

Choice Of Forum In Federal Civil Tax Litigation (Part 1)

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After deciding what to dispute, the taxpayer has to decide where to dispute it.

SEVERAL DIFFERENT TRIAL-LEVEL COURTS hear federal civil tax cases in the United States: the Tax Court, district courts, the Court of Federal Claims, and bankruptcy courts. By a large margin, most tax cases are filed in Tax Court, but the thoughtful advocate planning tax litigation carefully considers all available options. (All section references are to the Internal Revenue Code unless otherwise indicated.)

Article I Courts

The Tax Court and the Court of Federal Claims are sometimes called “Article I” courts, because their judicial power is derived solely from Acts of Congress. Judges on the Tax Court and Court of Federal Claims serve limited terms.

Tax Court

The Tax Court is a court of nationwide jurisdiction based in Washington, D.C. The Tax Court conducts trials and hearings in 74 cities around the nation.

Court Of Federal Claims

The Court of Federal Claims is also based in Washington, D.C., and also may hear trials in cities around the nation. All the cases before the Tax Court have a tax nexus. All the cases before the Court of Federal Claims involve a monetary dispute between the plaintiff and the United States; tax cases make up a substantial subset of those cases. The Court of Federal Claims was formerly called the U.S. Court of Claims, and is successor to the Court of Claims.

Article III Courts

District courts are located throughout the nation. There are 94 judicial districts, including at least one in each state. District courts are called “Article III” courts, since their judicial power is derived from Article III of the Constitution, together with Acts of Congress. District courts have jurisdiction, in law and equity, over cases under the laws of the United States—including most tax cases. District court judges enjoy lifetime appointments. Bankruptcy courts are separate units of district courts; bankruptcy court judges serve limited terms.

TYPES OF TAX CASES • Most broadly, tax litigation may be divided into two classes: prepayment actions and refund suits.

Prepayment Actions Versus Refund Suits

Some prepayment actions are also called redetermination actions or deficiency cases. Almost all redetermination actions are heard by the Tax Court after the IRS issues a notice of deficiency to a taxpayer, but some prepayment (or partial-payment) actions are heard by a bankruptcy court on an objection to an IRS proof of claim or in an adversary proceeding.

Types Of Tax Cases

Of course, one may choose a forum only when offered a choice. The table below shows the types of tax cases that may be litigated in either prepayment or refund forums. This table captures the vast majority of tax disputes, whether measured by number of cases or by dollars in dispute. Bear in mind that bankruptcy court jurisdiction to hear tax disputes is permissive, not mandatory. 11 U.S.C. §505(a). Penalties and additions to tax almost always take on the character of the underlying tax for procedural purposes, so they are not discussed separately below.

Tax Cases For All Forums		
Type of Tax Case	Prepayment Jurisdiction Authority	Refund Jurisdiction Authority
Income, estate, and gift taxes (Subtitle A & B); Public charity excess lobbying taxes (Chapter 41); Private foundation taxes (Chapter 42); Qualified plan taxes (Chapter 43); Excise taxes on RICs & REITs (Chapter 44)	§6213(a) (Tax Court); 11 U.S.C. §505(a) (bankruptcy).	§6512(b) (Tax Court); §7422(a); 28 U.S.C. §1340; 28 U.S.C. §1346(a)(1); 11 U.S.C. §505(a) (bankruptcy); 28 U.S.C. §1491 (Court of Fed. Claims).

Exempt Status And Classification Declaratory Judgment Actions

The Tax Court, district courts, and the Court of Federal Claims each has original jurisdiction over exempt organization status and classification declaratory judgment actions. §7428(a); 28 U.S.C. §1507.

Disclosure Actions

Although they are not tax disputes *per se*, disclosure actions arising under section 6110 of the Internal Revenue Code may be heard by either the Tax Court or the District Court for the District of Columbia. §6110(f)(4)(A).

Multiple Actions

If a taxpayer timely files both a redetermination action in Tax Court and a refund suit with respect to the same taxable period, generally the court hearing the refund suit loses jurisdiction. §7422(e). In a similar way, another statute provides a tiebreaker rule that denies jurisdiction to the Court of Federal Claims if the plaintiff has a suit against the United States pending in any other court. 28 U.S.C. §1500; *Snyder v. United States*, 63 Fed. Cl. 762 (2005).

Actions Where Choice Of Forum Unavailable

Some tax disputes do not offer litigants a choice of forum. Here are the types of tax disputes that may only be heard in district court (including actions commenced by the United States, over which the district court also has jurisdiction under 28 U.S.C. §1345):

Cases Heard Only in District Court	Authority
Summons enforcement actions, filed by United States	§§7402(b); 7609(f) (John Doe summons).
Petition to quash third-party summons, filed by taxpayer	§7609(b)(2), -(h)(1).
Quiet title actions brought by United States	§7402(e).
Action to enforce or discharge liens in favor of the United States	§7403(a); 28 U.S.C. §2410.
Judicial approval of principal residence levy, filed by United States	§6334(c)(1)(B).
Erroneous refund suit, filed by United States	<i>United States v. Wurts</i> , 303 U.S. 414, 415 (1938); §7405(a).
Tax return preparer and tax shelter injunction suits, filed by United States	§§7407(a); 7408(a).
Actions to quiet title, foreclose, partition, condemn, or interpleader with respect to real property on which the United States claims a lien	28 U.S.C. §2410.
Wrongful levy actions	§7426; <i>EC Term of Years Trust v. United States</i> , 550 U.S. 429 (2007).
Review of jeopardy levy or jeopardy assessment, filed by taxpayer	§7429(b)(2)(A). <i>But see</i> §7429(b)(2)(B) (providing Tax Court jurisdiction in limited circumstances).
Civil disclosure damages actions, filed by taxpayer	§7431(a).
Civil damages actions against United States for IRS failure to release lien or certain unauthorized collection actions	§7433(a). <i>See</i> §7433(e)(1) (providing jurisdiction for bankruptcy court to hear damages claims for Title 11 violations by IRS).
Claims for refund of trust fund recovery penalty	§6672(c)(2).

Actions Relegated To Tax Court

Some tax disputes must be heard by the Tax Court. Although the exclusivity of the jurisdiction of the Tax Court has not been tested with respect to all of these provisions, the careful advocate should not plumb the limits of jurisdiction if it can be helped. *See, e.g., Hinck v. United States*, 550 U.S. 501 (2007) (holding §6404(h) gives the Tax Court exclusive jurisdiction to review denials of interest abatement requests).

Cases Heard Only in Tax Court	Authority
Appeal from collection due process determination (lien or levy case)	§6330(d)(1).
Review of IRS refusal to abate interest	§6404(h); <i>Hinck v. United States</i> , 550 U.S. 501 (2007).
Review of a decision granting or denying (in whole or in part) an award for reasonable administrative costs under §7430(a)	§7430(f)(2).

Declaratory action (qualified plans)	§7476(a).
Declaratory action (gift valuation)	§7477(a).
Declaratory action (tax-exempt bonds)	§7478(a).
Declaratory action (estate-tax installment payment eligibility under §6166)	§7479(a). <i>But see</i> §7422(j) allowing refund suits where estate tax has not been fully paid solely because of section 6166 election).
Redetermination of Informant Awards	§7623.

Other Unique Actions

TEFRA Partnership Proceedings

In 1982, Congress unified partnership tax proceedings, instead of forcing each partner to litigate with the IRS one-by-one. Accordingly, TEFRA partnership items are determined at a single, partnership-level proceeding. For our purposes, it is enough to note that the Tax Matters Partner may petition the Tax Court, a district court, or the Court of Federal Claims within 90 days of receiving a final partnership administrative adjustment from the IRS. §6226(a). So the Tax Matters Partner enjoys a full choice of forums to litigate TEFRA partnership proceedings. If the Tax Matters Partner does not timely file a petition in one of those three forums, other “notice” partners may file an action in any of the three courts listed above within the next 60 days. §6226(b)(1). District court jurisdiction to hear TEFRA partnership proceedings is based upon 28 U.S.C. §1346(e). The Court of Federal Claims has jurisdiction under 28 U.S.C. §1508. The first such action filed in the Tax Court, however, goes forward to the detriment of all the other petitions. §6226(b)(2).

Claims For Relief From Joint And Several Liabilities

Oversight of IRS determinations to grant or deny relief from joint and several liability under section 6015 of the Code rests primarily with the Tax Court. The Code emphatically grants the Tax Court jurisdiction to review such determinations. §6015(e)(1)(A). In considering whether other courts have jurisdiction to consider section 6015 claims, it is important to consider that a section 6015 claim with respect to an assessed joint liability is in the nature of an equitable defense. Accordingly, in collection cases, district courts typically look with a jaundiced eye on taxpayers who wait until the IRS seeks to collect assessed liabilities before raising section 6015 claims, declining to find jurisdiction. *See, e.g., United States v. Boynton*, 99 A.F.T.R.2d 920 (S.D. Cal. 2007); *United States v. Fedra*, 2006 WL 897887 (N.D. Ill. April 3, 2006). On the other hand, timely stand-alone claims for relief, or claims for relief made as part of a refund claim, are more warmly received by district courts and the Court of Federal Claims. *See, e.g., Flores v. United States*, 51 Fed. Cl. 49 (2001) (stand-alone claim). *See* §6015(e)(3)(A) (stripping Tax Court of section 6015(e) jurisdiction if district court or Court of Federal Claims obtains jurisdiction over refund claim for same taxable year).

Tax Court Primary Forum

Most tax cases are litigated in Tax Court, as the following table shows. This data comes from IRS records. Deborah A. Butler, Associate Chief Counsel, Procedure & Administration, Office of Chief Counsel, IRS, *Remarks on Behalf of the Office of Chief Counsel, IRS, to ABA Tax Section Court Practice & Procedure Committee* (Jan. 18, 2008) (Presentation on file with author). See also Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, Appendix, Tables C-2 & C-4, available at www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx (reporting 748 tax suits pending with United States as defendant and 1,438 tax suits in general terminated over 12-month period).

Fiscal Year 2007 Filing, Inventory, and Closing Statistics			
		<i>Refund Cases</i>	
	<i>Tax Court</i>	<i>District Courts</i>	<i>Court of Federal Claims</i>
Cases Filed	29,040	219	96
Inventory – Cases in Dispute	29,400	800+/-	500+/-
Inventory – Dollars in Dispute	\$23.5 billion	\$5.5 billion	\$2.7 billion
Disposals	25,700	216	189

Unreviewable Actions

Some tax disputes cannot be reviewed by any court.

Abatement Of Certain Unpaid Tax

A refusal by the IRS to abate unpaid portions of assessed income, gift, or estate tax under section 6404(a) is not susceptible to judicial review, *see, e.g., Krugman v. Commissioner*, 112 T.C. 230, 237 (1999) (no jurisdiction to abate additions to tax), in contrast to interest abatement decisions, which may be reviewed by the Tax Court under section 6404(h) of the Code.

Overpayment Offsets

Overpayment offsets are unreviewable. §6402(f) (barring judicial review of Treasury offsets applied against other-agency debts); *Kalb v. United States*, 505 F.2d 506, 509 (2d Cir. 1974), *cert. denied*, 421 U.S. 979 (1975) (dismissing claim for judicial review of overpayment offset applied to federal tax liability); *In re Lybrand*, 338 B.R. 402, 407 (Bankr. W.D. Ark. 2006). *But see Oatman v. Dep't of Treasury*, 34

F.3d 787, 789 (9th Cir. 1994) (holding district court has jurisdiction under 28 U.S.C. §1346(a)(1) to review Treasury's refusal to allow taxpayer's claim to one-half community property interest in offset tax overpayment).

JURISDICTIONAL CONSIDERATIONS •

Jurisdictional requirements affect the choice-of-forum decision, aside from the statutory limitations set forth above.

Money

Often, the most important jurisdictional consideration is money.

Prepayment Versus Refund

Tax Court and bankruptcy courts usually are prepayment forums. The Tax Court has jurisdiction to determine an overpayment, §6512(b)(1), and bankruptcy courts may order the IRS to issue a refund under section 505 of the Bankruptcy Code. Alternatively, the statutes and caselaw demand full payment of tax liabilities before a district court or

the Court of Federal Claims may take jurisdiction over a refund suit. 28 U.S.C. §1346(a)(1); *Flora v. United States*, 362 U.S. 145 (1960).

The “full payment” rule also applies to estate and gift tax refund suits. *See, e.g., Rocovich v. United States*, 933 F.2d 991 (Fed. Cir. 1991). *But see* §7422(j) (allowing refund suits where sole reason estate tax has not been fully paid is because of section 6166 election). The “full payment” rule does not, however, apply to refund suits litigated in bankruptcy. 11 U.S.C. §505(a)(1) (providing permissive jurisdiction to determine “amount or legality of any tax... whether or not paid”).

For TEFRA partnership proceedings in district court or the Court of Federal Claims, only the petitioning partner’s proportionate share of the tax that would be due if all the IRS partnership adjustments were sustained must be paid to the IRS to satisfy the prepayment prerequisite. §6226(e)(1).

Interest

The solvent and creditworthy taxpayer may surmount the financial hurdle separating prepayment and refund litigation. In such a case, the financial decision may come down to the cost of money—interest. The interest provisions are found in sections 6601 to 6631 of the Code. At least three concepts must be mastered: underpayment interest, overpayment interest, and deposits in the nature of cash bonds.

The underpayment and overpayment interest rate is the same for noncorporate taxpayers: the Federal short-term rate plus three percentage points. §6621(a).

For corporate taxpayers, the spread between the overpayment interest rate and the large corporate underpayment (a “large corporate underpayment” is more than \$100,000) interest rate is 4.5 percent. That is, the large corporate underpayment rate is the Federal short-term rate plus five percentage points (also known as “hot interest”), §6621(c),

and the corporate overpayment rate is the Federal short-term rate plus 0.5 percent. §6621(a)(1)(B).

Properly submitted deposits in the nature of cash bonds stop the running of underpayment interest, but such deposits, insofar as they become overpayments, earn interest only at the Federal short-term rate. §6603; *see* Rev. Proc. 2005-18, 2005-1 C.B. 798.

Weigh Financial Implications

With the concepts of prepayment versus refund litigation and interest in mind, a taxpayer facing a choice-of-forum decision may be able to weigh the relevant cost-of-money factors along with other cash needs, the merits of the case, and market interest rates compared to the underpayment and overpayment rates. *See also* William K. Drew, *A Guide to Interest on Overpayments and Underpayments of Internal Revenue Taxes*, 107 Tax Notes 1271, June 6, 2005.

Timing

Timing is another major jurisdictional factor in the choice-of-forum analysis. Different jurisdictional time limits sometimes foreclose options.

Tax Court

Most importantly, failure to petition Tax Court in a timely fashion after the IRS issues the notice of deficiency is fatal to the Tax Court’s jurisdiction. §6213(a). If the IRS cannot establish that the notice of deficiency was sent to the last known address or received by the taxpayer in time to petition the Tax Court, then the Tax Court’s dismissal of a late-filed petition on the ground that the notice was invalid vitiates the notice and any assessment of tax related to it. *Shelton v. Commissioner*, 63 T.C. 193 (1974).

Missing the 90-day deadline by even one day (150 days if the notice is addressed to a person outside the United States) will inevitably draw a motion to dismiss from the IRS Office of Chief Counsel, and the motion to dismiss, if well taken, will be granted. The Tax Court has no authority to extend

its jurisdictional deadline. *Joannou v. Commissioner*, 33 T.C. 868, 869 (1960).

Refund Jurisdictions

The time limits on filing refund claims and refund suits are no less forgiving than the deadlines governing Tax Court jurisdiction; they just run longer. In all refund cases, a taxpayer must file a timely administrative claim before bringing suit against the government. *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008) (unconstitutional tax).

Generally, a claim must be filed within three years of filing a return or within two years of payment, whichever comes later. §6511(a). A refund claim is timely under section 6511(a) if it is filed within three years of the filing of the original return, regardless of when the original return is filed. *Omohundro v. United States*, 300 F.3d 1065 (9th Cir. 2002); *Weisbart v. U.S. Dep't of Treasury*, 222 F.3d 93 (2d Cir. 2000); Rev. Rul. 76-511, 1976-2 C.B. 428. Section 6511(b) provides additional “look-back” periods in certain fact-specific circumstances.

Thereafter, a refund suit may be filed within the window of time beginning six months after the claim is filed and ending two years after the denial of the claim by the IRS. §6532(a). The Bankruptcy Code effectively forces the IRS to allow or deny the refund claim of a debtor in bankruptcy within 120 days. *See* 11 U.S.C. §505(a)(2)(B).

At times, the IRS never denies a claim. Historically, it has been understood that in those situations no statute of limitations governs when a refund suit may be filed, although the government could claim laches if the delay is excessive. One recent District Court case has held, however, that refund suits are barred if they are not filed within six years and six months of the filing of the refund claim. *Wagenet v. United States*, 104 A.F.T.R.2d 2009-7804 (C.D. Cal. 2009). *See also* 28 U.S.C. §2401(a).

“Equitable tolling” cannot extend refund claim and refund suit statutes of limitation. *United States v. Brockamp*, 519 U.S. 347 (1997). *But see* §6511(h)(sus-

pension of period of limitations for filing a refund claim by an individual during period of financially disability).

Raising New Issues After Docketing Case

Docketing in Tax Court Tolls Assessment Statute

The statute of limitation on assessment—that otherwise would bring the IRS’s claims to rest—is tolled while a Tax Court case is pending. §6503(a)(1).

The Tax Court has plenary jurisdiction to redetermine all items in the taxable period at issue in a deficiency or TEFRA partnership case, so the Tax Court may exercise its jurisdiction to consider an IRS claim for an increased deficiency or TEFRA partnership adjustment (or penalties, for that matter) asserted anytime before the entry of a final decision. *Estate of Quick v. Commissioner*, 110 T.C. 172, 180 (1998). The Tax Court’s discretion in these matters is guided by whether allowing the IRS to claim an increased deficiency would surprise or unfairly disadvantage the taxpayer. *Id.*

The Tax Court rarely enters comprehensive scheduling orders except in the most complex cases, and even then, few Tax Court scheduling orders set a deadline for amending pleadings over the objection of the IRS. Especially in cases where the IRS did not unearth all material issues in examination, this factor should be considered, in light of the necessity of the IRS to bear the burden of proof on new issues, if allowed. Tax Court Rules of Practice and Procedure, Rule 142(a).

Variance

This relative flexibility in the Tax Court’s willingness to entertain new issues cuts both ways, and it stands in marked contrast to the “variance doctrine” that circumscribes refund suit jurisdiction. The variance doctrine bars a taxpayer from presenting claims in a refund suit that substantially vary from the legal theories and factual bases set forth

in the administrative refund claim presented to the IRS. *Lockheed Martin Corp. v. United States*, 210 F.3d 1366, 1371 (Fed. Cir. 2000). *Compare, e.g., Curr-Spec Partners Ltd. P'ship v. Commissioner*, 94 T.C.M. (CCH) 314 (2007), *aff'd*, 579 F.3d 391 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 3321 (2010)(allowing petitioner to amend petition after IRS filed motion for summary judgment, and denying motion for summary judgment because amendments raised new, material fact issues).

The variance doctrine rests on the specific statutory and regulatory requirements governing claims. §7422(a); Treas. Reg. §301.6402-2(b)(1).

There are limitations on a taxpayer's ability to amend claims after the statute of limitation has expired. *See, e.g., Computervision v. United States*, 445 F.3d 1355 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1338 (2007).

Strategic Considerations

Because of the stricter timing requirements imposed in refund forums, an amorphous tax case is best developed in Tax Court when pressed for time—if possible. Otherwise, the hurried advocate runs the risk of either waiving new, valid arguments, on the one hand, or having the subsequent refund suit based on those new arguments dismissed for lack of jurisdiction, on the other.

Erroneous Or Invalid Statutory Notice of Deficiency

Statutory notices of deficiency must conform to certain statutory requirements:

- (i) The notice must assert a deficiency as defined by §6211(a);
- (ii) The deficiency must relate to the proper taxable period, *see Finn v. Commissioner*, 22 B.T.A. 799, 802 (1931);
- (iii) A determination must be made that a deficiency exists, §6212; and

- (iv) The notice must be properly transmitted to the taxpayer before the expiration of the statutory period of limitations. *See* §6501.

Tax Court

A notice of deficiency is a pre-requisite to filing suit in the Tax Court. *Stamm International Corp. v. Commissioner*, 84 T.C. 248, 252 (1985) (“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”). To the extent the Commissioner issues an invalid notice, the taxpayer may file suit in the Tax Court and then seek to dismiss the suit on the grounds the court lacks jurisdiction. Note, however, that unless the statute of limitations for issuing a notice has expired, the Commissioner may re-issue a valid notice of deficiency.

Refund Forums

If a notice of deficiency is invalid, a taxpayer may pay the deficiency, file an action in a refund forum and dispute the validity of any assessment based on such notice. Similar to the Tax Court, if the taxpayer is successful in contesting the validity of the Notice, the Commissioner may issue a new notice provided the statute of limitations for doing so remains open.

If the IRS assesses the tax asserted in the notice of deficiency, a taxpayer may file an action in District Court, pursuant to section 6213(a), to enjoin collection of the assessed tax. *See, e.g., Mann v. United States*, 82 AFTR2d 98-5503, 98-2 U.S.T.C. ¶ 50,608 (D.N.M. 1998), *aff'd*, 204 F.3d 1012 (10th Cir. 2000)(IRS collection activity enjoined where no notice of deficiency had been issued).

Liberal Interpretation Of Requirements

“The essential purpose of a deficiency notice is to provide a formal notification that a deficiency in taxes has been determined.” *Pietz v. Commissioner*, 59 T.C. 207, 213–14 (1972); *Olsen v. Helvering*, 88 F.2d 650, 651 (2d Cir. 1937) (“the notice is only to ad-

wise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough”). Provided this requirement is met, errors in the Notice are generally ignored. *Hart v. Commissioner*, 44 T.C.M. (CCH) 1203, (1982) (“An error in a notice of deficiency, which otherwise fulfills its purpose, will be ignored where the taxpayer is not misled thereby and is provided by it with information sufficient for the preparation of his case for trial.”)

A notice may be invalid only in part. To the extent this is the case, a court will not lack jurisdiction or dismiss an action with respect to the valid parts of the notice simply because the notice contains invalid portions. For example, in *Stamm International*, the Commissioner issued a notice related to four taxable periods. One of those periods was invalidly noticed because the statutory period had expired. The Tax Court held that the notice remained valid with respect to the remaining three taxable periods, despite the notice containing errors related to one period. *Stamm International Corp. v. Commissioner*, 84 T.C. 248 (1985).

Other Considerations

Payment Of Tax After Statute Expires

If the statute of limitations on assessment—which typically runs three years after the return is due or filed, whichever comes later (§6501(a))—with respect to a given taxable period has arguably expired before the IRS issued a notice of deficiency, it may be a bad idea to pay the liability and claim a refund. First, the Tax Court will consider a statute-of-limitations defense to an otherwise valid deficiency. A successful statute-of-limitations defense in Tax Court would yield a decision that would bar the IRS from collecting any underpayment. Second, the *sine qua non* of a valid refund claim is an *overpayment* of tax. *Lewis v. Reynolds*, 284 U.S. 281

(1932). See also *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947) (defining overpayment). A taxpayer may always volunteer to pay an uncollectible tax, but the IRS need not (and will not) allow a refund unless and until the taxpayer proves an overpayment, regardless of whether the IRS could have assessed and collected the tax in the first place.

Setoff And Equitable Recoupment

The government may assert a setoff to an otherwise time-barred adjustment as a defense in refund litigation, but not in deficiency cases in Tax Court.

The doctrine of equitable recoupment extends the setoff principle to cover different taxes. See, e.g., *Wilmington Trust Co. v. United States*, 221 Ct. Cl. 686, 701 (1979) (discussing Supreme Court equitable recoupment cases). See also *United States v. Dalm*, 494 U.S. 596 (1990). Historically, the IRS took the position that the Tax Court lacked jurisdiction to consider a plea of equitable recoupment. Rev. Rul. 71-56, 1971-1 C.B. 404. Accordingly, the Tax Court has rarely—if ever—applied equitable recoupment in favor of the IRS. But the Tax Court has asserted jurisdiction to grant equitable recoupment claims in favor of taxpayers, see, e.g., *Estate of Mueller v. Commissioner*, 101 T.C. 551 (1993), and Congress explicitly granted the Tax Court jurisdiction to hear such claims. Pension Protection Act of 2006, Pub. L. 109-280, Title VIII, §858(a), 120 Stat. 1020, codified at §6214(b); *Menard, Inc. v. Commissioner*, 130 T.C. 54 (2008).

In refund litigation the taxpayer must prove an overpayment of tax. *Lewis*, 284 U.S. at 283. A setoff defense allows the government to reduce or eliminate an otherwise valid refund claim using time-barred underpayments. *Kingston Prods. Corp. v. United States*, 177 Ct. Cl. 471 (1966).

(Part 2 of this article will appear in the Spring issue.)