

No. 18-

IN THE
Supreme Court of the United States

DIEBOLD FOUNDATION, INC., TRANSFEREE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tax Court must determine liability for a legally-defined taxable year. If the Commissioner has issued a notice for an incorrect period, the Tax Court and five federal courts of appeals have applied 26 U.S.C. § 6214(a)–(b) and well-settled guideposts to determine whether the Tax Court lacks jurisdiction. Under these precedents, the Tax Court has jurisdiction to impose liability only for the correct tax year and only if a timely-issued notice relates to the correct year. Abandoning this decades-old legal framework, the Second Circuit concluded that a taxable year need not be “completely correct” to give the Tax Court jurisdiction to impose a liability. Thus, the Second Circuit failed to consider whether the Tax Court asserted jurisdiction over the correct taxable year when it imposed liability. The Second Circuit then refused to consider the non-jurisdictional consequences of an improper tax year even though appellee presented that issue on appeal. The questions presented are as follows:

1. Whether the Tax Court lacks jurisdiction to consider and determine a liability for an incorrect taxable year when it does not have jurisdiction over the taxpayer’s correct taxable year.
2. Whether the Second Circuit erred in ignoring the agreed non-jurisdictional consequences of an improper tax year when appellees shifted positions and argued for the first time on appeal that an incorrect tax period is not a jurisdictional issue.

CORPORATE DISCLOSURE

All parties are listed in the caption.

Diebold Foundation, Inc. is a charitable foundation that is organized as a non-stock, nonprofit corporation. It does not have any parent corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Diebold Foundation, Inc. (“the Foundation”) respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit.

OPINIONS AND DECISIONS BELOW

The Second Circuit’s November 15, 2018 summary order (App.1a–15a) is not published in the *Federal Reporter* but is available at No. 17-3622, 2018 U.S. App. LEXIS 32309 (2d Cir. Nov. 15, 2018). The Tax Court’s August 4, 2017 decision (App.16a–17a) is unreported. The Tax Court’s June 6, 2017 order (App.18a–28a) also is unreported. The Tax Court’s August 15, 2016 supplemental memorandum opinion (App.29a–51a) is available at 112 T.C.M. (CCH) 227 (T.C. 2016).

The Second Circuit’s November 14, 2013 opinion (App.52a–94a) is available at 736 F.3d 172 (2d Cir. 2013). The Tax Court’s March 6, 2012 opinion (App.95a–133a) is available at 103 T.C.M (CCH) 1290 (T.C. 2012).

JURISDICTION

The Tax Court entered its decision on August 4, 2017. App.16a–17a. The Second Circuit entered its summary order and judgment affirming that decision on November 15, 2018. App.1a–15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in the appendix to this petition. App.134a–157a.

STATEMENT

Departing from a long line of precedents, the Second Circuit concluded that the Tax Court has jurisdiction to impose liability against a transferee for an incorrect and incomplete period and without regard to the correct tax year of the taxpayer.¹ App.9a, 11a. The Second Circuit’s unprecedented ruling conflicts with the decisions of five other circuits and deviates from settled law defining the parameters of the Tax Court’s jurisdiction when the Commissioner issues a notice reflecting an incorrect taxable period.

The Second Circuit compounded this error by also imposing a restrictive new waiver rule that directly conflicts with the decisions of ten circuit courts. App.13a–15a. The Second Circuit’s novel waiver ruling prevents the appellant from responding to a position and argument raised for the first time in an appellee’s brief. Its decision also departs from the

¹ The Internal Revenue Code imposes the same rules for taxpayers and transferees. *See* I.R.C. § 6901(a) (subject to delineated exceptions, transferee liabilities shall “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”). For this reason, the law discussed herein applies both to tax redetermination and transferee liability cases.

prior decisions of this Court with respect to basic elements of appellate procedure.

A. Background.

Our federal income tax system functions through a legally-defined taxable year. 26 U.S.C. (“I.R.C.”) § 441(a). In turn, the Internal Revenue Code (“Code”) and Treasury Regulations (“Regulations”) provide bright-line rules that define the “taxable year” for each of the hundreds of millions of taxpayers that must compute and pay taxes each year. For most taxpayers, I.R.C. § 441(b)(1) and (2) define a taxable year to cover a 12-month period simultaneous with either the calendar year or the taxpayer’s fiscal year. In a few specific situations, the Code and Regulations end a taxpayer’s taxable year before the calendar or fiscal year expires. I.R.C. §§ 441(b)(3), 443(a). This “short period” most often occurs when an individual dies or a corporation ceases to exist before the end of the full taxable year. I.R.C. § 443(a)(2). For corporate terminations, Treas. Reg. § 1.6012-2(a)(2) mandates that the corporation’s taxable year does not end until the corporation “ceases business and dissolves, retaining no assets”

The legally-defined taxable year is the basis upon which the Code and Regulations impose legal rights and responsibilities, including the taxpayer’s obligations to compute income tax liabilities, I.R.C. § 441(a), and to file tax returns, I.R.C. § 6012(a). If the Commissioner determines that there is a “deficiency” in income taxes for a taxable year, the Commissioner issues a notice of deficiency to the taxpayer for that taxable year. *See* I.R.C. § 6212(a). A notice of deficiency is “a jurisdictional prerequisite to a

taxpayer's suit in the Tax Court for redetermination of his tax liability." *Laing v. United States*, 423 U.S. 161, 165 n.4 (1976). Under I.R.C. § 6213(a), a taxpayer who has received a notice of deficiency from the Commissioner may file a petition with the Tax Court for a redetermination of the deficiency.

I.R.C. § 6214(a) grants the Tax Court "jurisdiction to redetermine the correct amount of the deficiency" determined by the Commissioner and reflected in the notice of deficiency for the specified taxable year. I.R.C. § 6214(b) dictates that the Tax Court does not have jurisdiction to determine liability for any other taxable year. I.R.C. § 6901 grants the Tax Court jurisdiction to redetermine a transferee liability subject to the same statutory rules applicable to deficiency redeterminations.

Throughout its history, the Tax Court has confronted cases in which the Commissioner issued a notice of deficiency or liability² that specified an incorrect period that did not reflect the taxpayer's legally-defined taxable year. This creates a problem because the Tax Court's authority to redetermine a deficiency or impose transferee liability presumes that it has jurisdiction over a legally-defined taxable year. Given this roadblock, the Tax Court has concluded that it does not have jurisdiction to impose a liability for an incorrect and incomplete taxable year. *See, e.g., Century Data Sys., Inc. v. Comm'r*, 80 T.C. 529, 537 (1983) (Tax Court "has no jurisdiction to redetermine a deficiency" where notice of deficiency based on incorrect fiscal year); *Pittsburgh Realty Inv.*

² In transferee cases, the Commissioner's notice is referred to as a "notice of liability."

Trust v. Comm’r, 67 T.C. 260, 282 (1976) (Tax Court without jurisdiction “since [Commissioner] has no authority to issue a notice of liability for a period less than the proper taxable period”).

While the Tax Court never has jurisdiction to determine a liability for an incorrect tax period, the Tax Court (and five appellate courts) have identified two situations in which the Tax Court has jurisdiction to impose liability for the *correct* tax period, notwithstanding an error in the notice. First, if the notice reflects a typographical error with respect to the tax year but the remainder of the notice makes clear that the Commissioner determined the liability for the correct tax year, then the technical error is excused and the Tax Court has jurisdiction to redetermine liability for the correct tax period.³ Second, if the notice reflects a longer period that covers the correct “short” taxable period and the taxpayer is not misled as to the proper “short” tax period, the Tax Court has jurisdiction because the notice included the correct period.

Beyond these two circumstances, the Tax Court lacks jurisdiction to impose liability for an incorrect taxable year reflected in a notice of deficiency (or notice of liability) and also lacks jurisdiction over the correct taxable year because it is not reflected in the notice.

The Second Circuit’s decision departs from this legal framework by holding that the Tax Court has jurisdiction and authority to impose a liability for an

³ Of course, the notice must be issued on a timely basis for that correct period for the Commissioner to impose liability.

incorrect tax year without regard to the taxpayer's correct taxable year. App.9a, 11a.

B. Procedural Background And Facts.

The Diebold Foundation (the "Foundation") is a charitable foundation that historically has provided funding to numerous charitable endeavors such as the Connecticut Children's Medical Center Foundation (which raises funds for sick children in need) and the Hole in the Wall Gang Fund (which provides free medically-supervised summer camps and programs to seriously ill children and their families), among many others. If upheld, the Second Circuit's adverse decision will end these charitable efforts and leave ongoing projects unfunded.

The underlying dispute involves a transferee liability claim made by the Commissioner for alleged unpaid taxes of Double-D Ranch, Inc. ("Double-D"). The Foundation received approximately \$33.5 million of contributions that ultimately traced back to proceeds received from the sale of Double-D's stock. App.35a–36a. The Commissioner issued a notice of deficiency to Double-D for tax and penalties allegedly due for a period covering July 1, 1999 to July 2, 1999. App.36a. The Commissioner later issued a notice of liability asserting that the Foundation was liable as a secondary transferee under I.R.C. § 6901(a) for that deficiency. App.37a. The Foundation timely filed a petition with the Tax Court to challenge the asserted tax liability. App.37a.

Double-D's annual taxable year reflected its fiscal year, which began on July 1 and ended on June 30. I.R.C. § 441(b)(1). Joint Stip. (T.C. Doc. 13) ¶ 275. Thus, pursuant to I.R.C. § 441(a) and (b)(1), Double-

D's taxable year that began on July 1, 1999 covered a 12-month period that ended on June 30, 2000.

Double-D took the position based on the actual sale of its stock on July 2, 1999 to another corporation that it properly entered into a consolidated group with that corporation on July 3, 1999. If accepted, this would have created two reporting periods: a period covering July 1 to July 2, 1999 and a period covering July 3, 1999 to June 30, 2000. *See* Treas. Reg. § 1.1502-76(b)(1)(ii)(A)(1). Based on this position, Double-D filed a federal tax return for a short taxable period ending July 2, 1999, and joined in the filing of a consolidated return that fully reported its income from July 3, 1999 through June 30, 2000. Joint Stip. (T.C. Doc. 13) ¶¶ 280, 285, 286.

The Commissioner, however, determined that the actual sale of Double-D stock that took place on July 2, 1999 should be disregarded and treated as a sale of Double-D's assets followed by distributions to the selling shareholders (at least some of which were after July 2, 1999). The Commissioner thus determined that Double-D did not properly enter into the consolidated group and that Double-D's tax year could not have ended on July 2, 1999 on this basis. *See* Treas. Reg. § 1.1502-75(f)(1); Resp. Reply Brief (T.C. Doc. 17) at 62. The Tax Court accepted the Commissioner's position and, as such, Double-D's taxable year did not end on July 2, 1999 based on the application of these rules.

Given the Commissioner's determination to recharacterize the transaction at issue, any notice of deficiency (or notice of liability) should have related to Double-D's taxable year that began on July 1, 1999 and ended on June 30, 2000. However, at the time

that it issued its notice of deficiency to Double-D, the statute of limitations for that taxable year already had expired. Accordingly, to circumvent this statute of limitations, the Commissioner chose to reflect his recast of the transaction in a determination of a liability for a tax period ending on July 2, 1999 and imposed tax and transferee liability on that basis. App.36a.

The Commissioner argued that Double-D's taxable year ended on July 2, 1999 based on Treas. Reg. § 1.6012-2(a)(2) and his assertion that Double-D went out of existence on that date. Double-D's tax year that began on July 1, 1999 could have ended on July 2, 1999 under Treas. Reg. § 1.6012-2(a)(2) only if Double-D ceased activities, held no assets, and dissolved on that date.

The Foundation timely argued that Double-D's tax year could not have ended on July 2, 1999 pursuant to the plain terms of Treas. Reg. § 1.6012-2(a)(2) because Double-D did not dissolve on July 2, 1999 and retained cash, stock, and other assets and performed activities in the days and months after July 2, 1999. The stipulations of the parties, other uncontroverted evidence, and findings of the Tax Court establish that Double-D held substantial cash and other assets beyond July 2, 1999, engaged in activities after that date, and retained substantial assets as of June 30, 2000, the natural end of its taxable year that began on July 1, 1999. *E.g.*, App.35a; Joint Stip. (T.C. Doc. 13) ¶¶ 4, 251–252, 283; Ex. 111-J at STIP00931–936, 942, 950.

The Tax Court initially found in favor of the Foundation on a state transferee liability issue without addressing the federal law issues (including

the incorrect tax year issue). App.96a. The Second Circuit reversed the Tax Court’s decision regarding the state law issue and remanded the case to the Tax Court to address the federal law issues. App.54a–55a. The Tax Court’s supplemental opinion found for the Commissioner but failed to address whether Double-D’s tax year ended on July 2, 1999 pursuant to Treas. Reg. § 1.6012-2(a)(2) or instead ended in its normal course on June 30, 2000. See App.29a–51a. Accordingly, the Foundation filed a motion to dismiss for lack of jurisdiction because the Tax Court’s opinion imposed a liability for an incorrect and incomplete tax period.⁴ Motion to Dismiss (T.C. Doc. 43).

In its briefing to the Tax Court, the Commissioner did not contest treatment of the issue of Double-D’s proper tax year as a jurisdictional question. Appellee Br. (Dkt. 17-3622) at 27 n.8. In its Order denying the Foundation’s motion to dismiss, the Tax Court agreed that it lacked jurisdiction to impose a liability for an incorrect tax year, and explained that “[i]f a notice covers only a portion of a taxpayer’s taxable year, the notice is invalid and the Court does not have jurisdiction to determine the deficiency.” App.23a (citing *Pittsburgh Realty Inv. Tr. v. Comm’r*, 67 T.C. 260, 282 (1976); *Schick v. Comm’r*, 45 T.C. 368, 373

⁴ This unusual procedural posture was due to the Tax Court’s decision to disregard the actual transactions and its failure to consider the taxable year issue in both its original opinion and its supplemental opinion on remand despite extensive briefing of the issue by both parties throughout the litigation.

(1966)).⁵ The Tax Court incorrectly concluded that Double-D's taxable year ended on July 2, 1999 pursuant to Treas. Reg. § 1.6012-2(a)(2).⁶ App.25a.

The Tax Court entered a decision imposing a \$33.5 million liability against the Foundation for a tax year ending July 2, 1999. App.16a–17a. The Foundation appealed the Tax Court's decision to the Second Circuit. The Foundation argued that (1) the Tax Court erred in applying Treas. Reg. § 1.6012-2(a)(2) when it concluded that Double-D Ranch's tax year ended on July 2, 1999, and (2) the Tax Court did not have jurisdiction to impose a liability for an incorrect and incomplete period. Appellant Op. Br. (Dkt. 17-3622) at 2–3, 32–54. The Foundation explained that it could not be liable for a June 30, 2000 tax year

⁵ The Tax Court decided the issue of the wrong tax year in the context of a jurisdictional analysis and never separately analyzed or addressed the non-jurisdictional consequences raised by the Commissioner for the first time in the Second Circuit.

⁶ The Tax Court also incorrectly asserted, at the Commissioner's urging, that it would have jurisdiction to impose a liability for a June 30, 2000 taxable year (if that was the proper taxable year) because Double-D was not misled by the error in the notice. App.25a. While the Commissioner raised this alternative argument in opposition to the motion to dismiss, the Commissioner and the Tax Court did not at any time contend that Double-D's proper taxable year ended on June 30, 2000, or that the Commissioner's notices of deficiency and tax liability covered that period. In the Second Circuit, the Commissioner did not dispute that the period of limitations for Double-D's June 30, 2000 had expired at the time the relevant notices were issued, which would have substantively barred the Commissioner from imposing any liability for that period.

because the Tax Court lacked jurisdiction over that period and because the Commissioner was barred from imposing a liability for that period at the time the notice was issued due to the expiration of the applicable statute of limitations. *Id.* at 44–56.

In appellee’s brief to the Second Circuit, the Commissioner argued for the first time that an incorrect and incomplete tax year in a notice of liability does not raise a jurisdictional issue, but instead should result in a “merits” determination that the Foundation did not have any liability for such a tax year. Appellee Br. (Dkt. 17-3622) at 34–39. The Commissioner offered this argument as an alternative ground to affirm the Tax Court’s decision because the Foundation framed the issue of the wrong tax year in jurisdictional terms. In making this new argument, the Commissioner “acknowledge[d] that the Tax Court and the Commissioner appear to have assumed that the issue was jurisdictional in the proceeding below.” Appellee Br. (Dkt. 17-3622) at 27 n.8. Given that the Commissioner agreed that the proper remedy in a “merits” context was for the Tax Court to enter a decision in favor of the Foundation, the Foundation presented this position to the Second Circuit as an alternative remedy (i.e., an alternative to dismissing the case for lack of jurisdiction) in its reply brief and at oral argument. The Foundation maintained that the outcome is the same—the Tax Court cannot determine a liability for an incorrect and incomplete taxable year, regardless of whether that determination is treated as a jurisdictional outcome or a non-jurisdictional outcome. Appellant Reply Br. (Dkt. 17-3622) at 18.

The court of appeals affirmed the Tax Court's decision but departed from the Tax Court's reasoning. The court of appeals rejected the Tax Court's conclusion that it lacked jurisdiction to impose a liability for an incorrect and incomplete period. App.9a–10a. The Second Circuit instead concluded that the Tax Court had jurisdiction to impose a liability for a July 2, 1999 period even if that was an incorrect taxable period. *Id.* The Second Circuit accepted the Commissioner's newly-raised argument that an improper tax period is solely a “merits” issue, but refused to consider the “merits” ramifications of an improper tax year on the grounds that the Foundation did not frame its objections to the improper tax year using that term in its opening appellate brief. App.12a–14a. The Second Circuit refused to consider the Foundation's response to the Commissioner's new position, as fully set out in the Foundation's reply brief and further discussed during oral argument. App.15a. The Second Circuit also did not remand the question of whether Double-D's improper tax year would require the Tax Court to enter a decision for the Foundation even though that issue was not previously addressed by the Tax Court.⁷ *Id.*

⁷ In its Order denying the Foundation's motion to dismiss, the Tax Court acknowledged that it had not otherwise considered or decided the question of whether “Double-D Ranch's short year is its proper tax year,” although it mistakenly stated that the parties had not previously raised the question. App.23a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision conflicts with the decisions of five other circuit courts on an important question concerning the jurisdiction of the United States Tax Court. It similarly departs from the settled law of the Tax Court itself, which has never presumed the authority to impose a tax liability for an incorrect and incomplete period. Thus, the Second Circuit's decision creates disparate rules and standards relating to the Tax Court's jurisdiction. A circuit conflict on a matter of such undeniable importance is sufficient reason to grant certiorari.

The Second Circuit's decision also is wrong. Our tax system hinges on the computation of tax liability for a legally-defined taxable year. If the Commissioner issues a notice for an incorrect and incomplete taxable year, the Tax Court has no legal authority to enter a decision that imposes a liability for that incorrect period. Without dominion over the full and correct taxable year, the Tax Court cannot fully analyze all of the items of income and expense that must be taken into account in the proper computation of a tax liability required under the Internal Revenue Code. Moreover, the Tax Court has recognized that the proper procedure when the Commissioner issues a notice for an incorrect and incomplete tax year is for the Commissioner to issue a new notice of deficiency for the full and correct taxable year (subject, of course, to the applicable statute of limitations). This approach is most consistent with the requirements of the Internal Revenue Code.

Finally, this case presents a proper vehicle to address these issues. The scope of the Tax Court's

authority to impose a liability for an improper period was squarely addressed by the parties in the Tax Court and the Second Circuit, and the Second Circuit concluded that the Tax Court had the authority to impose a liability for an incorrect and incomplete period. The separate waiver question presented below does not impact the resolution of this primary issue. Instead, the two questions raise alternative grounds for reversal of the Second Circuit's decision.

This petition also presents a separate question as to whether waiver should be applied to the detriment of appellants based on the alternative grounds for affirmance raised for the first time in appellee's appellate brief. The Second Circuit's novel waiver rule conflicts with the prior decisions of this Court and other circuits, which have not applied a waiver concept to ignore an appellant's response to new alternative grounds raised by the appellee for the first time in its responsive appellate brief.

**A. The Decision Below Conflicts With The
Decisions Of Five Other Circuits And
Departs From Decades Of Settled Law**

The Second Circuit decision grants the Tax Court jurisdiction to impose liability for an incorrect period without regard to the taxpayer's correct taxable year. This is a sharp departure from the decisions of the Third, Fifth, Sixth, Seventh, and Tenth Circuits. Rather than grant the Tax Court jurisdiction to impose a liability for an *incorrect* period, these circuits have set forth parameters for when the Tax Court has jurisdiction to impose a liability for the taxpayer's *correct* taxable year when the face of a notice specifies an incorrect tax period. None have

permitted the Tax Court to impose a liability for an incorrect tax year, as the Second Circuit does here.

The general rule is that the Tax Court lacks jurisdiction over either the incorrect tax period or the correct tax year if the notice issued by the Commissioner reflects an incorrect tax period. *See, e.g., Miles Prod. Co. v. Comm'r*, 987 F.2d 273, 276 (5th Cir. 1993) (“It is well established that a deficiency notice is invalid if based upon incorrect taxable periods.”); *Sanderling, Inc. v. Comm'r*, 571 F.2d 174, 176 (3d Cir. 1978) (the Tax Court lacks “jurisdiction where the deficiency notice does not cover a proper taxable period”).

However, there are two limited scenarios in which the Tax Court has jurisdiction to impose liability for the correct taxable year because it is determined to be within the scope of the notice. First, the Tax Court has jurisdiction over the correct period if “it is apparent within the notice itself that it covers the correct taxable period.” *Century Data Sys., Inc. v. Comm'r*, 80 T.C. 529, 536 n.11 (1983) (collecting cases); *accord. Estate of Scofield v. Comm'r*, 266 F.2d 154, 167 (6th Cir. 1959); *Commissioner v. Forest Glen Creamery Co.*, 98 F.2d 968, 970 (7th Cir. 1938). Second, the Tax Court has jurisdiction if the period reflected in the notice includes the taxpayer’s correct tax year and the taxpayer is not misled by the error. *Sanderling, Inc. v. Commissioner*, 571 F.2d 174, 176 (3d Cir. 1978); *Burford v. Commissioner*, 76 T.C. 96, 99–100 (1981) (distinguishing between a notice that covers a period that includes the correct taxable year and a notice that only covers a “fractional part” of the correct taxable year), *aff’d without opinion*, 786 F.2d 1151 (4th Cir. 1986).

The Second Circuit departs from these settled standards by granting the Tax Court jurisdiction to impose a liability for an incorrect taxable year without any regard to the correct taxable year. App.9a, 11a.

1. In 1938, the Seventh Circuit grappled with a notice containing an incorrect period in the context of a review of a decision of the Board of Tax Appeals. *Comm'r v. Forest Glen Creamery Co.*, 98 F.2d 968 (7th Cir. 1938). The court addressed the question of whether the Commissioner determined a deficiency for the taxpayer's correct taxable year (the calendar year 1927) or the incorrect and incomplete six-month period that was reflected on the face of the notice. *Id.* at 969. The Seventh Circuit regarded this question as controlling because “[w]hen the Commissioner of Internal Revenue has determined a deficiency against a taxpayer for a taxable year the Board of Tax Appeals has no jurisdiction ‘to determine whether or not the tax for any other taxable year has been overpaid or underpaid.’” *Id.* at 970 (citing the predecessor to I.R.C. § 6214(b)). The Seventh Circuit found that the Commissioner had determined the liability for the correct taxable year and had given sufficient notice of that period, and concluded that the Tax Court had jurisdiction to determine liability for the correct taxable year (not the incorrect period).

2. The Sixth Circuit analyzed a similar issue in *Estate of Scofield v. Comm'r*, 266 F.2d 154 (6th Cir. 1959). In *Estate of Scofield*, the face of the notice of deficiency incorrectly identified a short six-month period when the correct taxable year was the taxpayer's full calendar year. *Id.* at 167. Because the tax liability computations contained in the notice

were based on the full calendar year and because the taxpayer's petition placed into issue the full calendar year, the Sixth Circuit concluded that the Tax Court had jurisdiction to determine the liability for the full calendar year (as opposed to the incorrect, short period). *Id.*

3. In 1978, the Third Circuit addressed a case in which the Commissioner issued a deficiency notice that incorrectly reflected a full calendar year when the taxpayer's correct tax year ended prematurely due to its termination. *Sanderling, Inc. v. Comm'r*, 571 F.2d 174 (3d Cir. 1978). The Third Circuit recognized that the Tax Court generally lacks "jurisdiction where the deficiency notice does not cover a proper taxable period." *Id.* at 176 (3d Cir. 1978). However, the Third Circuit explained that the Tax Court retains jurisdiction if "the notice actually covered a time longer than that asserted by the taxpayer to be the proper period, and the transaction at issue in fact occurred before the end of that taxable year." *Id.* Thus, "the notice of deficiency was valid since the year cited included the taxable event and *the correct taxable period.*" *Id.* (emphasis added). As such, the Tax Court had jurisdiction to determine the liability for the proper taxable year (not the incorrect period reflected in the notice).

4. In 1993, the Fifth Circuit reiterated that the Tax Court did not have jurisdiction to impose a liability for an incorrect tax period. *Miles Production Co. v. Comm'r*, 987 F.2d 273 (5th Cir. 1993). The Fifth Circuit explained that "[i]t is well established that a deficiency notice is invalid if based upon incorrect taxable periods" and thus deprives the Tax Court of jurisdiction. *Id.* at 276. The Fifth Circuit

ultimately concluded that the year reflected in the deficiency notice was the proper tax year. *Id.* at 278.

5. In *Estate of Davenport v. Comm’r*, 184 F.3d 1176 (10th Cir. 1999), the Tenth Circuit applied the reasoning of the Fifth Circuit. The Tenth Circuit held that “[i]t is well established that a deficiency notice is invalid if based upon incorrect taxable periods . . . [i]t follows that the Tax Court does not have jurisdiction if a deficiency notice sets forth an incorrect taxable period.” *Id.* at 1182 n.2 (citing *Miles Prod.*, 987 F.2d at 276). The court then concluded that the period reflected in the notice was correct. *Id.* at 1188.

6. In addition to conflicting with these decisions, the Second Circuit’s decision also conflicts with the Tax Court’s own long-standing jurisprudence. The Tax Court has never held that it has the jurisdictional power to impose liability for an incorrect and incomplete tax period. To the contrary, the Tax Court has repeatedly concluded that it does not have the authority to impose a liability for an incorrect tax period under the Code, consistent with the standards articulated by the five courts of appeals decisions identified above. For example, in *Century Data Sys., Inc. v. Comm’r*, 80 T.C. 529 (1983), the Tax Court observed that it has “long held that [the Commissioner] has no authority to issue a notice of deficiency for a period less than the taxpayer’s full taxable year.” *Id.* at 535. Because the Tax Court cannot impose liability for anything other than the taxpayer’s legally-defined taxable year, “the Tax Court simply has no jurisdiction to determine a deficiency for any taxable year other than a taxpayer’s correct taxable year.” *Id.* The Tax Court has applied these principles in more than a dozen cases spanning

many decades and—until the Second Circuit’s decision—this position reflected the settled law of the Tax Court. See, e.g., *Sanderling, Inc. v. Comm’r*, 66 T.C. 743, 749 n.7 (1976); *Pittsburgh Realty Inv. Tr. v. Comm’r*, 67 T.C. 260, 282 (1976); *Schick v. Comm’r*, 45 T.C. 368, 370 (1966); *Columbia River Orchards, Inc. v. Comm’r*, 15 T.C. 253, 261 (1950); *Estate of Curtis v. Comm’r*, 36 B.T.A. 899, 903 (1937).

The Second Circuit decision upends this previously-settled area of law and dramatically reimagines the jurisdictional reach of the Tax Court. The previous decisions of the five circuits and the Tax Court articulate clear standards for when the Tax Court may exercise jurisdiction to impose a liability for a *correct* tax year. None have allowed the Tax Court to impose a liability for an *incorrect* tax period, as the Second Circuit’s decision allows. This conflict is irreconcilable and creates an inconsistent reading of the Tax Court’s jurisdictional powers.

B. This Conflict Creates Uncertainty As To The Tax Court’s Jurisdiction.

This circuit conflict calls into question the scope of the Tax Court’s jurisdictional powers and provides inconsistent standards to be applied when a notice reflects an incorrect tax period. The Tax Court is a court of nationwide jurisdiction. As such, I.R.C. § 7482(b)(1) provides that the venue for appeals of Tax Court decisions depends on petitioner’s residence or principal place of business. This means that a consolidated Tax Court case with multiple petitioners may be appealable to more than one court of appeals. While this is a natural consequence of the Tax Court’s national reach, this feature also makes it especially

critical for the Tax Court to have uniform and administrable rules relating to its jurisdiction and scope of review. Since the majority of the Tax Court's docket relates to tax redeterminations, this is no small issue. See Harold Dubroff & Brant J. Hellwig, *The United States Tax Court: An Historical Analysis*, at 909 (2d ed. 2014) (From 2009 to 2013, an average of approximately 29,500 deficiency cases were filed per year, making up 93% of the Tax Court's docket).

The Second Circuit's ruling permits the Tax Court to impose a liability for an incorrect taxable year even if any potential liability relates to a different correct taxable year over which the Tax Court does not have jurisdiction. Under the controlling legal framework, the Tax Court does not have jurisdiction to determine a liability for an incorrect taxable year, and may impose a liability only after it determines whether it has jurisdiction over the correct taxable year. This inconsistency in the application of the Tax Court's jurisdictional powers is untenable and warrants review.

C. The Decision Below Was Wrong.

The Second Circuit's conclusion that the Code grants the Tax Court jurisdiction to impose a liability for an incorrect tax year also is wrong. There is good reason why courts have concluded that the Tax Court does not have jurisdiction over a potential liability for an incorrect tax year, and may not impose any liability when it lacks jurisdiction over the taxpayer's correct taxable year.

The Tax Court is "a court of limited jurisdiction" whose authority to act is precisely delineated in the Code. *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987); I.R.C.

§ 7442. I.R.C. § 6214(a) grants the Tax Court “jurisdiction to redetermine the correct amount of the deficiency” determined by the Commissioner, while I.R.C. § 6214(b) specifies that the Tax Court does not have jurisdiction to determine liability for any other taxable year. Thus, I.R.C. § 6214 empowers the Tax Court to recompute the taxes due for a legally-defined taxable year and determine whether the taxpayer is liable for that period. To do its job, the Tax Court must have jurisdiction over the correct taxable year because Congress imposes all legal obligations on the basis of a legally-defined taxable year. As this Court explained in 1934:

The revenue acts since the Sixteenth Amendment have consistently assessed income taxes on the basis of annual accounting periods, either the calendar year or the different fiscal year which the taxpayer may adopt. From the beginning these periods have been known as taxable years and the provisions of the taxing statutes have been drafted and enacted with primary reference to such normal accounting periods.

Helvering v. Morgan's Inc., 293 U.S. 121, 126 (1934) (citation omitted).

The Second Circuit erred in concluding that the Tax Court has jurisdiction to compute and impose liability without regard to the Code’s legally-mandated taxable year. The Tax Court highlighted the problems inherent in the Second Circuit’s approach in *Century Data Sys., Inc. v. Comm’r*, 80

T.C. 529 (1983). The Tax Court explained that a notice that fails to reflect the full and correct taxable year of the taxpayer “is inherently erroneous because the deficiency asserted has necessarily omitted items of income and deduction of the correct taxable year and has included other items which properly belong in another taxable year.” *Id.* at 535. Thus, the Tax Court has held that “[i]f there is any deficiency . . . it must be determined for the entire taxable year” *Columbia River Orchards*, 15 T.C. at 261.

Our income tax system depends on the imposition of tax for a clear and unambiguous taxable year. Specificity as to the proper tax year is critical because the core legal rights and obligations set forth in the Code hinge off of that period. *See, e.g.*, Treas. Reg. § 1.441-1(a)(1) (“[A] return must be made for a period known as the taxable year.”); I.R.C. §§ 6651(a)(1) (imposing penalties for failing to file a return and for filing incorrect returns); 6501(a) (applying a 3-year statute of limitations triggered upon the date the return was filed); 6662(a) (a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year). As such, the Code and Regulations set forth unambiguous, bright-line rules that define a taxpayer’s taxable year. I.R.C. §§ 441(a)(3); 7701(a)(23). Thus, the Tax Court can only determine the “merits” for the correct tax year. There is no “merits” determination for an incorrect period because the Code does not permit the Commissioner or the Tax Court to impose liability for anything less than the full, legally-defined taxable year of the taxpayer. This is an inherent aspect of the Tax Court’s power and is not something that can be waived or ignored.

In *Schick v. Commissioner*, 45 T.C. 368 (1966), *acq.* 1966-2 C.B. 7, the Tax Court concluded that the proper tax year was a full calendar year rather than a short 3-month period (which was reflected in the notice of deficiency). *Id.* at 373. The Commissioner argued that the Tax Court should determine a deficiency for that short 3-month period notwithstanding his failure to reflect the full and correct taxable year. The Tax Court rejected this invitation because it had “no more authority to make such a determination than does [the Commissioner].” *Id.* The Tax Court explained that, under the Internal Revenue Code, “the proper procedure would be for [the Commissioner] to issue a new notice of deficiency for the proper taxable year.” *Id.* The Commissioner ultimately agreed with the Tax Court’s conclusion in *Schick*. *See* 1966-2 C.B. 7.

Indeed, the Commissioner himself has affirmatively advocated for this position in other proceedings before the Tax Court. *See, e.g., Petaluma FX Partners v. Commissioner*, 94 T.C.M. (CCH) 237 (moving to dismiss for lack of jurisdiction because notice made adjustments for the wrong taxable year).

The confusion and problems that the Second Circuit’s unique rule engenders are illustrated in this case. The Second Circuit concluded that even if the full and correct tax period was June 30, 2000, the Tax Court still could impose a \$33.5 million liability against the Foundation for an incorrect and incomplete period ended July 2, 1999. App.9a, 11a. This directly undermines the jurisdictional bar set forth in I.R.C. § 6214(b), which would deprive the Tax Court of jurisdiction to impose a liability for a June 30, 2000 tax year. This statutory provision prevents

the Tax Court from determining liability for other tax periods not reflected in the notice. The Second Circuit's decision also directly sidesteps the legally-defined statute of limitations for the full and correct tax period (covering July 1, 1999 to June 30, 2000), which was closed at the time the Commissioner issued his notices.

D. The Second Circuit's Waiver Decision Also Warrants Review.

Separate and apart from the primary question discussed above, the Second Circuit also applied a new waiver rule that prevents an appellant from fully responding to an argument raised by appellee for the first time in its appellate brief, even when that position reflects a significant departure from the position argued by the appellee in the lower court. The Second Circuit's unusual and restrictive waiver approach conflicts with the decisions of ten circuit courts—and this Court—on an important issue of appellate procedure. The Second Circuit's rule also is wrong and, if allowed to stand, threatens to adversely impact the fairness and integrity of the judicial process in future cases.

1. The Second Circuit's Waiver Decision Conflicts With The Decisions Of Ten Other Circuits.

The Second Circuit's decision conflicts with the decisions of ten other circuits. Those circuits permit an appellant to fully respond to new issues and other matters raised by an appellee in its brief even if those

matters were not explicitly raised as issues in the appellant's opening brief.

1. The First Circuit permits an appellant to respond fully to an appellee's newly-raised arguments in a reply brief even if the appellant's position was not contemplated in its opening brief. In that scenario, the appellant has asserted its position "at the earliest point when it was logical to do so, and it would make no sense to fault [appellants] for not having raised it sooner." *Holmes v. Spencer*, 685 F.3d 51, 66 (1st Cir. 2012); *accord. Walker v. Exeter Region Coop. Sch. Dist.*, 284 F.3d 42, 47 (1st Cir. 2002) (finding that if an appellee raises an argument in its opening brief "prudence dictated that [appellants] counter with a reply brief showing that the [appellees] were wrong").

2. The Third Circuit has explained that "it is well settled that 'where an appellee raises a[n] argument not addressed by the appellant in its opening brief, the appellant may reply.'" *McCray v. Fidelity Nat'l Title Ins. Co.*, 682 F.3d 229, 241 (3d Cir. 2012) (quoting *Bennett v. Tucker*, 827 F.2d 63, 69–70 n.2 (7th Cir. 1987)). As such, the Third Circuit permitted the appellant to present policy arguments in its reply brief "because [a]ppellees raised it for the first time in their brief." *Id.*

3. The Fifth Circuit similarly has explained that, while it does not generally entertain arguments not raised in appellant's opening brief, it "views the situation differently when a new issue is raised in the appellee's brief and the appellant responds in his reply brief." *United States v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009). "In that situation, the court avoids the more unfair scenario that occurs when 'an appellant raises a completely new issue in its reply

brief, disadvantaging the appellee, and for which the procedural bar concerning initial briefs was properly developed and utilized.” *Id.* (citing *Cousin v. Trans Union Corp.*, 246 F.3d 359, 373 n.22 (5th Cir. 2001)). Correspondingly, the Fifth Circuit allows appellees to raise alternative grounds for affirmance only if both sides have the opportunity to fully brief the issue. *See, e.g., Maryland Cas. Co. v. State Bank & Trust Co.*, 425 F.2d 979, 982 (5th Cir. 1970).

4. The Sixth Circuit adopts the same position, concluding that while “the appellant cannot raise new issues in a reply brief,” appellant can “respond to arguments raised for the first time in appellee’s brief.” *United States v. Fleming*, 463 F. App’x 550, 553 (6th Cir. 2012) (quoting *United States v. Jerkins*, 871 F.2d 598, 602 n.3 (6th Cir. 1989)).

5. The Seventh Circuit also has “recognized that where an appellee raises a[n] argument not addressed by the appellant in its opening brief, the appellant may reply.” *Bennett v. Tucker*, 827 F.2d 63, 69 n.2 (7th Cir. 1987).

6. The Eighth and Ninth Circuits apply a similar rule. When an appellee raises a new issue in its answering brief “that issue has been joined and [the court] may consider it.” *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 n.3 (9th Cir. 2007) (citing *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 324 (9th Cir. 1991) (“We have discretion to review an issue not raised by appellant, however, when it is raised in the appellee’s brief.”)); *United States v. Miranda-Zarco*, 836 F.3d 899, 902 n.1 (8th Cir. 2016) (applying rule set forth by Ninth Circuit in *In re Riverside-Linden Inv. Co.* 945 F.2d at 324).

7. The Tenth Circuit similarly allows appellants to present arguments in response to a new issue or argument raised in appellee's opening brief. See *Sadeghi v. INS*, 40 F.3d 1139, 1143 (10th Cir. 1994). Thus, in *United States v. Holmes*, 727 F.3d 1230 (10th Cir. 2013), the Tenth Circuit permitted the government to raise an issue for the first time on appeal as the appellee, but did so only after providing the appellant with the "opportunity to respond to the government's new argument, both in his reply brief and at oral argument." *Id.* at 1233.

8. The D.C. Circuit also has made clear that "an appellant generally may, in a reply brief, 'respond to arguments raised for the first time in the appellee's brief.'" *United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018) (quoting 16AA Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 3974.3 (4th ed. 2017)).

9. The Federal Circuit similarly has held that "[w]hen a potentially material issue or argument in defense of the judgment is raised for the first time in the appellee's brief, fundamental fairness requires that the appellant be permitted to respond, lest the appellate court deem the point conceded." *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1356 (Fed. Cir. 2001) (concluding that appellant is not "required to remain silent" when appellee raises a new issue "not decided by district court").

The Second Circuit's decision departs from the decisions of these ten other circuits by refusing to consider appellant's response to a new issue or argument presented by the appellee in its appellate brief.

2. The Second Circuit's Waiver Decision Conflicts With The Decisions Of This Court.

The decisions of the ten circuits discussed above adhered to the core principles of appellate procedure that this Court has laid down over the past eight decades. Those rules balance fairness, justice, and judicial economy. The Second Circuit's waiver decision undermines those principles. While this Court has granted appellate courts discretion to consider new questions not presented to the lower court when justice demands it, that discretion must be applied with great care to avoid prejudice to either party. In particular, an appellee may raise new arguments in their appellate brief only in appropriate circumstances, and when this is permitted, appellants must be given an opportunity to respond to the new arguments raised.

As a general matter, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This rule is of fundamental importance because "our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Correspondingly, this Court has emphasized the value of respecting the requirement that litigants present issues for the first time in the lower court. The waiver rules have value because they "ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008). As this Court has explained:

The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a ‘winnowing process,’ and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.

Exxon Shipping Co., 554 U.S. at 487 n.6 (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)). By allowing the appellee to raise new arguments not adequately raised below and restricting the ability of appellants to address those arguments, the Second Circuit abandons these principles and undermines justice.

Appellate courts may allow an appellee to raise a new alternative ground to affirm the decision of the lower court because the court’s review is centered on the correctness of the lower court’s ultimate decision (here, the Tax Court’s decision to impose liability against the Foundation for an incorrect July 2, 1999 tax year). See *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (“In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”) (citation omitted). Because the focus is on the correctness of the decision, appellant is permitted to fully address the new argument to show why the lower court’s decision is wrong under the alternative ground without being limited to the specific points raised in its opening brief.

This Court and other circuits have ruled that a new argument by an appellee has at least two consequences: (1) the appellant must be allowed to fully address the alternative ground in the appeal just as it would have been able to do in the lower court, and (2) the appellant must be given the opportunity to present additional facts (or legal arguments) that may have bearing on this new grounds for affirmance in the lower court through remand, if appropriate. *See, e.g., Gowran*, 302 U.S. at 245; *United States v. Holmes*, 727 F.3d 1230, 1233 (10th Cir. 2013); *Spokane County v. Air Base Housing, Inc.*, 304 F.2d 494, 497 (9th Cir. 1962); *Rhodes v. Comm’r*, 111 F.2d 53, 57 (4th Cir. 1940); *see also Singleton v. Wulff*, 428 U.S. 106 (1976) (“Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.”). As this Court has explained, giving the appellant the opportunity to full address the newly raised alternative ground is a basic matter of “fairness and justice.” *Gowran*, 302 U.S. at 245.

By departing from these principles and only partially considering the ramifications of appellee’s newly-raised alternative ground, the Second Circuit’s approach encourages an incomplete analysis of an alternative ground for affirmance that does not focus on the ultimate correctness of the lower court’s decision.

3. The Second Circuit’s Waiver Decision Was Wrong.

The Second Circuit’s waiver decision also is wrong. While the Second Circuit had discretion to consider

appellee's new argument as an alternative ground for affirmance of the lower court's decision, it must fully address the parties' arguments if it exercises that discretion. This is particularly important if, as here, the appellee abandons his lower court position and takes the contrary position. *See Gregory v. Missouri Pacific R. Co.*, 32 F.3d 160, 165 (5th Cir. 1994) (“[Appellee] cannot take one position before the district court and then take an inconsistent position here.”).

The failures of the Second Circuit's approach are apparent in its application to this case.

1. The Second Circuit's new rule fails to focus on whether appellee's alternative ground for affirmance demonstrates that “the decision below is correct.” *Gowran*, 302 U.S. at 245. The Second Circuit's appellate jurisdiction “was conferred by I.R.C. § 7482(a) which grants exclusive jurisdiction to courts of appeals to review ‘the *decisions* of the Tax Court’, a decision of the Tax Court being the formal determination of the existence or non-existence of a deficiency.” *W. W. Windle Co. v. Comm’r*, 550 F.2d 43, 45 (1st Cir. 1977); *Kreider v. Comm’r*, 762 F.2d 580, 584 (7th Cir. 1985). Here, the Tax Court's decision imposed liability against the Foundation for a July 2, 1999 tax year. App.17a. That decision necessarily is not correct unless Double-D's proper tax year ended on July 2, 1999. Even if that wrong tax year is viewed as solely a “merits” issue (as appellee's newly-raised ground claims), that characterization does not establish that the Tax Court's decision imposing a liability for a July 2, 1999 tax year was correct. To the contrary, the Commissioner conceded that the appropriate remedy for an improper tax year would

be for the Tax Court to enter a decision for the Foundation, not *against* the Foundation. Appellee Br. (Dkt. 17-3622) at 40–41, 46 (arguing that the proper remedy for an incorrect tax year “might properly result in a *decision* for the transferee”).

2. The Second Circuit’s rule wrongly applies waiver to appellants when it is the appellee that raised a new issue that should have been presented below. When the Commissioner switched positions in the Second Circuit and argued for the first time that an improper tax year was a “merits” issue rather than a “jurisdictional” issue, the Commissioner put the treatment of the improper taxable year as a “merits” issue into dispute. Appellee Br. (Dkt. 17-3622) at 34–39. The Foundation had the right to argue—as it did—that the issue was not a “merits” issue and that the result was the same regardless of the characterization. While it may be appropriate for an appellate court to bar appellants from raising issues wholly unrelated to appellee’s new argument, it is inappropriate to prevent appellants from directly responding to the argument as the Second Circuit does with its waiver decision.

3. The Second Circuit’s restrictive application of waiver encourages gamesmanship and turns a blind eye to fairness and justice. Indeed, the parties had fully briefed the issue of the proper tax year in their opening briefs on appeal and the Commissioner had conceded in its briefing that the “merits” characterization simply meant that the proper remedy was for the Tax Court to enter decision for the Foundation rather than dismiss the case for lack of jurisdiction. Appellee Br. (Dkt. 17-3622) at 40–41, 46. There was no prejudice to appellees for the Second

Circuit to fully address the ramifications that the Commissioner himself put into issue. Appellee Br. (Dkt. 17-3622) at 49–50 (recognizing that in the majority of cases “the practical effect of entering a merits decision for the petitioner that there is no deficiency or liability . . . is no different than deeming the notice invalid and dismissing for lack of jurisdiction”).

Conversely, the application of waiver directly prejudiced the Foundation by treating the core issue that it presented in the appeal as waived. By arguing that Double-D’s proper taxable year ended on June 30, 2000 and not on July 2, 1999 and framing that as one of the two issues presented in its opening brief, the Foundation unambiguously disputed the issue of the proper tax year and did not waive that issue. Appellant Op. Br. (Dkt. 17-3622), at 2–3, 25–43. While the argument was framed in jurisdictional terms because that is how it was decided in the Tax Court (and its jurisdictional nature was not in controversy), the presentation of the issue necessarily put into dispute all of the associated ramifications (whether framed as “jurisdictional” or “merits”). Indeed, it makes no sense to say—as the Second Circuit does—that the Foundation vigorously argued that Double-D Ranch’s tax year ended on June 30, 2000 for jurisdictional purposes, but nonetheless conceded that the taxable year properly ended on July 2, 1999 for “merits” purposes. The Foundation did not concede that Double-D’s tax year ended on July 2, 1999 for “merits” purposes; that issue was simply not addressed by the Tax Court on “merits” grounds. App.23a; *c.f. Adkison v. Comm’r*, 592 F.3d 1050, 1056 (9th Cir. 2010) (deciding that the Tax Court lacked

the authority to impose a proper remedy even though parties wrongly characterized the issue as one of jurisdiction).

“Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.” *Hormel*, 312 U.S. at 557. By requiring appellants to accurately predict which previously-settled areas the appellee will reopen and by allowing appellees to sandbag appellants by belatedly presenting issues on appeal that cannot be fully addressed, the Second Circuit has imposed a rule that encourages gamesmanship and injustice rather than preventing them.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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