

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 17-3679

Brad S. Francis; Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(009801-16)

JUDGMENT

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

The motion for leave to file out of time for good cause is denied.

The motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed. See Eighth Circuit Rule 47A(b).

January 29, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3679

Brad S. Francis and Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(009801-16)

ORDER

A petition for rehearing has been filed by Appellants in the above case. The court requests a response to the jurisdictional issues in the petition.

The response is limited to 3900 words, and must contain a word count certificate. The response should be filed electronically by February 23, 2018.

February 13, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3679

Brad S. Francis and Christine C. Francis

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(009801-16)

ORDER

The petition for rehearing by the panel is denied.

April 02, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES TAX COURT
WASHINGTON, DC 20217

BRAD S. FRANCIS &)	
CHRISTINE C. FRANCIS,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 9801-16
)	
COMMISSIONER OF)	
INTERNAL REVENUE,)	
)	
Respondent.)	
)	

ORDER

A timely petition was filed on April 26, 2016, disputing an income tax liability alleged in a Notice of Deficiency issued to petitioners for tax year 2013. On or around March 24, 2017, petitioners sent respondent a letter, a signed Form 5564, Notice of Deficiency – Waiver (Waiver form), a cashier’s check, and a copy of the cashier’s check with the notation: “Paid in Satisfaction of and Protest to, Alleged Deficiency for the Tax Period 2013.” On or around April 13, 2017k, petitioners submitted a form 1040X, Amended U.S. Individual Tax Return for tax year 2013 (2013 Form 1040X) in which they reported no income and no tax liability.

SERVED Nov 09 2017

On September 6, 2017, petitioners filed a Motion to Dismiss on Grounds of Mootness. Petitioners' motion states, among other things, that their signing of the Waiver form and payment of tax liability deprives the Tax Court of jurisdiction and also renders any existing controversy moot. In the response to petitioners' motion, filed September 25, 2017, respondent states, among other things, that the payment of tax or the signing of a Waiver form does not deprive the Tax Court of jurisdiction. Respondent also argues that petitioners' payment of tax under protest and subsequent filing of the 2013 Form 1040X that reports no income or tax liability demonstrates that an ongoing dispute remains.

Respondent's statements are correct. Petitioners invoked the exclusive jurisdiction of the Tax Court when they filed a petition for redetermination pursuant to their receipt of a valid notice of deficiency. Sec. 6512(a).¹ Amounts paid with respect to tax after the mailing of a notice of deficiency shall not deprive the Tax Court of jurisdiction over such deficiency for the year at issue. Sec. 6213(b)(4). Petitioners' signing of the Waiver from waives restrictions on the assessment and collection of tax, but does not deprive the Tax Court of jurisdiction over the deficiency. Sec. 6123(d); Sec. 301.6213-1(d), Income Tax Regs. Once invoked, the Tax Court's jurisdiction remains unimpaired until it decides the controversy. Estate of Ming v. Commissioner, 62 T.C. 519, 521 (1974). Petitioners' payment of their tax liability "in protest" and

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year at issue.

subsequent filing of a tax return in which they claim zero income and zero tax liability demonstrate the existence of an ongoing controversy regarding the determined deficiency amounts. Petitioners' signatures on the Waiver form do not represent acquiescence to the deficiency amount. Accordingly, the issues presented in this case are not moot.

Given due consideration of the foregoing, it is hereby

ORDERED that petitioners' Motion to Dismiss on Grounds of Mootness, filed September 6, 2017, is denied.

(Signed) L. Paige Marvel
Chief Judge

Dated: Washington, D.C.
November 8, 2017

APPENDIX E

Brad S. Francis & Christine C. Francis

RECEIVED
UNITED STATES TAX COURT
INTAKE #4

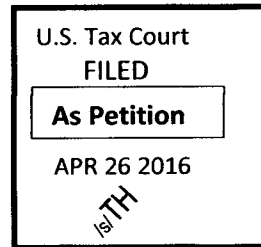
2016 APR 26 AM 8:50

BY: /s/ HN
DEPUTY CLERK

April 18, 2016

9801 – 16

Clerk of the United States Tax Court
400 Second Street NW
Washington, D.C. 20217



Dear Clerk,

Please send us information about the simplified procedure for small tax cases (less than \$50,000) and a petition form. Please mail to the address below.

Thank you,

Brad S. & Christine C. Francis
9704 North Holmes Street
Kansas City, MO 64155
Mobile: 816-812-3600

Address Used by Court

SERVED Apr 29 2016

APPENDIX F

84 T.C. 248 (1985)

STAMM INTERNATIONAL CORP., PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

Docket No. 5543-84.

United States Tax Court.

Filed February 25, 1985

E. A. Dominianni, for the petitioner.

Robert B. Marino and *Raymond J. Farrell*, for the
respondent.

OPINION

GERBER, *Judge*:

By statutory notice dated December 8, 1983, respondent determined deficiencies in petitioner's Federal corporate income and personal holding company tax as to the 249*249 taxable years ended June 30, 1978, 1979, 1980, and 1981, in the amounts of \$569,399, \$909,614, \$1,265,764, and \$1,647,793, respectively. Petitioner had previously received a statutory notice for the taxable year ended June 30, 1978, in which a deficiency was determined in a lesser amount (\$123,842).

This case is now before the Court on petitioner's motion to dismiss for lack of jurisdiction as to all 4 taxable years. We are asked to decide whether a statutory notice that determines deficiencies for several taxable years, which is a second notice as to one of the years, can be the basis for the jurisdiction of the Court.

Petitioner Stamm International Corp. is a corporation with its principal office located at 321 Commercial Avenue, Palisades Park, New Jersey 07650. For its taxable years ended June 30, 1978, 1979, 1980, and 1981, petitioner filed returns with the Internal Revenue Service Center at Holtsville, New York.

By written agreements pursuant to section 6501(c)(4),^[1] petitioner and respondent extended the period for assessment of tax due for the taxable years ended June 30, 1978 and 1979, to December 31, 1983. For the taxable year ended June 30, 1980, the statutory period for assessment expired on December 11, 1983.^[2]

On November 3, 1983, and on December 8, 1983, respondent sent statutory notices to petitioner, and copies of the statutory notices to petitioner's representatives. The record in this case concerning the issuance of statutory notices is unduly burdensome. Multiple notices were sent to various addresses, some of which were incorrect. Pursuant to a power of attorney, petitioner's representatives were entitled to receive copies of notices concerning the taxable year ended June 30, 1978.

For purposes of this case, however, it is important to note the following. For the taxable year ended June 30, 1978, 250*250 petitioner received and timely petitioned from a copy of a November 3, 1983, notice sent to its representatives. The other November notices that respondent attempted to send to petitioner were incorrectly addressed and were returned to respondent undelivered. Several notices were sent to the correct addresses of petitioner and its representatives on December 8, 1983. From these notices, two petitions were filed, one for the taxable year ended June 30, 1978, and the other for the taxable years ended June 30, 1978, 1979, 1980, and 1981. From this overabundance of notices and petitions, the issue of the divisibility of a notice has arisen.^[3]

251*251 On August 22, 1984, this Court heard oral argument on petitioner's motion to dismiss docket Nos. 5543-84^[4] (this action) and 4865-84^[5] for lack of jurisdiction. Petitioner argued that as to the taxpayer, taxable year, and taxes involved, the notice of deficiency in docket No. 4865-84 was duplicative of the notice in docket No. 2690-84.^[6] Respondent did not object to petitioner's motion to dismiss docket No. 4865-84. The Court entered an order dismissing the action in docket No. 4865-84 and took petitioner's motion in this action under advisement.

Petitioner, in its motion, contends that the notice of deficiency in this action is invalid as to 1978 because it is a second notice as to that year; that, because the notice is invalid as to one year, it is invalid as to all years; and, therefore, the Tax Court lacks jurisdiction.^[7] Respondent agrees that the notice is invalid as to the taxable year ended June 30, 1978,

but asserts that the notice is nevertheless valid for the taxable years ended June 30, 1979, 1980, and 1981, and concludes that the Tax Court has jurisdiction as to the 3 latter years.^[8] We agree with respondent's position.

We are unaware of any opinion that has focused on the issue presented in this case. Because our jurisdiction is statutorily limited, the Internal Revenue Code must be the starting point for our analysis. Where the Secretary of the Treasury determines a deficiency in tax, the Secretary is authorized under section 6212(a) to send notice of the deficiency to the taxpayer involved. The notice of deficiency is sufficient if mailed to the taxpayer at his last known address. Sec. 6212(b). As to subsequent notices of deficiency, section 6212(c), in pertinent part, provides as follows:

SEC. 6212(c). FURTHER DEFICIENCY LETTERS RESTRICTED. —

(1) GENERAL RULE. — If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the 252*252 Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year * * *

In the matter before us, notices of deficiency were mailed on November 3 and December 8, 1983.^[9] Petitioner filed a petition (docket No. 2690-84) from a copy of a statutory notice for 1978 mailed to its representatives on November 3.^[10] Petitioner also filed a petition (this action) based on the notice

of deficiency for the taxable years ended June 30, 1978, 1979, 1980, and 1981, mailed to it on December 8, 1983. Where a taxpayer files a petition from a notice of deficiency, respondent has no authority to send the taxpayer a second notice for the same taxable year and tax liability. Barth Foundation v. Commissioner, 77 T.C. 1008, 1013 (1981); McCue v. Commissioner, 1 T.C. 986 (1943). Accordingly, the notice of deficiency in this action, which was a second notice as to the taxable year ended June 30, 1978, is invalid for that year. A valid petition is the basis of the Tax Court's jurisdiction. To be valid, a petition must be filed from a valid statutory notice. See Midland Mortgage Co. v. Commissioner, 73 T.C. 902, 907 (1980); McCue v. Commissioner, *supra* at 988. The Court therefore has no jurisdiction as to the taxable year ended June 30, 1978, from the petition filed in this action since the petition is invalid as to that year.

In order to decide whether the statutory notice of deficiency in this action is nevertheless valid as to the taxable years ended June 30, 1979, 1980, and 1981, we must consider the function of the notice. A statutory notice of deficiency is a jurisdictional prerequisite to a taxpayer's suit seeking the Tax Court's redetermination of respondent's determination of the tax liability. Laing v. United States, 423 U.S. 161, 165 n. 4 (1976). No particular form is required for a statutory notice of deficiency. Scar v. Commissioner, 81 T.C. 855, 860 (1983); Foster v. Commissioner, 80 T.C. 34, 229 (1983), on appeal (9th Cir., Sept. 30, 1983); Jarvis v. Commissioner, 78 T.C. 646, 655 253*253 (1982). All that is required is that the notice provide formal notification that a deficiency in tax has been

determined.^[11] *Foster v. Commissioner, supra* at 229. "[T]he notice is only to advise the person who is to pay the deficiency 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).

Petitioner asserts, "where a court's jurisdiction over a matter is strictly statutory,^[12] there must be complete and exact compliance with the statutory requirements before jurisdiction is perfected." Petitioner cites numerous cases, none of which concern Federal taxation, for the proposition that a notice of deficiency that spans several tax years must be valid for each year in order for this Court to have jurisdiction over any of the years. Statutory and case law on Federal taxation, however, simply do not support petitioner's position.

As our decision in *Baron v. Commissioner*, 71 T.C. 1028 (1979), illustrates, a statutory notice is not wholly invalid where the petition filed from it is invalid in part for lack of jurisdiction. In *Baron v. Commissioner, supra*, a notice of deficiency was jointly issued to a husband and wife, who petitioned the Tax Court for redetermination of their tax liability. The statutory notice was sent after the husband had been adjudicated a bankrupt. The taxpayers argued that under section 6871(b),^[13] the Tax Court lacked jurisdiction as to 254*254 the husband and therefore the statutory notice was null as to him; and that, because the notice had been issued jointly, it was null as to the wife as well. Although we agreed with the taxpayers that the Tax Court had no jurisdiction over the husband, we nevertheless found the statutory notice valid with

respect to the wife and held that the Tax Court had jurisdiction as to her, since she was a separate taxpayer and section 6871(b) did not prohibit *her* from filing a petition with the Court.

The jurisdiction of the Tax Court over separate taxable years, rather than as to separate taxpayers, is at issue in this case. Taxes are levied annually, and each taxable year may be the basis of a separate cause of action. *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). Where the Commissioner determines a deficiency as to several taxable years, the taxpayer may petition the Tax Court to redetermine the deficiency as to any or all of the years. *John R. Thompson Co. v. Commissioner*, 10 B.T.A. 57, 61 (1928). For example, where the Commissioner in a statutory notice determines a deficiency as to two separate taxable years, the taxpayer may file a petition with respect to one or both years (or may file no petition and pay the determined deficiencies). Likewise, a taxpayer may file one petition contesting deficiencies determined for multiple years in separate notices. *Egan v. Commissioner*, 41 B.T.A. 204 (1940). In *Baron v. Commissioner, supra*, we held that a statutory notice sent jointly to separate taxpayers was valid as to one taxpayer, even though the Tax Court lacked jurisdiction as to the other taxpayer. Similarly, we regard a notice as to several separate taxable years as divisible: the notice may be valid with respect to certain taxable years even though, with respect to other years, the notice is invalid and the Tax Court consequently lacks jurisdiction. Cf. *S-K Liquidating Co. v. Commissioner*, 64 T.C. 713 (1975).

In the matter before us, had respondent on December 8, 1983, sent petitioner separate notices of deficiency for the taxable years ended June 30, 1978, 1979, 1980, and 1981, and had petitioner timely filed separate petitions for each of those years, the Court would have had jurisdiction as to the taxable years ended June 30, 1979, 1980, and 1981. We know of no reason to reach a different result because respondent used one 255*255 notice determining deficiencies in each of 4 separate taxable years, from which a single petition was filed.

The statutory notice in this action advised petitioner that the Commissioner had determined deficiencies in petitioner's taxable years ended June 30, 1979, 1980, and 1981, in amounts that the notice set forth.^[14] That was all that was necessary for the notice to be valid for those years. See *Scar v. Commissioner, supra* at 860-861; *Foster v. Commissioner, supra* at 229-230. We hold that the petition filed from the instant notice gave this Court jurisdiction over the deficiencies respondent determined for the taxable years ended June 30, 1979, 1980, and 1981.

Accordingly, petitioner's motion to dismiss will be granted as to the taxable year ended June 30, 1978, and denied as to the taxable years ended June 30, 1979, 1980, and 1981. To reflect the foregoing,

An appropriate order will be entered.

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954 as amended and in effect during the years at issue.

[2] Petitioner concedes that the period of limitations for the taxable year ended June 30, 1978, would have expired on Dec. 31, 1983, and has not contested respondent's assertion that the period of limitations for 1979 and 1980 expired as indicated.

The record does not disclose why the statutory period for assessment for the 1980 taxable year would have expired on Dec. 11, 1983.

The record also does not indicate when the statutory period for assessment with respect to the 1981 taxable year would have expired. In general, a tax must be assessed within 3 years of the filing of a return. Sec. 6501.

[3] For purposes of completeness, we provide the following list of statutory notices and copies of statutory notices. [Not included herein]

[4] Involving all 4 taxable years and arising from a Dec. 8, 1983, notice.

[5] Involving the taxable year ended June 30, 1978, only, and arising from a Dec. 8, 1983, notice.

[6] Involving the taxable year ended June 30, 1978, only, and arising from a copy of the Nov. 3, 1983, notice sent to petitioner's representatives.

[7] Were we to find the notice in this action entirely invalid, expiration of the statutory period for assessment for 1978, 1979, and 1980 would prevent respondent from again issuing notices for those years.

[8] Respondent maintains that the petition in this action does not give the Court jurisdiction over 1978, but that the petition in docket No. 2690-84 does.

[9] The notices of deficiency mailed on Nov. 3 to Palisades, New Jersey, were nullities because they were not sent to petitioner's last known address and were undelivered. See Reddock v. Commissioner, 72 T.C. 21, 27 (1979).

[10] This document reflects petitioner's address as 321 Commercial Avenue, Palisades, New Jersey 07204. The record suggests that this document is a copy of a notice for the taxable year ended June 30, 1978, the original of which petitioner never received.

Petitioner's representatives also received a copy of the statutory notice for 1978 mailed to petitioner at 400 Commercial Avenue, Palisades, New Jersey 07024.

[11] Where a valid notice of deficiency is mailed to the wrong address, the Tax Court may nevertheless have jurisdiction. See, e.g., Mulvania v. Commissioner, 81 T.C. 65 (1983) (notice of deficiency received by taxpayer's former wife at what may not have been taxpayer's last known address and given to him 16 days later, valid because taxpayer received it early enough to file a timely petition); Frieling v. Commissioner, 81 T.C. 42 (1983) (notice of deficiency, though not sent to taxpayer's last known address, valid where taxpayer actually received the notice within 90 days of its mailing and timely filed a petition).

[12] As petitioner correctly notes, the jurisdiction of the Tax Court derives from sec. 7442 and is strictly statutory.

[13] For the taxable year at issue, sec. 6871(b) read as follows:

SEC. 6871. CLAIMS FOR INCOME, ESTATE, AND GIFT TAXES IN BANKRUPTCY AND RECEIVERSHIP PROCEEDINGS.

(b) CLAIM FILED DESPITE PENDENCY OF TAX COURT PROCEEDINGS. — In the case of a tax imposed by subtitle A or B claims for the deficiency and such interest, additional amounts, and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver.

[14] As we have discussed, the Commissioner also determined a deficiency as to 1978, but the notice was an invalid second notice as to that year.

APPENDIX G

Relevant Portions of Title 26 Of the United States Code Provided in Pertinent Part (Internal Revenue Code)

§ 6211. Definition of a deficiency

(a) In general For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term “deficiency” means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of— (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over— (2) the amount of rebates, as defined in subsection (b)(2), made.

(b) Rules for application of subsection (a) For purposes of this section— (1) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 or 6852 (relating to termination assessments). (2) The term “rebate” means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 41, 42, 43, or 44 was less

than the excess of the amount specified in subsection (a)(1) over the rebates previously made. (3) The computation by the Secretary, pursuant to section 6014, of the tax imposed by § 6211 TITLE 26— INTERNAL REVENUE CODE Page 3238 chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return. (4) For purposes of subsection (a)— (A) any excess of the sum of the credits allowable under sections 24(d), 25A by reason of subsection (i)(6) thereof, 32, 34, 35, 36, 36A, 36B, 36C, 53(e), 168(k)(4), 6428, and 6431 over the tax imposed by subtitle A (determined without regard to such credits), and (B) any excess of the sum of such credits as shown by the taxpayer on his return over the amount shown as the tax by the taxpayer on such return (determined without regard to such credits), shall be taken into account as negative amounts of tax. * * *

§ 6212. Notice of deficiency

(a) In general If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local § 6212 TITLE 26— INTERNAL REVENUE CODE Page 3240 office of the taxpayer advocate and the location and phone number of the appropriate office.

(b) Address for notice of deficiency (1) Income and gift taxes and certain excise taxes In the absence of notice to the Secretary under section 6903 of the

existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. (2) Joint income tax return In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address. * * *

**§ 6213. Restrictions applicable to deficiencies;
petition to Tax Court**

(a) Time for filing petition and restriction on assessment Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice

has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

(b) Exceptions to restrictions on assessment

(1) Assessments arising out of mathematical or clerical errors If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the

deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof. (2) Abatement of assessment of mathematical or clerical errors (A) Request for abatement Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter. (B) Stay of collection In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph. (3) Assessments arising out of tentative carryback or refund adjustments If the Secretary determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback or the amount described in section 1341(b)(1) with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the excess as a deficiency as if it were due to a mathematical or

clerical error appearing on the return. (4)

Assessment of amount paid Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment. (5) Certain orders of criminal restitution If the taxpayer is notified that an assessment has been or will be made pursuant to section 6201(a)(4)— (A) such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and (B) subsection (a) shall not apply with respect to the amount of such assessment.

(c) Failure to file petition.

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

(d) Waiver of restrictions.

The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

(e) Suspension of filing period for certain excise taxes
The running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to investments which jeopardize charitable purpose), 4945 (relating to taxes on taxable expenditures), 4951 (relating to taxes on self-dealing), or 4952 (relating to taxes on taxable expenditures), 4955 (relating to taxes on political expenditures), 4958 (relating to private excess benefit), 4971 (relating to excise taxes on failure to meet minimum funding standard), 4975 (relating to excise taxes on prohibited transactions) shall be suspended for any period during which the Secretary has extended the time allowed for making correction under section 4963(e).

(f) Coordination with title 11

(1) Suspension of running of period for filing petition in title 11 cases In any case under title 11 of the United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter. (2) Certain action not taken into account For purposes of the second and third sentences of subsection (a), the filing of a proof of claim or request for payment (or the taking of any other action) in a case under title 11 of the United States Code shall not be treated as action prohibited by such second sentence.

(g) Definitions

For purposes of this section— (1) Return The term “return” includes any return, statement, schedule, or list, and any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44. (2) Mathematical or clerical error The term “mathematical or clerical error” means— (A) an error in addition, subtraction, multiplication, or division shown on any return, (B) an incorrect use of any table provided by the Internal Revenue Service with respect to any return if such incorrect use is apparent from the existence of other information on the return, (C) an entry on a return of an item which is inconsistent with another entry of the same or another item on such return, (D) an omission of information which is required to be supplied on the return to substantiate an entry on the return, (E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, or chapter 41, 42, 43, or 44, if such limit is expressed— (i) as a specified monetary amount, or (ii) as a percentage, ratio, or fraction, and if the items entering into the application of such limit appear on such return, (F) an omission of a correct taxpayer identification number required under section 32 (relating to the earned income credit) to be included on a return, (G) an entry on a return claiming the credit under section 32 with respect to net earnings from self-employment described in section 32(c)(2)(A) to the extent the tax imposed by section 1401 (relating to self-employment tax) on such net earnings has not been paid, (H) an omission of a correct TIN required under section 21 (relating to expenses for household and dependent care services necessary for gainful

employment) or section 151 (relating to allowance of deductions for personal exemptions), (I) an omission of a correct TIN required under section 24(e) (relating to child tax credit) to be included on a return, (J) an omission of a correct TIN required under section 25A(g)(1) (relating to higher education tuition and related expenses) to be included on a return, (K) an omission of information required by section 32(k)(2) (relating to taxpayers making improper prior claims of earned income credit), (L) the inclusion on a return of a TIN required to be included on the return under section 21, 24, 32, or 6428 if— (i) such TIN is of an individual whose age affects the amount of the credit under such section, and (ii) the computation of the credit on the return reflects the treatment of such individual as being of an age different from the individual's age based on such TIN, (M) the entry on the return claiming the credit under section 32 with respect to a child if, according to the Federal Case Registry of Child Support Orders established under section 453(h) of the Social Security Act, the taxpayer is a noncustodial parent of such child, (N) an omission of the reduction required under section 36A(c) with respect to the credit allowed under section 36A or an omission of the correct social security account number required under section 36A(d)(1)(B), (O) an omission of any increase required under section 36(f) with respect to the recapture of a credit allowed under section 36, and (P) an entry on a return claiming the credit under section 36 if— (i) the Secretary obtains information from the person issuing the TIN of the taxpayer that indicates that the taxpayer does not meet the age requirement of section 36(b)(4), (ii) information provided to the Secretary by the taxpayer on an income tax return

for at least one of the 2 preceding taxable years is inconsistent with eligibility for such credit, or (iii) the taxpayer fails to attach to the return the form described in section 36(d)(4). A taxpayer shall be treated as having omitted a correct TIN for purposes of the preceding sentence if information provided by the taxpayer on the return with respect to the individual whose TIN was provided differs from the information the Secretary obtains from the person issuing the TIN.

§ 6214. Determinations by Tax Court

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax Except as provided by section 7463, the Tax Court shall have jurisdiction to re-determine the correct amount of the deficiency even if the amount so re-determined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

(b) Jurisdiction over other years and quarters The Tax Court in re-determining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to re-determine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.

Notwithstanding the preceding sentence, the Tax Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims.

(c) Taxes imposed by section 507 or chapter 41, 42, 43, or 44 The Tax Court, in re-determining a deficiency of any tax imposed by section 507 or chapter 41, 42, 43, or 44 for any period, act, or failure to act, shall consider such facts with relation to the taxes under chapter 41, 42, 43, or 44 for other periods, acts, or failures to act as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the taxes under chapter 41, 42, 43, or 44 for any other period, act, or failure to act have been overpaid or underpaid. The Tax Court, in redetermining a deficiency of any second tier tax (as defined in section 4963(b)), shall make a determination with respect to whether the taxable event has been corrected.

(d) Final decisions of Tax Court For purposes of this chapter, chapter 41, 42, 43, or 44, and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

§ 6702. Frivolous tax submissions

(a) Civil penalty for frivolous tax returns A person shall pay a penalty of \$5,000 if—

(1) such person files what purports to be a return of a tax imposed by this title but which— (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or (B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

(2) the conduct referred to in paragraph (1)— (A) is based on a position which the Secretary has identified as frivolous under subsection (c), or (B) reflects a desire to delay or impede the administration of Federal tax laws.

(b) Civil penalty for specified frivolous submissions

(1) Imposition of penalty Except as provided in paragraph (3), any person who submits a specified frivolous submission shall pay a penalty of \$5,000.

(2) Specified frivolous submission For purposes of this section— (A) Specified frivolous submission The term “specified frivolous submission” means a specified submission if any portion of such submission— (i) is based on a position which the Secretary has identified as frivolous under subsection (c), or (ii) reflects a desire to delay or impede the administration of Federal tax laws. (B) Specified submission The term “specified submission” means— (i) a request for a hearing under— (I) section 6320 (relating to notice and opportunity for hearing upon filing of notice of lien), or (II) section 6330 (relating to notice and opportunity for hearing before levy), and (ii) an application under— (I) section 6159 (relating to

agreements for payment of tax liability in installments), (II) section 7122 (relating to compromises), or (III) section 7811 (relating to taxpayer assistance orders).

(3) Opportunity to withdraw submission If the Secretary provides a person with notice that a submission is a specified frivolous submission and such person withdraws such submission within 30 days after such notice, the penalty imposed under paragraph (1) shall not apply with respect to such submission.

(c) Listing of frivolous positions

The Secretary shall prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous for purposes of this subsection. The Secretary shall not include in such list any position that the Secretary determines meets the requirement of section 6662(d)(2)(B)(ii)(II).

(d) Reduction of penalty The Secretary may reduce the amount of any penalty imposed under this section if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws.

(e) Penalties in addition to other penalties

The penalties imposed by this section shall be in addition to any other penalty provided by law.

§ 6703. Rules applicable to penalties under sections 6700, 6701, and 6702

(a) Burden of proof In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the

burden of proof with respect to such issue shall be on the Secretary.

(b) Deficiency procedures not to apply Subchapter B of chapter 63 (relating to deficiency procedures) shall not apply with respect to the assessment or collection of the penalties provided by sections 6700, 6701, and 6702.

(c) Extension of period of collection where person pays 15 percent of penalty (1) In general If, within 30 days after the day on which notice and demand of any penalty under section 6700 or 6701 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2). (2) Person must bring suit in district court to determine his liability for penalty If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under section 6700 or 6701 is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the person fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such

penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph. (3) Suspension of running of period of limitations on collection The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court

§ 7433. Civil damages for certain unauthorized collection actions

(a) In general If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of \$1,000,000 (\$100,000, in the case of negligence) or the sum of— (1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or

negligent actions of the officer or employee, and (2) the costs of the action.

(c) Payment authority Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations (1) Requirement that administrative remedies be exhausted A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service. (2) Mitigation of damages The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff. (3) Period for bringing action Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures (1) In general If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States. (2) Remedy to be exclusive (A) In general Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such

petition shall be the exclusive remedy for recovering damages resulting from such actions. (B) Certain other actions permitted Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that— (i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and (ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

§ 7482. Courts of review

(a) Jurisdiction (1) In general The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code. (2) Interlocutory orders (A) In general When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from

such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court. (B) Order treated as Tax Court decision For purposes of subsections (b) and (c), an order described in this paragraph shall be treated as a decision of the Tax Court. (C) Venue for review of subsequent proceedings If a United States Court of Appeals permits an appeal to be taken from an order described in subparagraph (A), except as provided in subsection (b)(2), any subsequent review of the decision of the Tax Court in the proceeding shall be made by such Court of Appeals. (3) Certain orders entered under section 6213(a) An order of the Tax Court which is entered under authority of section 6213(a) and which resolves a proceeding to restrain assessment or collection shall be treated as a decision of the Tax Court for purposes of this section and shall be subject to the same review by the United States Court of Appeals as a similar order of a district court.

(b) Venue

(1) In general Except as otherwise provided in paragraphs (2) and (3), such decisions may be reviewed by the United States court of appeals for the circuit in which is located— (A) in the case of a petitioner seeking redetermination of tax liability other than a corporation, the legal residence of the petitioner, (B) in the case of a corporation seeking redetermination of tax liability, the principal place of business or principal office or agency of the

corporation, or, if it has no principal place of business or principal office or agency in any judicial circuit, then the office to which was made the return of the tax in respect of which the liability arises, (C) in the case of a person seeking a declaratory decision under section 7476, the principal place of business, or principal office or agency of the employer, (D) in the case of an organization seeking a declaratory decision under section 7428, the principal office or agency of the organization, (E) in the case of a petition under section 6226, 6228(a), 6247, or 6252, the principal place of business of the partnership, or (F) in the case of a petition under section 6234(c)—

(i) the legal residence of the petitioner if the petitioner is not a corporation, and (ii) the place or office applicable under subparagraph (B) if the petitioner is a corporation. If for any reason no subparagraph of the preceding sentence applies, then such decisions may be reviewed by the Court of Appeals for the District of Columbia. For purposes of this paragraph, the legal residence, principal place of business, or principal office or agency referred to herein shall be determined as of the time the petition seeking redetermination of tax liability was filed with the Tax Court or as of the time the petition seeking a declaratory decision under section 7428 or 7476 or the petition under section 6226, 6228(a), or 6234(c), was filed with the Tax Court. (2) By agreement Notwithstanding the provisions of paragraph (1), such decisions may be reviewed by any United States Court of Appeals which may be designated by the Secretary and the taxpayer by stipulation in writing. (3) Declaratory judgment actions relating to status of certain governmental obligations In the case of any decision of the Tax Court in a proceeding under section 7478, such

decision may only be reviewed by the Court of Appeals for the District of Columbia.

(c) Powers

(1) To affirm, modify, or reverse upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require. (2) To make rules for review of decisions of the Tax Court shall be those prescribed by the Supreme Court under section 2072 of title 28 of the United States Code. (3) To require additional security. Nothing in section 7483 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review. (4) To impose penalties. The United States Court of Appeals and the Supreme Court shall have the power to require the taxpayer to pay to the United States a penalty in any case where the decision of the Tax Court is affirmed and it appears that the appeal was instituted or maintained primarily for delay or that the taxpayer's position in the appeal is frivolous or groundless.

APPENDIX H

EIGHTH CIRCUIT RULE 47A(b) provides:

(b) On Motion of Parties. The appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction. Except for good cause or on the motion of the court, a motion to dismiss based on jurisdiction must be filed within 14 days after the court has docketed the appeal.

On expiration of the time allowed for filing or express waiver of the right to file a response, or on receipt of the response, the clerk will distribute to the court the briefs filed, the record on appeal, and the motion and response. The court will consider the motion and enter an appropriate order.

Except as the court orders, the filing of a motion to dismiss does not toll the time limitations set forth in the Federal Rules of Appellate Procedure or these rules.

APPENDIX I

FEDERAL RULE OF CIVIL PROCEDURE 1

Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

FEDERAL RULE OF CIVIL PROCEDURE 12

Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after

being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) **HOW TO PRESENT DEFENSES.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) **MOTION FOR JUDGMENT ON THE PLEADINGS.** After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) **RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a

reasonable opportunity to present all the material that is pertinent to the motion.

(e) **MOTION FOR A MORE DEFINITE STATEMENT.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) **MOTION TO STRIKE.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **JOINING MOTIONS.**

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or

objection that was available to the party but omitted from its earlier motion.

(h) **WAIVING AND PRESERVING CERTAIN DEFENSES.**

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) **HEARING BEFORE TRIAL.** If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

APPENDIX J
UNITED STATES TAX COURT
Relevant portions of Rule 13

RULE 13. JURISDICTION

(a) Notice of Deficiency or of Transferee or Fiduciary Liability Required: Except in actions for declaratory judgment, for disclosure, for readjustment or adjustment of partnership items, for administrative costs, for review of failure to abate interest, for redetermination of employment status, for determination of relief from joint and several liability, for lien and levy, or for review of whistleblower awards (see Titles XXI, XXII, XXIV, and XXVI through XXXIII), the jurisdiction of the Court depends: (1) In a case commenced in the Court by a taxpayer, upon the issuance by the Commissioner of a notice of deficiency in income, gift, or estate tax or, in the taxes under Code chapter 41, 42, 43, or 44 (relating to the excise taxes on certain organizations and persons dealing with them), or in the tax under Code chapter 45 (relating to the windfall profit tax), or in any other taxes which are the subject of the issuance of a notice of deficiency by the Commissioner; and (2) in a case commenced in the Court by a transferee or fiduciary, upon the issuance by the Commissioner of a notice of liability to the transferee or fiduciary. See Code secs. 6212, 6213, 6901.

(b) Declaratory Judgment, Disclosure, Partnership, Administrative Costs, Review of Failure To Abate

Interest, Redetermination of Employment Status, Determination of Relief From Joint and Several Liability, Lien and Levy, or Whistleblower Action: For the jurisdictional requirements in an action for declaratory judgment, for disclosure, for readjustment or adjustment of partnership items, for administrative costs, for review of failure to abate interest, for redetermination of employment status, for determination of relief from joint and several liability, for lien and levy, or for review of whistleblower awards, see Rules 210(c), 220(c), 240(c), 270(c), 280(b), 290(b), 300(c), 310(c), 320(b), 330(b), and 340(b), respectively.

(c) Timely Petition Required: In all cases, the jurisdiction of the Court also depends on the timely filing of a petition. See Code sections 6213 and 7502; with respect to administrative costs actions, see Code section 7430(f); with respect to declaratory judgment actions, see Code sections 6234, 7428, 7476, 7477, 7478, and 7479; with respect to determination of relief from joint and liability actions, see Code section 6015(e); with respect to disclosure actions, see Code section 6110; with respect to lien and levy actions, see Code sections 6320 and 6330; with respect to partnership actions, see Code sections 6226, 6228, and 6247; with respect to redetermination of employment status actions, see Code section 7436; with respect to review of failure to abate interest actions, see Code section 6404(h); and with respect to whistleblower actions, see Code section 7623(b)(4).

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