax Court’s decision and the favorable case law, the government argues that the Tax Court decision relates solely to the husband, since only he was before the Tax Court.\textsuperscript{125} While the IRS will abate the wife’s tax liability to reflect the married-filing-jointly status, it considers the joint return to have been filed late\textsuperscript{126} despite the Tax Court’s decision that the husband owes no late-filing or late-payment penalty. The effect of that determination is that the parties may not avail themselves of any credit carryovers because the return is considered filed after the statute of limitations has run and the parties are subject to late filing and late payment penalties.\textsuperscript{127} Thus, the IRS illogically considers itself free to assess and collect from the wife, despite the husband’s favorable Tax Court decision. The IRS takes the position that as far as the wife is concerned, her return (even though a joint return is at issue) was submitted on the date the return was presented by the husband to the Tax Court, and thus it is a late return for the wife, and the carryovers from prior tax years cannot be used to her credit.

How can the government take this position? Apparently by arguing that the Tax Court decision relates solely to the husband’s SFR that was before the court and not to the joint return that he presented to the court.\textsuperscript{128} The IRS has taken the position that since the court’s decision relates only to the husband’s SFR, the deficiency regarding the joint return that arose because the credit carryovers were not allowed can be assessed against both the husband and the wife.\textsuperscript{129} Later, it reversed its position as to the husband and focused only on the wife,\textsuperscript{130} creating the fictional concept of the “unilateral joint return.”\textsuperscript{7}

The IRS’s position does not make sense for several reasons. First, if the husband stated in his Tax Court petition that he filed a joint return and he presented a copy of that return to the court, how could the court make the determination that he owed no additional tax and no penalties or interest unless it had considered his original jointly filed return, regardless of the caption of the court’s decision? The SFR is not considered the husband’s return if he did not accept it as his return by signing it.\textsuperscript{131} If the husband did not sign the SFR, then in order to reach its decision, the court had to consider his original jointly filed return. This is reinforced by the fact that the court addressed the delinquency penalties\textsuperscript{132} and held that the husband did not owe any of these penalties. That determination could not be made with an SFR, at least not for the late-filing penalty, because the tax code provides that the late-filing penalty does not accrue for a section 6020(b) return\textsuperscript{133} because it is not considered the taxpayer’s filed return.\textsuperscript{134} Thus, if the court had considered only the husband’s SFR, it would have stated that the late-filing penalty would be determined later, and it would have imposed the late-payment penalties.

Second, Cheesecake Factory restated the existing law that when a petition is filed in the Tax Court, all issues regarding that return are before the court, even though it may not have been possible jurisdictionally to raise all of the issues in the Tax Court.\textsuperscript{135} When a petition is filed in the Tax Court, the issues are defined in the notice of deficiency, which must be attached to the petition.\textsuperscript{136} In a case involving an unsigned SFR, everything pertaining to that tax year is before the court because the notice of deficiency states that the taxpayer either did not file a return or filed a false and fraudulent return, and thus everything is a deficiency. Because the definition of a deficiency\textsuperscript{137} depends on a return having been filed, if there is no return, the entire amount of tax liability owed, plus penalties and interest, is a deficiency. Thus, if the Tax Court had considered only the SFR, it would have held that the husband owed the tax plus interest and penalties, as alleged in the notice of deficiency. Instead, the court’s decision indicates that the taxpayer’s original return

\textsuperscript{124}Id. at section 6013(d)(3); reg. section 1.6013-4(b).
\textsuperscript{125}This is the IRS’s unofficial position. See Letter from Deborah A. Butler, IRS associate chief counsel (procedure and administration), to Senate Finance Committee member Robert Menendez, D-N.J. (Feb. 26, 2013) (on file with the author).
\textsuperscript{126}Id.
\textsuperscript{127}See section 6651.
\textsuperscript{128}See Butler letter, supra note 125 (noting that the Tax Court decision was captioned in name of party before the court only and does not mention, and therefore does not apply to the nonfiling party).
\textsuperscript{129}This is what happened in the ongoing case referred to at supra notes 12, 91, and 119.
\textsuperscript{130}Id.
\textsuperscript{131}See discussion, supra text accompanying notes 27-29.
\textsuperscript{132}Section 6651(a)(1) (late-filing penalty); section 6651(a)(2) (late-payment penalty); section 6651(a)(3) (late payment of estimated tax penalty).
\textsuperscript{133}See section 6651(g). After conflicting court decisions on this issue, Congress amended the Internal Revenue Code in 1996 to clarify that the section 6651(a)(1) failure to file penalty does not apply to a section 6020(b) return, although the failure to pay penalties do apply. Id. See also supra text accompanying notes 32-40.
\textsuperscript{134}See discussion, supra at Section II.B.
\textsuperscript{135}See supra text accompanying notes 111-117.
\textsuperscript{136}This is a jurisdictional requirement of filing suit in the Tax Court. See Tax Court Rule 34(b) (Content of Petition in Deficiency or Liability Action) and Tax Court Rules, App. I, Form 1.
\textsuperscript{137}See supra note 15 for the definition of a deficiency.
was timely filed because no late filing penalty was imposed. It would not have addressed this penalty at all if only the SFR had been considered.\footnote{See supra notes 26 and 39.} Thus, under the authority of the *Cheesecake Factory* case, the Tax Court had to have considered all issues relevant to the joint return, even if the return was filed after the taxpayer filed a petition in the Tax Court.

Third, the only way in which the government’s position could be at all credible is if the Tax Court had dismissed the case. But that would have required the agreement of the taxpayer as the petitioning party. Moreover, if that had happened, the Tax Court would not have reached a decision on penalties or any other issue. Nor could the government have rescinded the notice of deficiency after the Tax Court petition had been filed. Under the long-standing principle of *Bowman v. Commissioner*,\footnote{17 T.C. 681 (1951).} the Tax Court cannot be deprived of jurisdiction once the taxpayer files a petition and the court agrees to hear the case. In *Bowman*, the taxpayer received a notice of deficiency and filed a timely petition in the Tax Court. The IRS later determined that the notice had been sent in error and rescinded the notice. The Tax Court, however, decided that it retained jurisdiction over the case regardless of the rescission.\footnote{Id. at 685.} It then held that there was no deficiency and thus the petitioner owed no tax, interest, or penalties.\footnote{Id. at 688.} The court reasoned that “A litigant in a matter before a court of competent jurisdiction who brings the other party into court is entitled to an ultimate judgment, and the opposing party cannot defeat the jurisdiction of the court by a waiver or disclaimer on his part.”\footnote{Id. at 685. The court then quoted from *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U.S. 683 (1895): “When an action has been instituted in the court to determine such a controversy, it is not within the competency of the defendant to take himself out of court. A defendant may withdraw his answer and thus let judgment go by default, but he does not thereby deprive the court of a jurisdiction which has been once established. The rule applicable here is no different from that which applies in any other case. When a defendant has by personal service or appearance once been brought into a court, having jurisdiction of the subject-matter, he cannot at his election oust the court of jurisdiction, or prevent the case from passing to judgment. Whether he confesses plaintiff’s right or defaults in answer, or files a denial or a disclaimer, is alike immaterial. In each and all of these cases the jurisdiction remains and the court may enter the appropriate judgment. Where the defendant simply withdraws his answer, as was this case, the court is under no obligations to inquire whether he has lost all interest, but...”}

Fourth, under the principles of joint and several liability, when a joint tax return is filed, each party is liable for the entire tax due and owing, outstanding penalties and interest, and the veracity of the return.\footnote{143 Section 6015(d)(3). But see section 6015 and reg. section 1.6015-1 (providing conditions for relief from joint and several liability on a joint return).} According to the IRM, “under the joint and several liability concept, each spouse is responsible for the entire income tax liability even though all or part of the liability arises from income earned by or a deduction attributable to the other spouse.”\footnote{Id. at 694-695.} Thus, the parties are considered one taxable unit\footnote{Section 1.6015-1 (providing conditions for relief from joint and several liability on a joint return).} with the same liability, regardless of which spouse earned the income in question.\footnote{144IRM section 25.15.1.2.}

Under that same principle, if the Tax Court decides that the husband filed a timely joint tax return, and that the tax liability shown as due on that return has been fully and timely paid, then a fortiori that decision must apply equally to the wife because she signed the joint return, even though she was not physically before the Tax Court. It should not matter that she already has been assessed on the basis of the SFR.\footnote{145Indeed, it has been the IRS’s long-standing view that “a single joint return is one return of a taxable unit and not two returns of two units on one sheet of paper.” Camp, supra note 118, at 1308 (citing I.T. 1575, II-1 C.B. 144 (1923)). This view has been reinforced by the U.S. Supreme Court in *Taff v. Helvering*, 311 U.S. 195, 198 (1940), and *Helvering v. Jannay*, 311 U.S. 189 (1940).} This, of course, presupposes that

may proceed to judgment, and its judgment is an adjudication of the rights of the plaintiff, as shown by the complaint and testimony.

*Id.* at 694-695.

\footnote{146Reg. section 1.6013-4(b).} Although the IRS has been successful in the bankruptcy context using the argument that it does not have to accept a return filed post-assessment because it does not serve any purpose under section 6011 (see, e.g., *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999) (post-assessment return is not a “return” for purposes of discharging debts in bankruptcy); *In re Moroney*, 352 F.3d 902 (4th Cir. 2003) (same); *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000) (same)), it will not use this argument in the SFR context in which the married parties file a joint return. The IRM itself provides that when one taxpayer petitions the Tax Court for redetermination of a deficiency based on the joint return, the IRS must take the administrative steps to adjust a non-petitioning spouse’s account records to accord with the Tax Court case, even when the non-petitioning spouse has been assessed. *See IRM section 8.4.1.18.4.1, at 3(C). (“Since the deficiency shown in the notice of the non-petitioning spouse has already been assessed in a separate MFT 31 account, APS [Account and Processing Support] will adjust the amount to...”)}
the government considers the Tax Court decision to have been based on a joint return. By alleging that the Tax Court decision related only to the SFR and not to the joint return, this allegedly allows the government to consider the joint return filed late and therefore not to allow the credits to carry over. Because that produces a deficiency, the government can assess that deficiency against the husband, contrary to the decision of the Tax Court.148

If the parties can obtain a court hearing, they have a strong collateral estoppel argument based on the favorable Tax Court decisions. This should force the IRS to adjust its transcript to allow the taxpayers the benefit of their overpayment carryovers from prior returns. The problem, however, is getting to court.149

B. Transcript Problems

When the IRS prepares SFRs for married taxpayers, it will prepare separate SFRs for the parties under the filing status of married filing separately and it will create separate transcripts for the parties. A transcript is a record of the taxpayer’s past tax returns. It is used frequently by taxpayers to secure mortgages, student loans, and small business loans.150 Therefore, the accuracy of the tax transcript may be of critical importance to the taxpayer. When the IRS receives a joint return, regardless of whether it is filed late, it must create a single transcript to reflect that return. In the hypothetical case posed above, the transcript of the wife (the non-petitioning party) must be adjusted to reflect the Tax Court’s decision.151 Similarly, under the ASFR process, if an assessment is made after an ASFR has been issued and the taxpayer then files an original return, the taxpayer is subject to the ASFR reconsideration process.152 In this process, the IRS will adjust the ASFR transcript to reflect the amounts on the original return rather than zero out the ASFR transcript and start a new transcript to reflect the original return.153 Olson noted complaints from practitioners that those adjustments were frequently done incorrectly, resulting in clients being charged interest and penalties they did not owe.154 It stands to reason that the IRS increases its chance of error by simply adjusting the single SFR accounts rather than closing them out and starting from the taxpayer’s filed return.155

C. Effect on the Non-Petitioning Spouse

There are some post-assessment remedies available to the non-petitioning spouse. Since the matter is in the hands of the Collection Division, she may request a CDP or equivalent hearing.156 CDP hearings are usually opportunities for taxpayers to work things out with the IRS when the tax liability is likely to be uncollectible.157 The taxpayer may raise issues of fairness and due process158 at this hearing but her ability to do that is limited. First, she must file a timely request for a due process hearing within 30 days after the date of the notice of lien filing, which the IRS must send within five days of the date the lien is filed.159 As in the case of the notice of deficiency, actual receipt of the notice of lien filing is not required. If it is mailed to the taxpayer’s last known address, the notice is valid and the 30-day period begins to run from the end of the five-day notification period.160 If she does not file her request within this 30-day period, she loses the opportunity for a full review. However, she may petition for an administrative appeal with the IRS, although she cannot contest an adverse determination from that appeal in the Tax Court as she could have if there had been an adverse determination in a full CDP hearing.161 Second, she may challenge the existence or amount of the tax liability that is the subject of the lien only if she did not receive a notice of deficiency for this liability or otherwise did not have an adequate opportunity to dispute the IRS’s determination of liability.162

So, in the hypothetical case, if the wife was assessed either before the husband filed his petition in the Tax Court or while he was before the Tax

reflect the corrected deficiency determined in the petitioning spouse’s case.”). See also Camp, supra note 17 (discussing SFRs in the bankruptcy context).

148 In the ongoing case referred to at supra note 12, the IRS has collected against the petitioning spouse, although it waffles on whether this is proper. Thus, it has collected on occasion and then will halt the collection action and claim not to be collecting against that spouse.

149 In the ongoing case, the taxpayers filed a writ of mandamus that the district court denied. If the taxpayers cannot afford to pay the entire tax liability, they could consider filing a claim for injunctive relief, arguing for an exception to the anti-injunction act of section 7421 under Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962). But this is a long shot.


151 See supra note 145.

152 See IRM section 4.13.7.1.

153 2011 NTA Annual Report, supra note 6, at 100.
154 Id. at 100, n.52; see supra text accompanying note 88.
155 Indeed, in the ongoing case, supra note 12, the transcript of the non-petitioning spouse was incorrectly adjusted.
156 See section 6320; see also supra note 57.
157 See id.
158 For instance, the taxpayer may at this time raise an innocent spouse defense, challenge the appropriateness of the lien filing, make an offer in compromise, or offer a collection alternative. Reg. section 301.6320-1T.
159 Id. at reg. section 301.6320-1T(a)(1) and (a)(2).
160 Id. at reg. section 301.6320-1T(a)(2), Q&A 11.
161 This administrative appeal is called an “equivalent hearing.”
162 Id. at reg. section 301.6320-1T.
Court, and the notice of tax lien is sent shortly before or immediately after the Tax Court renders its favorable decision, the wife logically may believe that she does not need to file a request for a due process hearing because her husband’s favorable Tax Court decision should also apply to her under the principle that they are one taxable unit with joint and several liability. Thus, the 30-day period might expire without her making a request for a CDP hearing.

At this point, the wife is out of luck as far as having any control over her fate. The inflated tax liability from the SFR has been assessed and at least as far as the IRS is concerned, she has not engaged in any self-help, so she is not likely to fare well. Logically, if the Tax Court has accepted the husband’s jointly filed return and has decided that the return was timely filed, this should apply to the wife as well. But because the IRS interprets the Tax Court decision to apply only to the SFR, this becomes problematic. As far as the IRS is concerned, at this point the wife’s only remedy is to pay the tax liability, plus penalties and interest, and file a claim for refund. The unfairness of this position affects not only the wife but also the husband, because it negates his favorable Tax Court decision. If the IRS attempts to collect the entire amount of the liability against the wife, it is as if the husband never appeared before the Tax Court.

There are two major procedural problems in this case. The first problem is that while the Tax Court Rules allow a permissive joinder of parties, the permission depends upon both parties having received a notice of deficiency. Since the wife in the hypothetical did not receive one, neither she nor her husband are eligible to request a permissive joinder. If such a joinder had been possible, it would have been clear immediately that the Tax Court’s decision applied to both parties equally. There would be no wiggle room for spurious arguments by the IRS. The second problem is that the Tax Court lacks jurisdiction to enforce or clarify its decisions. There is no other feasible avenue of judicial appeal for the taxpayer at this point because the husband obtained a successful decision in the Tax Court. Also, the husband is at the mercy of the IRS to refund any amount wrongfully collected from him because the Cheesecake Factory case may deny him the right to be heard in the federal district court (or Court of Federal Claims) to appeal any denial of his refund claim. However, the IRS cannot have it both ways: if it claims that the Tax Court decision applied only to the SFR and that was all that was before the court, then the wife, at least, should be able to bring suit to appeal any denial of her claim for refund and arguably, the husband should be able to do so as well.

VI. Suggestions for Reform

Because the federal tax system is a system of self-assessment, the government should do everything in its power to ensure that taxpayers are treated fairly in order to prevent tax gamesmanship and to restore confidence in the tax system. But in many cases this does not happen. Congress and the IRS should take the initiative to enact reforms to provide greater due process for taxpayers. These suggested reforms go beyond Olson’s current proposal.

The most important taxpayer rights in the civil context are those arising before assessment. Once an assessment has been made and the collection process begins, the taxpayer’s rights are much more attenuated. Thus, greater emphasis should be placed on ensuring proper due process at the pre-assessment end of the process. This would promote greater efficiency for the government as well because it would reduce the likelihood of problems later. Thus, most of the suggested reforms apply to the pre-assessment process.

First, notice of a proposed tax assessment is particularly problematic in the automated assessment and the ASFR systems, in which notice is sent by computer without the additional verification of the taxpayer’s last known address that formerly was done. Olson’s proposal for Congress to provide a discrete definition for a last known address is a good one. The IRS should be required to make extra efforts, outside of the automated enforcement process, to verify an address when a notice has been returned marked undelivered/unaccepted.

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163 See supra text accompanying notes 143-148.
164 See Tax Court Rule 61.
165 See also Tax Court Rule 34(a)(1) (discussing joinder of married parties when both receive a notice of deficiency).
166 See section 7421 (Anti-Injunction Act limits actions to enjoin the assessment and collection of taxes). In the ongoing case, supra note 12, the parties filed a motion for a writ of mandamus in the federal district court but it was denied.
167 See supra text accompanying notes 111-118.
168 But see Camp, supra note 17.
169 Tax gamesmanship is a well-known phenomenon. See, e.g., Victor Fleischer, “Taxing Blackstone,” 61 Tax L. Rev. 89 (2008) (discussing the regulatory gamesmanship of the Blackstone IPO); Alex Reed, “Subsidizing Hate: A Proposal to Reform the Internal Revenue Service’s Methodology Test,” 17 Fordham J. Corp. & Fin. L. 823 (2012) (arguing that the IRS needs to reform its method test to prevent such gamesmanship as hate groups masquerading as educational organizations to receive preferential tax treatment).
Second, another problem with notice is that at present it is an all-or-nothing proposition. If the taxpayer received notice, then that taxpayer may advance to the next step in the process. If the taxpayer did not receive notice and the requisite time period has passed, that taxpayer may be out of luck. Since there are circumstances other than avoidance of process or illegality that may cause a taxpayer to miss the 90-day filing deadline period in the Tax Court, there should be a no-fault process through which a taxpayer who has been assessed after failing to receive notice through no fault of her own should be able to petition the Tax Court for reconsideration of her assessment.170 This seems a fundamental requirement of due process. Also, Congress should go further and allow a taxpayer who has received notice but who has an extraordinary reason for failing to act on the notice to be able to appeal to the Tax Court, particularly when the IRS has failed to engage in activities to educate taxpayers about the meaning of the various notices.171

Third, the Tax Court Rule on permissive joinder should be amended to allow joinder of parties to a joint return regardless of whether they both have received notices of deficiency. If the parties filed a joint return, the issues with regard to that return apply equally to both parties even though only one of the parties had income or deductions.172 Thus, their interests are the same because their liability is the same, and the fact that one of the parties received a notice of deficiency should indicate to the court that there is a problem.173 Generally, a single notice of deficiency will be issued to the joint parties,174 but in cases in which it is not, the court should be required to at least inquire why only one party to a joint return is before the court.

Fourth, Congress should either enact a provision to extend the current statute of limitations to provide relief from the Flora full-payment rule or to relax that rule when it may operate to deny taxpayers the ability to obtain a refund of an illegally collected tax. This again is a matter of simple fairness and due process.

Fifth, the IRS should take extra precautions to avoid errors in adjusting taxpayers’ transcripts in SFR cases. Thus, it should cease its current practice of adjusting the SFR transcript to reflect the filed return and instead, it should start with a new transcript prepared for the filed return and make adjustments to that.

Sixth, and finally, the same no-fault hearing suggested for failure to meet the 90-day filing period in the Tax Court also should be provided in the case of a CDP hearing to address hardships that may have arisen toward the end of the 30-day period that did not leave sufficient time for the taxpayer to request the hearing or for other extraordinary cases. The arbitrary time periods chosen by Congress may not operate fairly in many cases, and this could cause extreme hardship for those taxpayers.

VII. Conclusion

Olson’s recent TBOR proposal is admirable as far as educating the taxpaying public but it is only the tip of the iceberg as far as what needs to be done to ensure that the government treats its citizens fairly. The hypothetical above presents an unusual case but it highlights the myriad gaps in the system of fundamental tax administration. These gaps are the collective fault of Congress, the courts, and the IRS. In some cases, they can produce egregious results. Granted, there are those who cheat on their taxes, and there must be swift and certain punishment for those cheats to ensure that the system works for all. But an ideal tax system should provide a balance that would allow the IRS to discover and punish the guilty while protecting the innocent in the preservation of their rights. The current system falls far short of providing sufficient due process to many honest taxpayers.

The above six proposals are not radical. They can be accomplished easily and efficiently and can yield tremendous results. Admittedly, they may require more effort from the IRS, an agency that for at least the past 15 to 20 years has been asked to do more with less. But this is an investment that may produce huge dividends for the IRS through its potential to engender a more favorable impression of the agency as one that treats its constituents fairly. This,
in turn, has the potential to promote greater taxpayer cooperation and less gamesmanship to ensure that all taxpayers shoulder their fair share of the tax burden. Indeed, a fair, impartial, and just system of voluntary taxation, as well as basic principles of due process, should require no less.

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William Hays Weissman addresses the California appellate court’s recent decisions in *Ventura* and *West Hollywood* to reaffirm employers’ right to have a judicial review of California Unemployment Insurance Appeals Board decisions involving unemployment insurance benefits, but argues that given that the right to judicial review by way of a writ of mandamus was firmly established, these recent cases were unnecessary.

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