

No. 18-1069

In the Supreme Court of the United States

DIEBOLD FOUNDATION, INC., TRANSFEREE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

After the Tax Court ruled against petitioner on the merits in this transferee-liability case, petitioner moved to dismiss its own petition for lack of subject-matter jurisdiction, arguing that the notice of transferee liability had incorrectly identified the relevant taxable year. The questions presented are as follows:

1. Whether the Tax Court had subject-matter jurisdiction to adjudicate petitioner's challenge to the notice of transferee liability that is at issue in this case.
2. Whether the court of appeals permissibly declined to consider a merits issue that petitioner had raised in its reply brief but not in its opening brief on appeal.

(I)

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-15a) is not published in the Federal Reporter but is reprinted at 753 Fed. Appx. 57. The order of the Tax Court denying petitioner's motion to dismiss for lack of subject-matter jurisdiction (Pet. App. 18a-28a) is unreported. The opinion of the Tax Court on the merits (Pet. App. 29a-51a) is not published in the United States Tax Court Reports but is reprinted at 112 T.C.M. (CCH) 227.

A prior opinion of the court of appeals (Pet. App. 52a-94a) is reported at 736 F.3d 172. A prior opinion of the Tax Court (Pet. App. 95a-133a) is not published in the United States Tax Court Reports but is reprinted at 103 T.C.M. (CCH) 1289.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2018. The petition for a writ of certiorari

(1)

was filed on February 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. “The Tax Court is a court of limited jurisdiction.” *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam). In cases involving deficiencies in income tax, Sections 6212-6214 of the Internal Revenue Code define the Tax Court’s jurisdiction.

Section 6212 provides that, if the Internal Revenue Service (IRS) “determines that there is a deficiency in respect of” a taxpayer’s income tax (*i.e.*, if the taxpayer owes more tax than it reported on its return), the IRS “is authorized to send notice of such deficiency to the taxpayer.” 26 U.S.C. 6212(a). Section 6213 states that, within 90 days after the mailing of that notice of deficiency, “the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.” 26 U.S.C. 6213(a). That provision also bars the IRS from assessing a deficiency or commencing proceedings for its collection until the 90-day period has expired or, if a petition for redetermination was timely filed, until the Tax Court’s decision thereon has become final. *Ibid.*

Section 6214 confirms that “the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer.” 26 U.S.C. 6214(a). It also states that the Tax Court has jurisdiction over the deficiency alleged and cannot, except in specified circumstances, “determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.” 26 U.S.C. 6214(b); see 26 U.S.C. 6512(b) (2012 & Supp. V 2017) (authorizing Tax Court to determine certain overpayments). Because the Tax

Court’s jurisdiction to redetermine a deficiency under Sections 6213 and 6214 is contingent on the IRS’s mailing of the notice under Section 6212(a), “[t]he statutory notice of deficiency is often referred to as the taxpayer’s ‘ticket to the tax court.’” *Estate of Yaeger v. Commissioner*, 889 F.2d 29, 34 (2d Cir. 1989) (citations omitted), cert. denied, 495 U.S. 946 (1990).

The Internal Revenue Code also establishes a procedure for assessing a taxpayer’s unpaid taxes against a transferee of the taxpayer’s assets who is liable for the tax debt “at law or in equity”—typically, under state fraudulent-transfer law. 26 U.S.C. 6901(a)(1)(A). A transferee’s liability for a transferor’s tax debt generally will “be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred.” 26 U.S.C. 6901(a). For unpaid income taxes, the deficiency procedures and grant of Tax Court jurisdiction set forth in Sections 6212, 6213, and 6214 thus apply equally to a transferee’s liability. See *ibid.* As a result, the Commissioner’s determination of a transferee’s liability is subject to redetermination by the Tax Court upon the Commissioner’s issuance of a notice of that liability and the transferee’s timely filing of a Tax Court petition. See, e.g., *Kellogg v. Commissioner*, 88 T.C. 167, 174-175 (1987).

2. Petitioner is a transferee that seeks relief from the Commissioner’s adverse determination of its liability for unpaid taxes. See Pet. App. 4a-5a. Petitioner argues that the Tax Court lacked jurisdiction to adjudicate petitioner’s own petition for a judicial redetermination of that liability. See *ibid.*

a. In 1999, Double-D Ranch, Inc. (Double-D) was a personal holding company that had two shareholders

and approximately \$319 million in assets, including cash, real property, and approximately \$291 million in publicly traded securities. Pet. App. 58a-59a. The shareholders wanted to liquidate Double-D, but a sale of its non-cash assets would have incurred approximately \$81 million in tax liability. *Id.* at 3a, 59a. To substantially avoid that tax liability, Double-D's shareholders decided to sell their stock on July 2, 1999, in a tax-shelter transaction known as an "intermediary" or "Midco" transaction. *Id.* at 3a, 67a; see *id.* at 55a-58a (explaining Midco transactions generally). The shareholders sold Double-D's stock to an intermediary entity, or "Midco," for approximately \$309 million; Double-D sold its assets for approximately \$319 million; and the intermediary netted a profit of approximately \$10 million after draining Double-D of that \$319 million. *Id.* at 69a. The transaction left Double-D insolvent and unable to pay its \$81 million tax bill on the sale of its assets. *Id.* at 3a-4a. Of the \$309 million received by the shareholders, petitioner's predecessor received approximately \$100 million, and it later distributed approximately \$33.5 million to petitioner. *Id.* at 70a, 109a.

Double-D had historically used a taxable year starting July 1 and ending June 30. Pet. App. 4a & n.1. But because the Midco transaction involved a sale of Double-D's stock to the intermediary, Double-D purported to join a consolidated group with a new parent, effective July 3, 1999. See *id.* at 70a. Double-D thus filed a "final" corporate return for a short (two-day) taxable year beginning July 1, 1999, and ending July 2, 1999. *Id.* at 111a. Double-D did not include its gain on the sale of its non-cash assets in that standalone, short-year return. *Id.* at 70a. Instead, the intermediary reported the gain on its return for its taxable year ending June 30, 2000,

which it filed as a consolidated return with Double-D. *Id.* at 70a-71a. As planned, however, the intermediary did not pay any tax on this amount because it claimed sufficient artificial losses to offset the gains. *Ibid.*

b. In March 2006, the Commissioner sent Double-D a notice of deficiency, determining a deficiency in income tax, penalties, and interest totaling approximately \$100 million for Double-D’s short taxable year ending July 2, 1999. Pet. App. 4a.¹ The deficiency resulted from the Commissioner’s determination that the sale of Double-D stock should be recharacterized, in accordance with its substance, as a sale of assets by Double-D, followed by a liquidating distribution of the proceeds to the shareholders. *Id.* at 112a. Double-D did not petition the Tax Court for a redetermination of the deficiency, and the IRS assessed the deficiency and penalties in July 2006. *Ibid.*; see 26 U.S.C. 6213(c). At that time, Double-D had no remaining assets from which the IRS could collect the liability. Pet. App. 113a.

In July 2008, the Commissioner issued to petitioner a notice of transferee liability for \$33.5 million—a third of the tax deficiency that the Commissioner had determined against Double-D “for the taxable year ended July 2, 1999.” C.A. App. 209; see Pet. App. 4a. The Commissioner determined that petitioner’s predecessor was a transferee of Double-D’s assets under Section

¹ Petitioner’s allegation (Pet. 7-8) that the Commissioner “chose *** a tax period ending on July 2, 1999” to “circumvent th[e] statute of limitations,” which Petitioner asserts “already [would] ha[ve] expired” if the correct taxable period were the 12-month period ending June 30, 2000, has no support in the record. See Pet. App. 41a-43a. To the contrary, the notice of deficiency matched the short taxable year that Double-D had declared on its “final” corporate return. See *id.* at 4a n.1.

6901 and was substantively liable under New York law for Double-D's tax debt as a recipient of a fraudulent conveyance from Double-D. Pet. App. 72a, 78a.

c. Petitioner filed a petition in the Tax Court for re-determination of its transferee liability. Pet. App. 4a. Petitioner initially prevailed on the merits, based on the Tax Court's conclusions that the shareholders lacked actual or constructive knowledge of the entire scheme and that New York fraudulent-conveyance law therefore did not allow the transaction to be recharacterized in accordance with its substance. *Id.* at 130a. The court of appeals reversed and remanded, concluding that the shareholders had the requisite constructive knowledge and "that, in substance, Double D sold its assets and made a liquidating distribution to its Shareholders, which left Double D insolvent." *Id.* at 93a; see *id.* at 94a.

3. a. On remand, petitioner contended, *inter alia*, that the sale of assets had not occurred within the taxable year that ended on July 2, 1999. Pet. App. 39a-40a. Petitioner argued that Double-D therefore could not have underreported its tax liability for the short taxable year ending on July 2, 1999. *Id.* at 42a. Petitioner also argued, in the alternative, that recharacterizing the transaction as an asset sale followed by a liquidating distribution—a prerequisite to treating petitioner's predecessor as a "transferee" within the meaning of Section 6901—would mean that Double-D's taxable year did not end on July 2, 1999, and that Double-D therefore could not have a deficiency in income tax for that period. See 24742-08 Pet. T.C. Br. 80-86 (Nov. 13, 2014).

In August 2016, the Tax Court rejected petitioner's arguments and upheld the Commissioner's determination of petitioner's transferee liability. Pet. App. 29a-51a. The court explained that a "series of transactions"

had “started on July 2, 1999,” and that the court of appeals had previously “collapsed the transaction and treated it as a de facto liquidation to shareholders.” *Id.* at 41a. Although the Tax Court did not specifically address petitioner’s alternative argument that Double-D’s taxable year had not ended on July 2, 1999, the court stated that it had “considered all arguments of the parties, and, to the extent not mentioned above,” had concluded that they were “without merit.” *Id.* at 51a.

Before the Tax Court entered its “decision” (the Tax Court equivalent of a judgment), however, petitioner moved to dismiss the case for lack of subject-matter jurisdiction. Pet. App. 19a. Petitioner contended that the notice of transferee liability was “invalid” because it identified the taxable year ending July 2, 1999, as the period of Double-D’s underlying tax deficiency and because, in petitioner’s view, that was not Double-D’s “proper taxable year.” *Ibid.* Petitioner again argued that, because of the recharacterization of the Double-D transaction, Double-D “did not become a member of a consolidated group on July 2, 1999,” and that it was thus “improper for Double-D Ranch to file a short year return.” *Id.* at 20a. In petitioner’s view, the Commissioner should have issued a notice of transferee liability for a taxable year ending June 30, 2000. *Ibid.*

b. The Tax Court denied petitioner’s motion to dismiss. Pet. App. 18a-28a. The court held that the Commissioner had properly issued a notice of liability on the basis of the short year ending on July 2, 1999. *Id.* at 25a. The court observed that it had previously concluded, in its August 2016 merits decision, that “the transactions at issue, in substance, were a liquidating distribution that occurred on July 2, 1999.” *Id.* at 24a. Thus, it explained, “[i]n substance, Double-D Ranch

* * * terminated in existence on July 2, 1999.” *Id.* at 25a. Because it found that the notice of liability had identified the correct taxable year, the court concluded that it had jurisdiction.

In the alternative, the Tax Court determined that, “even if we were to find that [the IRS] issued the notices with respect to an incorrect taxable period, we would hold that the error did not invalidate the notices because the error did not mislead petitioner.” Pet. App. 25a. The court explained that the function of a notice is to inform the taxpayer or transferee of the liability that will be assessed. *Id.* at 26a. The court further explained that “a deficiency notice is valid where it provides sufficient information so the taxpayer is not reasonably misled as to the taxable period involved,” and it concluded that petitioner was not misled here. *Ibid.*

The Tax Court entered a final decision in the IRS’s favor. Pet. App. 5a.

4. a. Petitioner appealed but elected not to renew any of the merits arguments that it had asserted in the Tax Court, including its argument that the Commissioner’s deficiency determination failed because of the alleged taxable-year error. See Pet. App. 5a, 13a, 15a. Instead, petitioner’s opening brief challenged only the denial of its motion to dismiss for lack of subject-matter jurisdiction. *Id.* at 5a; see Pet. C.A. Br. 15-56.

The Commissioner responded that the Tax Court’s denial of the motion was correct for the reasons stated by that court. Gov’t C.A. Br. 52-64. The Commissioner also argued that the Tax Court’s ruling could be affirmed on the alternative ground that the substantive correctness of the taxable year stated in the notice was irrelevant to the Tax Court’s subject-matter jurisdiction. *Id.* at 27-52. The Commissioner explained that,

although a notice’s identification of an erroneous taxable year may render the Commissioner’s deficiency determination incorrect on the merits (as petitioner had argued in the merits phase of the Tax Court litigation), it does not render the notice jurisdictionally invalid. *Id.* at 34-39.

In its reply brief, petitioner attempted to rebut the Commissioner’s argument that the taxable-year issue is not jurisdictional. See Pet. C.A. Reply Br. 21-22. Petitioner also argued that, if the Tax Court had jurisdiction, the court of appeals should vacate the Tax Court’s decision and remand with instructions to enter a decision on the merits in petitioner’s favor. Pet. App. 13a; see Pet. C.A. Reply Br. 29.

b. The court of appeals affirmed in a nonprecedential summary order. Pet. App. 1a-15a. The court acknowledged that “[t]he rationale for [the underlying] tax deficiency—Double-D’s mischaracterization of an assets transfer as a stock transfer—may have raised questions as to whether Double-D had also mischaracterized its July 1, 1999, tax year as a short year ending July 2, 1999, rather than a normal year ending twelve months later on June 30, 2000.” *Id.* at 9a. The court did not decide whether Double-D’s taxable year had ended on July 2, 1999, however, because it concluded that the notice issued to petitioner was sufficient to confer subject-matter jurisdiction on the Tax Court in any event. *Id.* at 9a-10a.

The court of appeals explained that the purpose of a notice of transferee liability “is only to advise the person who is to pay . . . that the Commissioner means to assess him; anything that does this unequivocally is good enough.” Pet. App. 7a (quoting *O’Rourke* v.

United States, 587 F.3d 537, 541 (2d Cir. 2009) (per curiam)). The court also explained that “the very purpose of the Tax Court is to adjudicate contests to deficiency notices.” *Id.* at 8a (citation omitted). Thus, “[i]f the existence of an error in the determination giving rise to the notice deprived the [Tax] Court of jurisdiction, [the Tax Court] would lack power to perform its function.” *Ibid.* (quoting *Stevens v. Commissioner*, 709 F.2d 12, 13 (5th Cir. 1983) (per curiam)) (second and third set of brackets in original).

The court of appeals found it “undisputed” that (1) Double-D had declared a short tax year of July 1, 1999, to July 2, 1999; (2) the IRS had determined that Double-D had a deficiency for that tax year, for which petitioner had transferee liability; (3) the IRS had sent petitioner a notice that identified petitioner as the taxpayer and that “stated an amount and taxable year”; and (4) petitioner had “understood that the IRS sought to assess it for taxes owed by Double-D for its claimed taxable year beginning July 1, 1999 and ending on July 2, 1999.” Pet. App. 8a-9a. Because the notice was “sufficient to unequivocally notify [petitioner] that the Commissioner meant to assess it for a portion of the Double-D deficiency for its claimed tax year beginning July 1, 1999,” the court concluded that the notice was likewise sufficient to confer subject-matter jurisdiction on the Tax Court. *Id.* at 9a (brackets, citation, and internal quotation marks omitted). The court explained that whether the listed tax year was Double-D’s *correct* tax year was immaterial: “As with the substantive correctness of the amount stated on a notice, * * * we see no reason why, in these circumstances, where [petitioner] was not misled as to the basis for the noticed deficiency, the taxable

year stated on a notice must be completely correct in order to give the Tax Court jurisdiction.” *Ibid.*

The court of appeals next observed that petitioner had “change[d] course” in its reply brief and had “argue[d] for the first time that the Tax Court was wrong to conclude, on the merits, that [petitioner’s] July 1, 1999, tax year ended on July 2, 1999.” Pet. App. 13a. The court held that petitioner had forfeited that merits argument by failing to raise it in petitioner’s opening brief. *Id.* at 13a, 15a. The court explained that the IRS had argued in its response brief that identifying the substantively correct tax year was a merits issue rather than a jurisdictional one, but that such an argument “did not open the door” for petitioner to raise merits issues in its reply brief. *Id.* at 14a. The court also observed that enforcing its forfeiture rules would not lead to injustice here because petitioner was represented by “sophisticated counsel” and had been aware of the argument that it chose not to pursue. *Id.* at 15a (citation omitted).

ARGUMENT

Petitioner primarily contends (Pet. 13-24) that the court of appeals erroneously held that the Tax Court had jurisdiction to impose liability for an incorrect taxable year listed on a notice of transferee liability. Contrary to petitioner’s repeated suggestions (Pet. i, 2, 5-6, 11-14, 16, 19-21, 23, 29), however, the court of appeals did not determine that the taxable year that the Commissioner identified in the notice actually was incorrect and that the Tax Court could impose liability for that incorrect taxable year. Instead, the court held only that “in these circumstances, where [petitioner] was not misled as to the basis for the noticed deficiency,” the Tax Court had jurisdiction to hear petitioner’s challenge to

the Commissioner’s liability determination. Pet. App. 9a. The court of appeals’ resolution of that jurisdictional question was correct, and its unpublished, non-precedential decision does not conflict with any decision of another court of appeals.

Petitioner also contends (Pet. 24-34) that the court of appeals adopted a restrictive “new waiver rule that prevents an appellant from fully responding to an argument raised by appellee for the first time in its appellate brief,” Pet. 24. The court below adopted no such rule, and its factbound application of ordinary forfeiture principles does not warrant this Court’s review.

1. a. The court of appeals correctly held that any dispute about the proper taxable year did not cast doubt on the Tax Court’s subject-matter jurisdiction. Pet. App. 9a-10a. “‘Jurisdiction’ refers to ‘a court’s adjudicatory authority.’ Accordingly, the term ‘jurisdictional’ properly applies only to ‘prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)’ implicating that authority.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-161 (2010) (citation omitted). The substantive “correctness” of the Commissioner’s determination of a particular deficiency does not implicate the Tax Court’s statutory authority to adjudicate the relevant “class[] of cases,” *id.* at 160—*i.e.*, timely petitions for redetermination.

Indeed, correcting errors in the Commissioner’s determinations of tax deficiencies is the Tax Court’s primary function. See Pet. App. 8a. If the Tax Court determines that the Commissioner erred with respect to the existence or amount of an asserted tax deficiency, or a transferee’s derivative liability therefor, then the appropriate response is not to dismiss the case for lack

of subject-matter jurisdiction. Rather, it is to enter a decision on the merits determining the correct amount, if any, of the deficiency or liability. See 26 U.S.C. 6214(a)-(b), 6215(a), 7459(a).

Under the Internal Revenue Code, the Commissioner's issuance of a notice of deficiency or transferee liability is a prerequisite to the Tax Court's jurisdiction to adjudicate a petition for redetermination of that deficiency or liability. See 26 U.S.C. 6212(a), 6213(a), 6214(a), 6901(a). But as Judge Learned Hand explained, the purpose of the notice "is only to advise the person who is to pay *** that the Commissioner means to assess him; anything that does this unequivocally is good enough." *Olsen v. Helvering*, 88 F.2d 650, 651 (2d Cir. 1937). As a result, "courts have held repeatedly that a notice of deficiency is valid if it notifies the taxpayer that a deficiency has been determined and gives the taxpayer the opportunity to petition th[e Tax] Court for redetermination of the proposed deficiency." *John C. Hom & Assocs., Inc. v. Commissioner*, 140 T.C. 210, 213 (2013); see *Frieling v. Commissioner*, 81 T.C. 42, 53 (1983) (describing those "two functions of section 6212"); see also *Bos Lines, Inc. v. Commissioner*, 354 F.2d 830, 835-836 (8th Cir. 1965) (concluding that "the notice requirements of the statute are satisfied" so long as the transferee is given "timely notice of the Commissioner's determination *** of its liability as a transferee"); *Dees v. Commissioner*, 148 T.C. 1, 6 (2017) ("[I]f the notice is sufficient to inform a reasonable taxpayer that the Commissioner has determined a deficiency, our inquiry ends there; the notice is valid."). Conversely, "[a] notice is invalid for this purpose only where the notice discloses on its face that there has

been no determination” of a deficiency or transferee liability. *John C. Hom*, 140 T.C. at 213 (citing *Clapp v. Commissioner*, 875 F.2d 1396, 1400 (9th Cir. 1989)); see, e.g., *Abrams v. Commissioner*, 787 F.2d 939, 942 (4th Cir.) (holding that IRS letter giving taxpayers “unsolicited advice not to claim * * * a deduction or credit” relating to their participation in a tax shelter was not a statutory notice of deficiency establishing jurisdiction of the Tax Court), cert. denied, 479 U.S. 882 (1986).

The jurisdictional scheme that Congress established in Sections 6212-6214 (and made applicable to transferees under Section 6901(a)) thus serves to ensure that every person who is determined by the Commissioner to be liable for unpaid income taxes can obtain judicial review of that determination *before* he or she is compelled to pay. See 26 U.S.C. 6213(a) (providing that “no assessment of a deficiency * * * and no levy or proceeding in court for its collection shall be made, begun, or prosecuted” for 90-day period after mailing of notice or until final Tax Court decision). It is the determination of a deficiency—and not the *correctness* of the determination of a deficiency—that establishes the Tax Court’s subject-matter jurisdiction. See, e.g., *H. Milgrim & Bros. v. Commissioner*, 24 B.T.A. 853, 854 (1931) (“It may well be true that the [Commissioner] erred in his determination that a deficiency existed for this period. But when he once determined that there was a deficiency, that fact gives us jurisdiction to determine whether or not it was correctly arrived at.”).

Congress implicitly confirmed that understanding when it enacted Section 7522 to specify the information about the Commissioner’s liability determination that

certain notices (including notices of deficiency) must include.² Section 7522 states that a notice “shall describe the basis for *** the tax due, interest, additional amounts, additions to the tax, and assessable penalties included in such notice,” but that “[a]n inadequate description under [this provision] *shall not invalidate such notice.*” 26 U.S.C. 7522(a) (emphasis added). Congress thus required the notice to provide useful information about the basis for the taxpayer’s liability, see S. Rep. No. 309, 100th Cong., 2d Sess. 8 (1988), without conditioning the Tax Court’s jurisdiction to redetermine the taxpayer’s liability on the Commissioner’s perfect compliance with the notice requirement.

In this case, it is “undisputed” that the notice of transferee liability provided full notice of the liability that the Commissioner intended to assess against petitioner—namely, petitioner’s derivative liability, as a transferee of a transferee of Double-D, for \$33.5 million of the \$97.3 million tax deficiency that the Commissioner had determined against Double-D for its declared short tax year of July 1, 1999, to July 2, 1999. Pet. App. 8a; see *id.* at 4a. “There is also no dispute that [petitioner] *understood* that the IRS sought to assess it for taxes owed by Double-D for its claimed taxable year beginning July 1, 1999 and ending on July 2, 1999.” *Id.* at 8a-9a (emphasis added). Under those circumstances, the court below correctly held that “the notice was sufficient to confer subject matter jurisdiction upon the Tax Court” to hear petitioner’s timely petition for redetermination in this case. *Id.* at 9a-10a.

² The IRS has taken the position that Section 7522 applies to notices of transferee liability as well, based on Section 6901’s incorporation by reference of the deficiency procedures. See *IRS Field Service Advisory*, 1998 WL 1984332 (Mar. 30, 1998).

b. Petitioner's contrary arguments are unavailing.

First, petitioner repeatedly asserts (Pet. 2, 5-6, 13-15, 18, 23) that the court of appeals found "that the Tax Court had the authority to impose a liability for an incorrect and incomplete period," Pet. 14. That assertion conflates the substantive correctness of the Tax Court's decision on the merits (which petitioner belatedly contested in its reply brief below, but which the court of appeals did not decide) with the Tax Court's subject-matter jurisdiction to decide the merits in the first place.

The "correctness" of the short taxable year identified in the notice of transferee liability, on which the Commissioner based his determination of Double-D's underlying deficiency, is a merits issue. Indeed, before petitioner repackaged its argument about Double-D's taxable year as a purported jurisdictional defect, petitioner unsuccessfully raised the same argument in the Tax Court as a defense to liability on the merits. Petitioner contended that Double-D's taxable year continued until June 30, 2000; that Double-D therefore did not have a deficiency for a taxable year ending July 2, 1999; and that petitioner could not be liable as a transferee for a nonexistent deficiency. See Pet. App. 39a-40a, 42a.

If the Tax Court had agreed that Double-D's taxable year continued past July 2, 1999, then petitioner might well have been entitled to a decision on the merits that the amount of its transferee liability was zero. See 14A Jacob Mertens, Jr., *Law of Federal Income Taxation* 53:47, at 53-118 (2004) (explaining that a transferee may demonstrate an "absence of tax liability on the part of the transferor"). But if the Tax Court had concluded that the IRS notice of transferee liability misidentified the relevant taxable year, it would not have been appro-

priate for the court to dismiss the case for lack of jurisdiction. Rather, as explained above, “the Tax Court’s jurisdiction is predicated on the Commissioner’s determination that a deficiency exists, as evidenced by his notice of the deficiency, not on the correctness of his determination.” *Stevens v. Commissioner*, 709 F.2d 12, 13 (5th Cir. 1983) (per curiam).

Second, petitioner invokes (Pet. i, 21, 23) Section 6214 as support for its argument that the Tax Court lacks jurisdiction to review a determination of transferee liability unless the corresponding notice correctly identifies the transferor’s taxable year. Petitioner’s reliance on that provision is misplaced.

Under Section 6214(a), the Tax Court has “jurisdiction to redetermine the correct amount of the deficiency” determined by the Commissioner. 26 U.S.C. 6214(a). Section 6214(b) states that “[t]he Tax Court in redetermining a deficiency of income tax for any taxable year * * * shall have no jurisdiction to determine whether or not the tax for any other year * * * has been overpaid or underpaid.” 26 U.S.C. 6214(b). As the court of appeals noted, Pet. App. 7a n.2, Section 6214(b) “arguably appear[s] to contemplate that the notice [will] state a taxable year,” in contrast with Section 7522(a), which omits the taxable year from the required elements of a notice. But even assuming that the notice must specify a taxable year, it does not follow that the Tax Court’s jurisdiction depends on whether the stated taxable year is *correct*, any more than jurisdiction depends on whether the stated amount of the liability is correct. See *id.* at 11a (finding “no basis to read into section 6214(b) a ‘correctness’ requirement for the taxable year stated in a notice”).

To be sure, Section 6214(b) confines the Tax Court’s jurisdiction “to a determination of the amount of deficiency or overpayment for the particular tax year as to which the Commissioner determines a deficiency.” *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 420 (1943) (discussing former version of Section 6214(b) and Tax Court’s predecessor).³ Section 6214(b) thus precludes the Tax Court, in evaluating an IRS determination of a deficiency for one fiscal year, from considering whether the taxpayer overpaid in a different fiscal year. See *id.* at 419-421. But that limitation is irrelevant in this case, where the court of appeals found it “undisputed” that the IRS sought to assess “taxes owed by Double-D for its claimed taxable year beginning July 1, 1999 and ending on July 2, 1999.” Pet. App. 8a-9a.

c. Petitioner asserts (Pet. 14-18) that the decision below conflicts with decisions of the Third, Fifth, Sixth, Seventh, and Tenth Circuits. But the court of appeals’ unpublished, nonprecedential decision cannot create a conflict warranting this Court’s review. In any event, despite occasional imprecise dicta, “no other circuit * * * has come to a different conclusion” on the question presented here. Pet. App. 8a.

As an initial matter, none of the decisions cited by petitioner held that the Tax Court lacked subject-matter jurisdiction, much less that it lacked jurisdiction because a notice stated an incorrect taxable year. See *Estate of Davenport v. Commissioner*, 184 F.3d 1176 (10th Cir. 1999); *Miles Prod. Co. v. Commissioner*,

³ Congress subsequently amended the statute to allow the Tax Court to address the situation presented in *Gooch Milling*. See 26 U.S.C. 6214(b) (second sentence).

987 F.2d 273 (5th Cir. 1993); *Sanderling, Inc. v. Commissioner*, 571 F.2d 174 (3d Cir. 1978); *Estate of Scofield v. Commissioner*, 266 F.2d 154 (6th Cir. 1959); *Commissioner v. Forest Glen Creamery Co.*, 98 F.2d 968 (7th Cir. 1938), cert. denied, 306 U.S. 639 (1939). Petitioner thus does not identify any court of appeals decision holding that the Commissioner's identification of an incorrect taxable year in a notice of a deficiency deprived the Tax Court of jurisdiction to hear the corresponding petition for redetermination.

Even the dicta that petitioner identifies in the five decisions cited above do not meaningfully conflict with the decision below. In three of those cases, the courts of appeals did not discuss whether the Tax Court's subject-matter jurisdiction was contingent on the correctness of the taxable year stated in the notice. In *Forest Glen Creamery Co.*, for example, the question was whether the Commissioner had determined (and given sufficient notice of) a deficiency for the full calendar year, which was the taxpayer's correct taxable year, or for an incorrect, short taxable year. 98 F.2d at 969. The Seventh Circuit noted that in the latter circumstance, under what is now Section 6214(b), the Tax Court's predecessor could not have redetermined the deficiency based on the full calendar year. *Id.* at 970. But the court held that the Commissioner had determined the deficiency for the full calendar year and had given the taxpayer sufficient notice thereof. *Id.* at 970-971.

Similarly in *Estate of Scofield*, the question was whether the notice covered the taxpayer's correct taxable year. 266 F.2d at 167. The Tax Court had concluded that it did not, but the Sixth Circuit disagreed and reversed what it characterized as the Tax Court's decision that an invalid notice had deprived it of jurisdiction. *Id.*

at 156, 167. That characterization of the Tax Court's decision was inaccurate, since the Tax Court had not treated the issue as jurisdictional but instead had ruled for the taxpayer on the merits, holding "that there is no deficiency * * * for that [incorrect] period." *Estate of Scofield v. Commissioner*, 25 T.C. 774, 783 (1956). And in any event, the court of appeals in *Estate of Scofield* did not indicate whether it viewed the correctness of the taxable year stated in the notice as a jurisdictional issue. 266 F.2d at 167.

In *Sanderling*, the Third Circuit likewise remarked that "[t]he Tax Court has held that it has no jurisdiction where the deficiency notice does not cover a proper taxable period." 571 F.2d at 176 (citing *Columbia River Orchards, Inc. v. Commissioner*, 15 T.C. 253 (1950)). As explained below, see pp. 21-22, *infra*, the Tax Court did not actually so hold in *Columbia River Orchards*; rather, it correctly treated the question of the correct taxable year as a merits issue. But in any event, the court of appeals in *Sanderling* did not indicate whether it agreed with the "jurisdictional" holding that it ascribed to *Columbia River Orchards*, since the *Sanderling* court held that the correct taxable period was subsumed within the period identified in the notice. 571 F.2d at 176.

In the other two decisions cited by petitioner, the Fifth and Tenth Circuits characterized the correctness of the taxable year stated in a notice as a jurisdictional issue. See *Davenport*, 184 F.3d at 1182 n.2; *Miles Prod.*, 987 F.2d at 276. But in each case, the court merely parroted the Tax Court's decision in *Century Data Systems, Inc. v. Commissioner*, 80 T.C. 529, 535-537 (1983), without independently analyzing whether the correctness of the notice relates to jurisdiction or the merits. See *Davenport*, 184 F.3d at 1182 n.2; *Miles Prod.*,

987 F.2d at 276; see also p. 23, *infra* (discussing *Century Data*). And again, both courts' characterizations of the issue as jurisdictional were dicta, as each court held that the taxable year stated in the relevant notice was correct. See *Davenport*, 184 F.3d at 1182 n.2; *Miles Prod.*, 987 F.2d at 278. Unexamined dicta on an easily overlooked distinction between jurisdictional conditions and merits determinations does not establish a conflict warranting this Court's review. Cf. *Reed Elsevier*, 559 U.S. at 161 (noting that courts "have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations").

d. Petitioner also contends (Pet. 18-19) that the court of appeals' decision conflicts with the established practice of the Tax Court. But even if such a conflict could warrant this Court's review, many of the Tax Court decisions that petitioner cites are consistent with the decision below.

In most of the deficiency and transferee-liability cases in which the Commissioner's reliance on an incorrect taxable year has been dispositive, the Tax Court has *not* dismissed for lack of jurisdiction, but rather has issued a "decision" (the Tax Court equivalent of a judgment) in favor of the taxpayer or transferee, holding that no deficiency exists for the incorrect tax period. See, e.g., *Schick v. Commissioner*, 45 T.C. 368, 370-371, 373 (1966); *Atlas Oil & Ref. Corp. v. Commissioner*, 17 T.C. 733, 740 (1951); *Columbia River Orchards*, 15 T.C. at 260-261. As the court below observed in this case, for example, Pet. App. 11a-12a & n.6, the Tax Court in *Columbia River Orchards* found that the Commissioner's determination of a deficiency for a taxable year ending July 17, 1943, was based on a taxable transaction that had actually occurred *after* that date.

15 T.C. at 258, 261. As a result, there was “no deficiency notice for the period [beyond July 17, 1943] during which the income involved was realized,” and for which the deficiency therefore should have been determined. *Id.* at 261. But the Tax Court did not hold that the notice was invalid, or that the court lacked subject-matter jurisdiction to adjudicate the petition for redetermination filed in response to that notice. Instead, the Tax Court concluded that “there [was] no deficiency for the period [ending July 17, 1943] over which [it had] jurisdiction,” and it accordingly entered a decision *on the merits* in the petitioner’s favor. *Ibid.*; see Pet. App. 12a.

To be sure, the Tax Court, like “this Court and others,” has sometimes “been less than meticulous” in distinguishing between jurisdictional and merits issues, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-511 (2006), “particularly when th[e] characterization [of an issue as jurisdictional] was not central to the case, and thus did not require close analysis,” *Reed Elsevier*, 559 U.S. at 161. As a result, one line of Tax Court decisions has erroneously suggested, almost always in dicta, that decisions like *Columbia River Orchards*, *Atlas Oil*, and *Schick* stand for the proposition that the Tax Court must dismiss a deficiency or transferee-liability case for lack of jurisdiction if the notice of deficiency does not identify the taxpayer’s correct taxable year. See, e.g., *Sanderling, Inc. v. Commissioner*, 66 T.C. 743, 749 n.7 (1976); *Burford v. Commissioner*, 76 T.C. 96, 99-100 (1981); *Miles Prod. Co. v. Commissioner*, 96 T.C. 595, 600-603 (1991); *Upchurch v. Commissioner*, 94 T.C.M. (CCH) 40, 42-43 (2007).⁴

⁴ This line of authority is particularly misguided because it begins with two decisions, *Sanderling* and *Burford*, in which the Tax Court

We are aware of only two reported decisions, however—*Century Data Systems*, 80 T.C. at 535-537, and *Pittsburgh Realty Investment Trust v. Commissioner*, 67 T.C. 260, 281-282 (1976)—in which the Tax Court has actually dismissed a case for lack of subject-matter jurisdiction based on a holding that an IRS notice was invalid because of an incorrect taxable year. As the court of appeals concluded in this case, those two decisions are “unpersuasive,” Pet. App. 12a n.6, both because they misconstrue *Columbia River Orchards*, on which they purport to rely, and because they conflate Section 6214(b)’s limitation of the Tax Court’s jurisdiction to the tax period for which the Commissioner determined the liability with the Tax Court’s subject-matter jurisdiction to adjudicate a petition for redetermination of that liability, see *id.* at 10a-12a & n.6. In any event, a conflict between a nonprecedential court of appeals decision and two Tax Court decisions issued more than 35 years ago does not warrant this Court’s review.

acknowledged that its earlier decisions in *Atlas Oil, Schick*, and *Columbia River* “do not hold the notices to be invalid *per se* by reason of setting forth an incorrect taxable period, but rather that we lack jurisdiction *over any period beyond the last date included in the deficiency notice.*” *Sanderling*, 66 T.C. at 749 n.7 (emphasis added); accord *Burford*, 76 T.C. at 100. Thus, if the Tax Court concludes that the correct tax period continued beyond the period identified in the IRS notice (*e.g.*, because a corporation did not dissolve before the end of its calendar year), the court’s power is limited to ruling for the taxpayer on the merits that no deficiency is owed for the incorrect period, even if the court’s analysis suggests that the taxpayer may have underpaid its taxes for the correct period. That distinction is the reason the Tax Court in those earlier cases reached the merits instead of dismissing for lack of subject-matter jurisdiction.

2. Petitioner separately contends (Pet. 24-34) that the court of appeals erred in failing to consider petitioner’s challenge to the Tax Court’s merits determination. That factbound contention about the application of established forfeiture principles does not warrant this Court’s review.

Petitioner asserts (Pet. 24) that the court of appeals “applied a new waiver rule that prevents an appellant from fully responding to an argument raised by [the] appellee for the first time in its appellate brief.” But the court did no such thing. As a general matter, the Second Circuit “do[es] not consider issues raised in a reply brief for the first time.” *In re Harris*, 464 F.3d 263, 268-269 n.3 (2006). The court has explained, however, that it “will consider arguments raised [in a reply brief] in response to arguments made in appellee’s brief.” *United States v. Bari*, 599 F.3d 176, 180 n.6 (2010) (per curiam).

Here, the court of appeals held only that this exception is inapplicable to the circumstances of petitioner’s appeal. See Pet. App. 13a-15a. The court found that the Commissioner’s argument in its appellee brief “was a direct rebuttal to [petitioner’s] argument” about jurisdiction in its opening brief, and thus “did not open the door for [petitioner] to belatedly make [a merits] argument in its reply.” *Id.* at 13a-14a. The court also observed that petitioner had been aware of the distinct merits argument, which it had pressed in the Tax Court, and had deliberately chosen not to pursue that argument in its opening brief in the court of appeals. *Id.* at 13a, 15a.

Petitioner contends (Pet. 24) that the court of appeals’ application of ordinary forfeiture principles prevented it from “fully responding” to the Commissioner’s

arguments. That is incorrect. Petitioner's opening brief challenged only the Tax Court's subject-matter jurisdiction and requested reversal of the Tax Court's denial of petitioner's motion to dismiss for lack of jurisdiction. See Pet. C.A. Br. 15-56. The Commissioner responded, in part, that the correctness of the taxable year stated in the notice was irrelevant to the Tax Court's subject-matter jurisdiction, but instead implicated a merits issue. See Gov't C.A. Br. 27-52. Petitioner therefore was free in its reply brief to attempt to rebut the argument that an incorrect notice did not eliminate jurisdiction. But the court of appeals did not consider petitioner's separate argument that the court should vacate the Tax Court's decision and instruct it to enter a decision on the merits in petitioner's favor. See Pet. App. 13a. Indeed, that separate argument for different relief related to a different Tax Court ruling, see *id.* at 29a-51a, from the one that petitioner had initially challenged, see *id.* at 18a-28a.

Petitioner also contends (Pet. 24-30) that the court of appeals' decision conflicts with decisions of other courts of appeals and of this Court, which have recognized that reply briefs may include responses to arguments raised for the first time in appellees' briefs. For the reasons just discussed, however, the court of appeals did not adopt or apply a contrary rule here. The court's decision therefore does not conflict with the decisions on which petitioner relies. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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