Burden of Proof in the Tax Court after the IRS Restructuring and Reform Act of 1998 and Shea v. Commissioner

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I. INTRODUCTION

Before the Commissioner of the Internal Revenue Service can make an assessment\(^1\) of tax against a taxpayer for deficiency,\(^2\) the Commissioner must mail to the taxpayer a final administrative determination of the taxpayer’s tax liability for the tax year in the form of a statutory notice of deficiency (notice).\(^3\) If the taxpayer wants to contest the Commissioner’s determination without having to first pay the proposed deficiency, a petition must be filed with the United States Tax Court within 90 days from the date the notice was mailed.\(^4\) If the taxpayer lives outside the United States, the petition must be filed within 150 days.\(^5\) If the notice is valid and the petition is timely filed, the tax court has jurisdiction to redetermine the correct amount of deficiency, if any.\(^6\) In addition, upon the issuance of a valid notice, the Commissioner cannot make an assessment until the tax court decision becomes final. If the taxpayer has not filed a petition with the tax court, the Commissioner is barred from making an assessment until the 90 days (or 150 days if applicable) after the date the notice was mailed has elapsed.\(^7\)

This Article begins by considering what constitutes a valid notice of deficiency. It then considers the burden of proof in the tax court, situations

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1. Assessment can be defined as “the formal recording of a taxpayer’s liability.” MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 10.01 (1981); I.R.C. § 6201(a) (1994). The assessment must be made prior to the expiration of the statute of limitations. I.R.C. § 6501 (Supp. 1998).

2. A deficiency is the amount by which tax due exceeds the amount shown as the tax owed by the taxpayer on the return, provided a return showing an amount has been filed, plus previously assessed deficiencies over rebates made. I.R.C. § 6211(a) (1994).

3. I.R.C. § 6213(a) (Supp. 1998). In general, a notification by the Service that tax in excess of the amount shown on the return is due because of a mathematical or clerical error is not considered a “notice of deficiency.” I.R.C. § 6213(b) (1994). In the case of a partnership, a notice of final partnership administrative adjustment is analyzed the same way as a notice of deficiency. I.R.C. § 6223 (1994); Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 386 (5th Cir. 1995).

4. I.R.C. § 6213(a). In the case of a partnership, the tax matters partner must file a petition within 90 days after the day on which a notice of final partnership administrative adjustment is mailed. I.R.C. § 6226(a) (1994). If the tax matters partner does not file a readjustment petition, any notice partner and any 5-percent partner may, within 60 days after the close of the 90-day period, file a petition. I.R.C. § 6226(b)(1) (1994).

As an alternative to filing a petition in the tax court, the taxpayer can pay the alleged deficiency and file a claim for a refund. I.R.C. § 6511 (1994). If the claim is denied, or six months have elapsed from the filing of the claim, the taxpayer can bring suit for the refund in district court or the U.S. Court of Federal Claims. I.R.C. §§ 6532(a), 7422(a) (1994).


when the burden may shift, and situations when it is specifically placed on the Commissioner by statute or the Tax Court Rules of Practice and Procedure. The Appendix summarizes, in the form of a flow chart, the issues that should be considered with respect to the validity of the notice and the burden of proof. Part IV of the Article addresses the impact of the IRS Restructuring and Reform Act of 1998 has had on the burden of proof in the tax court. This Act has shifted the burden of proof to the Commissioner, provided the taxpayer can meet certain requirements. Lastly, Part V analyzes the effect the tax court’s recent ruling in Shea v. Commissioner will have on burden of proof as it relates to the notion of “new matter.”

II. THE STATUTORY NOTICE OF DEFICIENCY

A. In General

The Commissioner is authorized to mail a notice of deficiency to the taxpayer whenever a deficiency in tax has been determined.\(^8\) Such a notice must be valid.\(^9\) Although there is no statutorily prescribed form that automatically renders the notice valid, it must meet certain substantive requirements.\(^10\) Specifically, it must “describe the basis for, and identify the amounts (if any) of, the tax due, interest, additional amounts, additions to the tax, and assessable penalties included in such notice.”\(^11\) This provision has been interpreted as not requiring the notice to have a reasonable basis in law or fact.\(^12\) However, the information in the notice must indicate that the Internal Revenue Service (Service) has considered information that relates to the taxpayer in question and has determined the amount of the deficiency.\(^13\) A valid determination is one that enables the taxpayer to identify from the notice the tax returns involved, the

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9. I.R.C. § 6212(a); Scar v. Commissioner, 814 F.2d 1363, 1367 (9th Cir. 1987); Cross, 98 T.C. at 615; Stamm Int'l Corp., 84 T.C. at 252.
11. I.R.C. § 7522(a) (1994). For notices mailed prior to the effective date of § 7522, see, e.g., Olsen v. Helvering, 88 F.2d 650 (2d Cir. 1937); Foster v. Commissioner, 80 T.C. 34 (1983), vacated on other grounds, 156 F.2d 1430 (9th Cir. 1985).
13. Scar, 814 F.2d at 1367; Benzvi v. Commissioner, 787 F.2d 1541, 1542 (11th Cir. 1986); Abatti v. Commissioner, 644 F.2d 1385, 1389 (9th Cir. 1981); Barnes v. Commissioner, 408 F.2d 65, 68 (7th Cir. 1969); Pietz v. Commissioner, 59 T.C. 207, 213-14 (1972); Whittington v. Commissioner, 78 T.C. M. (CCH) 339 (1999); Hesse v. Commissioner, 74 T.C.M. (CCH) 180, 183 (1997).
nature of the error charged, and the amount of the deficiency determined. If the taxpayer establishes the notice did not accomplish this purpose, the notice is considered misleading. In addition, if the notice demonstrates on its face that the Commissioner failed to make a determination, the Commissioner must prove a determination was in fact made.

B. Effect of an Invalid Statutory Notice of Deficiency

If the Commissioner has not made a determination that there was a deficiency in the taxpayer’s liability, the notice is not valid. This will have two immediate results. First, in the absence of a valid notice, the tax court has no jurisdiction to determine the correct amount of the deficiency. Second, without a valid notice, the Commissioner cannot make an assessment against the taxpayer for the amount of the deficiency. Thus, an invalid notice prevents the tax court from considering the deficiency issues, and prevents the Commissioner from formally recording the taxpayer’s liability.

In considering whether the notice is valid, the tax court will not look behind the face of the notice to examine how the Service determined the deficiency or the appropriateness of the Service’s motives or conduct. Furthermore, the possibility that the determination in the notice may ultimately turn out to be erroneous does not render the notice invalid.

14. Bokum v. Commissioner, 992 F.2d 1136, 1139 (11th Cir. 1993); Pasternak v. Commissioner, 990 F.2d 893, 897 (6th Cir. 1993); Estate of Yaeger v. Commissioner, 889 F.2d 35 (2d Cir. 1989); Donley v. Commissioner, 791 F.2d 383, 384-85 (5th Cir. 1986); Whittington, 78 T.C.M. (CCH) at 340-41; Hesse, 74 T.C.M. (CCH) at 183.

15. Estate of Yaeger, 889 F.2d at 35.


17. See Scar, 814 F.2d at 1370; Campbell, 90 T.C. at 114; Kong, 60 T.C.M. (CCH) at 698-99.


22. Stevens v. Commissioner, 709 F.2d 12, 13 (5th Cir. 1983); Whittington v. Commissioner 78 T.C.M. (CCH) 339, 341 (1999); Richards v. Commissioner, 73 T.C.M. (CCH) 2419, 2425 (1997), aff’d, 165 F.3d 917 (9th Cir. 1998) (holding arbitrary determination does not render notice invalid).
An example of the application of the notice requirements is found in *Scar v. Commissioner.* In that case, the Commissioner mailed a statutory notice of deficiency to Mr. and Mrs. Scar for their 1978 taxable year. An attachment to the notice explained that the adjustment stemmed from the Scars' investment in a business venture known as the Nevada Mining Project. Another attachment stated that the Scars' income tax return was not available.

The Scars filed a timely petition with the tax court, denying they had claimed any expenses or losses from the Nevada Mining Project. In their petition, they also alleged the proposed adjustment was not based on their return as it had been filed. The Commissioner eventually agreed, and mailed a revised form that identified the correct investment in which the Scars were involved and the correct deficiency amount. The Scars followed up by filing a motion to dismiss for lack of jurisdiction, claiming the notice was invalid because the Commissioner had failed to determine there was a deficiency in their tax. In the absence of such a determination, they argued, the notice would be invalid, wherefore the tax court lacked jurisdiction to make a redetermination.

The Ninth Circuit Court of Appeals held the Commissioner must consider information that relates to the particular taxpayer before a valid deficiency determination can be said to have been made. Here, the court found, the notice revealed on its face that no determination of tax deficiency had been made with respect to the Scars. Consequently, the tax court had no jurisdiction over this action wherefore it was properly dismissed.
The analysis in *Scar* has been applied to only those limited situations in which a deficiency notice reveals on its face that the Commissioner failed to make a determination. In other situations, the Commissioner enjoys a presumption a determination was in fact made.

An example of the latter situation is *Campbell v. Commissioner*. There, the Commissioner had mailed a statutory notice of deficiency and waiver form to Mr. and Mrs. Campbell. However, the explanation of adjustments attached to the notice referred to another taxpayer and made no reference to the Campbells. In addition, the amounts computed were not related to the deficiency determined in the notice and repeated in the waiver. Nevertheless, because the notice and waiver clearly indicated the Commissioner had determined a deficiency against the Campbells, and because there was no indication the Commissioner failed to consider information related to the Campbells, the court found that the notice did not reveal on its face that the Commissioner failed to make a determination. Thus, unlike in *Scar*, the Commissioner could enjoy the presumption of having made a deficiency determination.

III. BURDEN OF PROOF IN TAX COURT PROCEEDINGS

A. *In General*

Not only is the Commissioner presumed to have made a determination under the combined holdings of *Scar* and *Campbell*, the determination made in the statutory notice of deficiency is generally presumed to be correct. This

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35. Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 387 (5th Cir. 1995); Kantor v. Commissioner, 998 F.2d 1514, 1521-22 (9th Cir. 1993); Clapp v. Commissioner, 875 F.2d 1396, 1402 (9th Cir. 1989); Campbell v. Commissioner, 90 T.C. 110, 113-15 (1988).
36. *Scar*, 814 F.2d at 1367 n.6, 1369 n.9; *Campbell*, 90 T.C. at 113.
38. *Id.* at 110-11.
39. *Id.* at 111.
40. *Id.*
41. *Id.* at 113.
42. Campbell v. Commissioner, 90 T.C. 110, 113 (1988). The presumption a determination was made was considered conclusive by the explanation of adjustments for the Campbells' deficiency attached to the Commissioner's answer. *See also* Whittington v. Commissioner, 78 T.C.M. (CCH) 339 (1999) (holding the Commissioner can rely on information contained in its records, rather than the actual filed income tax return, to determine a deficiency).
43. *Scar* v. Commissioner, 814 F.2d 1363 (9th Cir. 1987).
45. Welch v. Helvering, 290 U.S. 111, 115 (1933); Moretti v. Commissioner, 77 F.3d
presumption is not lost merely because there is an inaccuracy in one portion of a deficiency determination. Nor is the presumption lost if the Commissioner were to concede one or more issues.

Any trial before the tax court is a de novo proceeding based on the merits of the case, as opposed to the administrative record developed by the Service. This is why the court will not look behind the notice to determine the Commissioner’s motives or procedures leading to the determination. Rather, based on the presumption of correctness, the notice constitutes a prima facie showing by the Commissioner that the taxpayer owes the tax determined in the notice.

As a consequence of the presumed correctness of the statutory notice of deficiency, the taxpayer generally has the burden of proof by a preponderance of the evidence with respect to each item in the notice. As with any other presumption, if the taxpayer fails to rebut by meeting the burden of proof, the Commissioner’s determination in the notice will be upheld. Whether the taxpayer has met the burden of proof is analyzed on an item-by-item basis. In general, the burden of production requires the

637, 643 (2d Cir. 1996); Schaffer v. Commissioner, 779 F.2d 849, 857 (2d Cir. 1985); Petzoldt v. Commissioner, 92 T.C. 661, 687 (1989); cf. Tax Ct. R. Practice and P. 142.

46. Foster v. Commissioner, 391 F.2d 727, 735 (4th Cir. 1968); Hoffman v. Commissioner, 298 F.2d 784, 788 (3d Cir. 1962); Clark v. Commissioner, 266 F.2d 698, 707 (9th Cir. 1959); Anderson v. Commissioner, 250 F.2d 242, 246 (5th Cir. 1957); Casey v. Commissioner, 38 T.C. 357, 377-78 (1962).

47. United States Holding Co. v. Commissioner, 44 T.C. 323, 328 (1965).


49. See supra note 21 and accompanying text.

50. Anastasato v. Commissioner, 794 F.2d 884, 887 (3d Cir. 1986); Rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir. 1975).

51. Schaffer v. Commissioner, 779 F.2d 849, 857-58 (2d Cir. 1985); Hoffman, 298 F.2d at 788; American Pipe & Steel Corp. v. Commissioner, 243 F.2d 125, 126-27 (9th Cir. 1957).

52. See, e.g., American Pipe & Steel Corp., 243 F.2d at 126.

53. Foster v. Commissioner, 391 F.2d 727, 735 (4th Cir. 1968); Clark v. Commissioner, 266 F.2d 698, 707 (9th Cir. 1959); Anderson v. Commissioner, 250 F.2d 242, 246 (5th Cir. 1957).

party upon whom it is placed to present prima facie evidence to entitle that party to have an issue decided by the trier of fact. In the realm of tax court litigation, this requires the taxpayer to present sufficient evidence contrary to the Commissioner’s findings. Alternatively, the taxpayer can establish that the findings are erroneous because they are based on an erroneous view of the law. On the other hand, simply characterizing the assessment as arbitrary or a general denial of liability is not sufficient to meet the burden of production. Generally, the taxpayer has met the burden of production and established a prima facie case when a reasonable person, based on the evidence presented, could find in favor of the taxpayer. At that point, the burden shifts to the Commissioner, who then must present rebuttal evidence.

The second burden, the burden of persuasion, requires the person upon whom it is placed to establish the merits of the claim, also by a preponderance of the evidence. An example of the application of this principle is found in the case of Borchers v. Commissioner, which dealt with the investment tax credit. Under the law in effect for the years at issue in Borchers, a taxpayer lost the ability to claim the investment tax credit if equipment was leased to another for a period representing at least half the equipment’s useful life.

In Borchers, the Commissioner had mailed a statutory notice of deficiency in which it was determined the Borchers were not entitled to the investment tax credit they claimed on their return because they had leased the equipment in question to their wholly-owned corporation for more than one-half of the equipment’s useful life. The parties agreed that the useful life of the equipment

56. Erickson v. Commissioner, 937 F.2d 1548, 1551 (10th Cir. 1991); Foster, 391 F.2d at 735; Herbert v. Commissioner, 377 F.2d 65, 69 (9th Cir. 1966).
58. Anastasato v. Commissioner, 794 F.2d 884, 888 (3d Cir. 1986); Rapp v. Commissioner, 774 F.2d 932, 935 (9th Cir. 1985); Petzoldt v. Commissioner, 92 T.C. 661, 690 (1989).
59. Senter, 70 T.C.M. (CCH) at 56.
60. Id.
61. Rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir. 1975); American Pipe and Steel Corp. v. Commissioner, 243 F.2d 125, 126-27 (9th Cir. 1957). See also Clukey, supra note 54, at 686.
64. Borchers, 95 T.C. at 84-88.
was six years. Accordingly, if the Borchers failed to introduce evidence that the leases were for less than three years, they would be unable to meet their burden of production, and a decision would have to be rendered for the Commissioner. However, they did introduce a lease establishing a twelve-month term, satisfying their burden of production and establishing a prima facie case.

The burden therefore shifted to the Commissioner to present evidence casting doubt on the 12-month leases. Arguably, had the Commissioner failed to present such evidence, the Borchers would have carried their burden of proof and would have been entitled to a decision in their favor. However, the Commissioner presented evidence that the leases were subject to the manipulative will of the Borchers to extend the leases beyond the 12-month term, and therefore were of indefinite duration. In other words, the leases were for more than three years, and more than one-half the equipment's useful life, which meant the Commissioner had satisfied its burden of going forward. Because the evidence more likely than not established that the leases were more than three years, the Borchers failed to satisfy the burden of persuasion, and a decision ultimately was entered in favor of the Commissioner.

B. Establishing the Notice is Arbitrary and Erroneous

As discussed above, as long as a taxpayer fails to establish a notice as misleading, or as long as the notice does not demonstrate on its face that the Commissioner failed to make a determination of deficiency, the notice is entitled to a presumption of correctness. However, this presumption is not available if the Commissioner has determined the taxpayer had unreported income, whether legal or illegal, and fails to introduce substantive evidence linking the taxpayer to that income. Such a deficiency notice is characterized as a naked

65. Id. at 85.
66. Id. at 88-89.
67. Id. at 89. See also Dellacroce v. Commissioner, 83 T.C. 269, 287 (1984) (holding the taxpayer prevailed when the Commissioner failed to present any probative evidence).
69. Id. at 90-91.
70. Id.
71. Id. at 91-92, 94-95.
72. Williams v. Commissioner, 999 F.2d 760, 763-64 (4th Cir. 1993); Day v. Commissioner, 975 F.2d 534, 537 (8th Cir. 1992); Zuhone v. Commissioner, 883 F.2d 1317, 1325 (7th Cir. 1989); Anastasato v. Commissioner, 794 F.2d 884, 887 (3d Cir. 1986); Schaffer v. Commissioner, 779 F.2d 849, 858 (2d Cir. 1985); Weimerskirch v. Commissioner, 596 F.2d 358, 361-62 (9th Cir. 1979); Petzoldt v. Commissioner, 92 T.C. 661, 688-89 (1989); Dellacroce v. Commissioner, 83 T.C. 269, 280 (1984); Llorente v. Commissioner, 74 T.C. 260, 264 (1980), rev'd on other grounds, 649 F.2d 152 (2d Cir. 1981); Jackson v.
assessment, and can be challenged by the taxpayer as arbitrary. The burden of establishing the arbitrary nature of the notice is, as with most matters before the tax court, on the taxpayer.

It is important to note that such a challenge is to the deficiency notice itself, on the basis that it bears no factual relationship to the taxpayer’s liability; it is not a challenge to any item of proof offered by the Commissioner. Accordingly, in contrast to determining validity, the tax court may go beyond the face of the notice when deciding the arbitrariness of a notice in which the Commissioner determined the taxpayer had unreported income.

To overcome such a challenge, the Commissioner has the burden of providing evidence linking the taxpayer to the income-generating activity. The required showing is minimal, but must be met even if the taxpayer is silent. The rationale for placing this burden on the Commissioner is that it is unfair, and sometimes impossible, for a taxpayer to show he or she did not receive a particular item of income.

In Weimerskirch v. Commissioner, the Commissioner determined Mr. Weimerskirch had $24,608 of income from illegal drug activity, which he of course did not report. The determination was based on information received from a confidential informant, wherefore the Commissioner called no witnesses and introduced no evidence linking Mr. Weimerskirch to the alleged drug sales. Nor did the Commissioner attempt to substantiate the unreported income.


74. Pittman v. Commissioner, 100 F.3d 1308, 1313 (7th Cir. 1996); Anastasato, 794 F.2d at 887; Andrews v. Commissioner, 76 T.C.M. (CCH) 381, 383 n.3 (1998).

75. Pittman, 100 F.3d at 1313.

76. See supra note 21 and accompanying text.

77. Petzoldt, 92 T.C. at 687-88; Dellacroce, 83 T.C. at 280; Jackson, 73 T.C. at 401.

78. Blohm v. Commissioner, 994 F.2d 1542, 1549 (11th Cir. 1993); Anastasato, 794 F.2d at 887; Rapp v. Commissioner, 774 F.2d 932, 935 (9th Cir. 1985); Llorente, 649 F.2d at 156; Weimerskirch, 596 F.2d at 361; Gerardo v. Commissioner, 552 F.2d 549, 554 (3d Cir. 1977); Jackson, 73 T.C. at 401; Smith v. Commissioner, 79 T.C.M. (CCH) 1474 (2000); Senter v. Commissioner, 70 T.C.M. (CCH) 54, 58 (1995).

79. Pittman, 100 F.3d at 1317; Blohm, 994 F.2d at 1549; Erickson v. Commissioner, 937 F.2d 1548, 1551 (10th Cir. 1991); Gerardo, 552 F.2d at 554.

80. Schaffer v. Commissioner, 779 F.2d 849, 858 (2d Cir. 1985); Weimerskirch, 596 F.2d at 361. It should be noted that the Commissioner does not have to link the taxpayer to the income-generating activity when determining that the taxpayer is not entitled to certain deductions. See Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 386-87 (5th Cir. 1995); Rapp, 774 F.2d at 935; Rockwell v. Commissioner, 512 F.2d 882, 886 (9th Cir. 1975); Norwest Corp. v. Commissioner, 73 T.C.M. (CCH) 1783, 1786-87 (1997).

81. 596 F.2d 358, 359 (9th Cir. 1979).

82. Id. at 360 n.2.
income by other means, such as the net worth, bank deposits, cash expenditures, or source and application of funds method.⁸³ Accordingly, the Ninth Circuit Court of Appeals held that the notice was not entitled to a presumption of correctness.⁸⁴

Establishing the required relationship between the taxpayer and unreported income can be done in a variety of ways.⁸⁵ For example, the Commissioner can establish a link between the taxpayer and the alleged business activity that generated the income.⁸⁶ As long as there is sufficient evidence the taxpayer received unreported income, the Commissioner does not have to establish an evidentiary link to the specific activity alleged to have generated the unreported income.⁸⁷ One means of doing this is by reconstructing the taxpayer’s entire income picture.⁸⁸ Another way is to provide evidence the taxpayer has an ownership interest in the assets in question.⁸⁹ Lastly, the Commissioner can establish a relationship between the taxpayer and unreported income by establishing the taxpayer possessed the funds forming the basis of the deficiency.⁹⁰

Currently, there is a split among the circuits as to whether evidence used to establish the necessary link between the taxpayer and unreported income must itself be admissible.⁹¹ In the fourth, seventh, and ninth circuits, inadmissible evidence may be considered in determining whether the Commissioner has met

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⁸³. Id. at 362.
⁸⁴. Id. at 361-62.
⁸⁶. Page v. Commissioner, 58 F.3d 1342, 1347-48 (8th Cir. 1995); Williams, 999 F.2d at 764; Fankhanel v. Commissioner, 76 T.C.M. (CCH) 809, 813 (1998), aff’d, 205 F.3d 1333 (4th Cir. 2000); Novoa v. Commissioner, 75 T.C.M. (CCH) 2360, 2365 n.10 (1998); Ahmad v. Commissioner, 73 T.C.M. (CCH) 2052, 2055-56 (1997); Alanis v. Commissioner, 69 T.C.M. (CCH) 2900, 2902-03 (1995).
⁸⁷. Erickson, 937 F.2d at 1551-52; Delaney v. Commissioner, 743 F.2d 670, 671-72 (9th Cir. 1984); Schad v. Commissioner, 87 T.C. 609, 618-20 (1986); aff’d, 827 F.2d 774 (11th Cir. 1987); Tokarski v. Commissioner, 87 T.C. 74, 76-77 (1986).
⁸⁸. Id. at 362.
⁸⁹. Erickson, 937 F.2d at 1551-52; Delaney v. Commissioner, 743 F.2d 670, 671-72 (9th Cir. 1984); Schad v. Commissioner, 87 T.C. 609, 618-20 (1986); aff’d, 827 F.2d 774 (11th Cir. 1987); Tokarski v. Commissioner, 87 T.C. 74, 76-77 (1986).
⁹⁰. Schad, 87 T.C. at 618-20; Alanis, 69 T.C.M. (CCH) at 2903.
its burden of proof and established a link between the taxpayer and unreported income.\textsuperscript{92} In the Second Circuit Court of Appeals, however, a statutory notice based on inadmissible evidence is arbitrary.\textsuperscript{93}

C. Effect on the Burden of Proof if the Statutory Notice of Deficiency is Shown to be Arbitrary or Erroneous

As discussed above, if the Commissioner fails to carry the initial burden of establishing the taxpayer received unreported income, the notice is not entitled to the presumption of correctness.\textsuperscript{94} In addition, the burden of production shifts to the Commissioner.\textsuperscript{95} However, this is not a basis for finding the notice of deficiency is invalid.\textsuperscript{96}

Whether the burden of persuasion also shifts to the Commissioner when the taxpayer has established a notice as arbitrary depends on the court considering the case. The tax court and the courts of appeals for the first and third circuits have found that, while the burden of going forward with the evidence (the burden of production) shifts to the Commissioner, the burden of persuasion remains on the taxpayer at all times.\textsuperscript{97} The courts of appeals for the second, fourth, fifth, sixth, eighth, and ninth circuits have found that, once the taxpayer has established the notice of deficiency is arbitrary, the presumption of correctness disappears. The Commissioner, therefore, has the burden of establishing the amount and existence of any deficiency; it is not incumbent upon the taxpayer to prove no tax was owed, or the amount of tax owed.\textsuperscript{98}

\textsuperscript{92} Williams, 999 F.2d at 765-66; Zuhone v. Commissioner, 883 F.2d 1317, 1325 (7th Cir. 1989); Avery v. Commissioner, 574 F.2d 467, 468 (9th Cir. 1978).

\textsuperscript{93} Llorente v. Commissioner, 649 F.2d 152, 156-57 (2d Cir. 1981).

\textsuperscript{94} See supra note 72 and accompanying text.

\textsuperscript{95} Portillo v. Commissioner, 932 F.2d 1128, 1133 (5th Cir. 1991); Senter v. Commissioner, 70 T.C.M. (CCH) 54, 59 (1995).

\textsuperscript{96} Clapp v. Commissioner, 875 F.2d 1396, 1403 (9th Cir. 1989).

\textsuperscript{97} Geftman v. Commissioner, 154 F.3d 61, 68 n.10 (3d Cir. 1998); Delaney v. Commissioner, 99 F.3d 20, 23 (1st Cir. 1996); Anastasato v. Commissioner, 794 F.2d 884, 887 (3d Cir. 1986); Borchers v. Commissioner, 95 T.C. 82, 90 (1990), aff'd, 943 F.2d 22 (8th Cir. 1991); Kluger v. Commissioner, 83 T.C. 309, 310 n.1 (1984); Petersen v. Commissioner, 69 T.C.M. (CCH) 2613, 2614 (1995).

\textsuperscript{98} See O'Reilly v. Commissioner, 973 F.2d 1403, 1409 (8th Cir. 1992); Cebollero v. Commissioner, 967 F.2d 986, 990, 992 (4th Cir. 1992); Portillo v. Commissioner, 932 F.2d 1128, 1134 (5th Cir. 1991); Muserlian v. Commissioner, 932 F.2d 109, 112 (2d Cir. 1991); Clapp v. Commissioner, 875 F.2d 1396, 1403 (9th Cir. 1989); Herbert v. Commissioner, 377 F.2d 65, 69 (9th Cir. 1967); Clark v. Commissioner, 266 F.2d 698, 706 (9th Cir. 1959); Cohen v. Commissioner, 266 F.2d 5, 11 (9th Cir. 1959); Gasper v. Commissioner, 225 F.2d 284, 288 (4th Cir. 1955); Durkee v. Commissioner, 162 F.2d 184, 187 (6th Cir. 1947). See also Rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir. 1975) (holding the presumption does not shift when notice is not determined to be arbitrary).
Upon whom the burden of persuasion is placed is important only in those cases in which evidence introduced by the taxpayer is given the same weight as evidence introduced by the Commissioner. If the burden of persuasion rests on the Commissioner and the Commissioner has failed to meet this burden, a decision must be entered for the taxpayer. Conversely, if the burden of persuasion is on the taxpayer, and it is the taxpayer who has failed to satisfy this burden, a decision must be entered for the Commissioner.

**D. The Statutory Burden of Proof and Unreported Income**

The Commissioner has the burden of producing reasonable and probative information concerning deficiencies in tax based on any income reported on information returns filed by a third party (Form W-2 or 1099) if the taxpayer asserts a reasonable dispute and has fully cooperated with the Commissioner. This information must be in addition to any material stated in the information return. The taxpayer is considered to have fully cooperated if, within a reasonable period of time, the taxpayer has provided “access to and inspection of all witnesses, information, and documentation within” his or her control.

Not only is the taxpayer required to assert a reasonable dispute, the assertion must be brought to the attention of the Service within reasonable

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100. Id.
101. Andrews v. Commissioner, 76 T.C.M. (CCH) 381, 385 n.8 (1998) (holding the taxpayer did not assert a reasonable dispute with respect to any item of income reported on the information return because he failed to file an income tax return, failed to state any facts tending to indicate he did not receive unreported income, and failed to deny he received any item of income reported on the information return); Bruner v. Commissioner, 76 T.C.M. (CCH) 40, 42 (1998) (holding the taxpayer’s testimony at trial did not constitute a reasonable dispute with respect to any item of income reported on an information return); Dennis v. Commissioner, 73 T.C.M. (CCH) 3061, 3064 (1997) (holding the taxpayer’s testimony at trial did not disprove receipt of income and did not constitute a reasonable dispute with respect to any item of income reported on the information return); Hardy v. Commissioner, 73 T.C.M. (CCH) 2105, 2109 (1997), aff’d, 181 F.3d 1002 (9th Cir. 1999) (holding the taxpayer failed to assert a reasonable dispute with respect to any item of income reported on an information return).
103. I.R.C. § 6201(d); Raush v. Commissioner, 76 T.C.M. (CCH) 39, 40 (1998) (holding the taxpayer did not fail to include interest income because the Commissioner did not introduce the information returns or any other evidence of unreported income).
104. I.R.C. § 6201(d); McQuatters v. Commissioner, 75 T.C.M. (CCH) 1909, 1912 (1998) (holding the taxpayer failed to establish he fully cooperated with the Service).
time. The Internal Revenue Code "does not provide a means for a taxpayer to avoid... Federal income tax liabilities by failing to file a tax return, refusing to provide any information to the Commissioner or the Court, and refusing to provide any records concerning... income." The reason for imposing this requirement on the taxpayer is that the Commissioner is under no duty to investigate a payment report made by a third party when the report is not disputed by the taxpayer. Similarly, if the taxpayer does not challenge the accuracy of third-party information returns, such as a W-2, the issue of whether a notice of deficiency is arbitrary does not arise.

IV. THE IMPACT OF THE IRS RESTRUCTURING AND REFORM ACT OF 1998 ON THE BURDEN OF PROOF

A. Section 7491—Shifting the Burden of Persuasion

When considering the provision that has been codified as I.R.C. § 7491, Congress felt individuals and small businesses who cooperated with the Service,

105. See Parker v. Commissioner, 117 F.3d 785, 787 (5th Cir. 1997) (holding that if the taxpayer does not file a tax return, the Commissioner is not required to conduct an independent investigation); Andrews, 76 T.C.M. (CCH) at 385 n.8 (holding that because the taxpayer failed to file an income tax return, failed to state any facts tending to indicate he did not receive unreported income, and failed to deny he received any item of income reported on an information return, he failed to assert a reasonable dispute with respect to any item of income reported on an information return); McQuatters, 75 T.C.M. (CCH) at 1912 (holding that because the taxpayer failed to file an income tax return, he did not bring his dispute over any item of income to the attention of the Service within a reasonable period of time as contemplated by the terms and legislative history of I.R.C. § 6201(d)). Cf. Smith v. Commissioner, 79 T.C.M. (CCH) 1474 (2000) (holding that if income at issue is not income reported by a third-party payor, the Commissioner must present predicate evidence for deficiency determination).

106. See, e.g., Parker, 117 F.3d at 787.
107. McQuatters, 75 T.C.M. (CCH) at 1913.
108. Parker, 117 F.3d at 787; Andrews, 76 T.C.M. (CCH) at 384.
109. Parker, 117 F.3d at 787; Geiger v. Commissioner, 77 T.C.M. (CCH) 1468, 1470 (1999); Green v. Commissioner, 71 T.C.M. (CCH) 2340, 2341-42 (1996) (holding the taxpayer did not challenge accuracy of Forms 1099-NEC issued to him); Hall v. Commissioner, 71 T.C.M. (CCH) 1869, 1883 (1996) (holding the taxpayer did not challenge accuracy of Forms 1099 reporting interest paid to him). Similarly, a taxpayer's contention that the Commissioner relied upon information reported by third-party payors on Forms 1099 does not state a claim upon which relief can be granted. White v. Commissioner, 74 T.C.M. (CCH) 866, 868 (1997).
but were still forced into litigation, were at a disadvantage. Accordingly, to create a better balance between government and taxpayers without encouraging tax avoidance, the IRS Restructuring and Reform Act of 1998 enacted a provision that allows facts asserted by the taxpayer to be accepted, thereby shifting the burden of proof to the Commissioner.

1. Requirements to Come Within Section 7491(a)

As discussed above, the taxpayer generally has the burden of proof in actions before the tax court. One exception to this general rule is I.R.C. § 7491(a), which shifts the burden of proof to the Commissioner, provided the taxpayer can meet certain requirements. First, the taxpayer must introduce credible evidence concerning a factual issue that is relevant to determining the taxpayer's income tax liability. Legislative history suggests evidence is considered credible when a court would find it sufficient basis for a decision if no contrary evidence were submitted. According to the Senate Finance Committee's report on the IRS Restructuring and Reform Act of 1998, examples of items that do not meet this credibility requirement are implausible factual assertions, frivolous claims, and tax protestor-type arguments. Similarly, the report provides that evidence the court finds unbelievable is not considered credible.

Next, the taxpayer must establish compliance with the statutory requirements of maintaining records and substantiation of items. Finally, the taxpayer must cooperate with all reasonable requests by the Commissioner for witnesses, information, documents, meetings, and interviews. Most likely,

111. Id.
112. See supra note 51 and accompanying text.
113. I.R.C. § 7491(a)(1) (Supp. 1998). Section 7491 is generally applicable for court proceedings arising in connection with examinations beginning after (or, if there is no examination, taxable periods or events beginning or occurring after) July 22, 1998. If the taxpayer is a partnership, corporation, or trust, for the provision to be applicable, certain net worth requirements set forth in section 7430(c)(4)(A)(ii) must also be satisfied. I.R.C. § 7491(a)(2)(C) (Supp. 1998).
116. Id.
117. Id.
118. I.R.C. § 7491(a)(2)(A), (B) (Supp. 1998). An example of the record-keeping requirement can be found in I.R.C. § 6001 (1994); an example of the substantiation requirement can be found in I.R.C. § 274 (1994), dealing with the deductibility of travel and entertainment expenses.
this requires the taxpayer to provide reasonable assistance to the Commissioner in obtaining access to and inspection of witnesses, information, or documents within the control of the taxpayer.\textsuperscript{120} In some circumstances, the taxpayer may also be required to establish administrative remedies were exhausted, including appeal rights provided by the Service.\textsuperscript{121} To the extent the taxpayer claims any privilege, the taxpayer is also required to establish the applicability of such.\textsuperscript{122}

Section 7491 appears to codify the taxpayer's burden of production, or the duty to come forward with prima facie evidence of a fact to entitle the party to have the issue decided by the trier of fact. If the taxpayer meets the statutory requirements and satisfies the burden of production, section 7491 places the burden of persuasion on the Commissioner.\textsuperscript{123} As a result, in those situations in

\begin{itemize}
  \item When the Commissioner determines the taxpayer is liable as a transferee of property from another. I.R.C. § 6902(a) (1994); TAx CT. R. PRACTICE AND P. 142(d).
  \item In a civil action involving the issue of whether jeopardy, levy, or assessment procedures were reasonable under the circumstances. I.R.C. § 7429(g)(1) (1994).
  \item When the Commissioner determines the taxpayer is liable for a penalty for promoting abusive tax shelters, aiding and abetting the understatement of tax liability, or filing a frivolous income tax return. I.R.C. § 6703(a) (1994).
  \item When the Commissioner determines a payment made to a disqualified individual is a parachute payment on account of a violation of any generally enforced security laws or regulations. I.R.C. § 280G(b)(2)(B) (1994).
  \item In certain accumulated earnings tax cases when the Commissioner's determination is based in whole or in part on an allegation of accumulation of corporate earnings and profits beyond the reasonable needs of the business. I.R.C. § 534(a) (1994); TAx CT. R. PRACTICE AND P. 142(e).
  \item When the Commissioner determines an income tax return preparer has willfully attempted to understate tax liability. I.R.C. § 7427 (1994).
  \item Concerning the fair market value of property (different from the price determined under the formula) transferred in connection with performance of services which is subject to a restriction which by its terms will never lapse and which allows the transferee to sell the property only at a price determined under a formula. I.R.C. § 83(d)(1) (1994).
  \item When the Commissioner determines the taxpayer is guilty of fraud with intent to evade tax. I.R.C. § 7454(a) (1994); TAx CT. R. PRACTICE AND P. 142(b).
  \item When the Commissioner determines a foundation manager knowingly participated in an act of self-dealing, participated in an investment which jeopardizes the carrying out of exempt purposes, or agreed to make a taxable expenditure. I.R.C.
which evidence provided by the taxpayer is equally balanced with evidence provided by the Commissioner, a decision would have to be entered for the taxpayer should the Commissioner fail to meet the burden of persuasion.  

2. Burden of Proof With Respect to Penalties

A second situation in which section 7491 places the burden of proof on the Commissioner is a court proceeding that may result in a penalty being imposed on the taxpayer. In such proceedings, the government must initially come forward with evidence establishing the appropriateness of applying a particular penalty. However, the Commissioner is not required to introduce evidence of elements such as reasonable cause or substantial authority or other defenses to the penalty. Rather, if the taxpayer believes it is inappropriate to impose the penalty for any of these reasons, the taxpayer must raise the issue. Thus, in this scenario, the burden of persuasion is not shifted to the Commissioner.

3. Burden of Proof When Income is Based on Statistical Information

One final situation in which section 7491 alters the general rule of placing the burden of proof on the taxpayer relates to tax deficiencies based on

§ 7454(b) (Supp. 1998); TAX CT. R. PRACTICE AND P. 142(c).

- When the Commissioner determines an organization manager knowingly agreed to make a political expenditure, agreed to make a disqualifying lobby expenditure, or knowingly participated in an excess benefit transaction. I.R.C. § 7454(b) (Supp. 1998); TAX CT. R. PRACTICE AND P. 142(c).
- When the Commissioner determines a trustee of a trust as defined in I.R.C. § 501(c)(21) (1994) has knowingly participated in an act of self-dealing or agreed to the making of a taxable expenditure. I.R.C. § 7454(b); TAX CT. R. PRACTICE AND P. 142(c).
- When the Commissioner determines a payment is nondeductible as an illegal bribe or kickback or in violation of a federal law. I.R.C. § 162(c)(1), (2) (1994).


125. I.R.C. § 7491(c) (Supp. 1998).


127. Id.
statistical information from unrelated taxpayers used solely to reconstruct an individual taxpayer’s income. In such a situation, the burden of proof is on the Commissioner solely with respect to the reconstructed item of income.¹²⁸

V. THE IMPACT OF SHEA V. COMMISSIONER ON THE BURDEN OF PROOF

A. New Matter

Under the Tax Court Rules of Practice and Procedure, the burden of proof is placed on the Commissioner for all increases in deficiency, affirmative defenses, and any “new matter.”¹²⁹ Specifically, Rule 142(a) provides: “The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the [Commissioner].”¹³⁰ However, Rule 142 does not define the concept of “new matter.”

Nevertheless, a line of cases has illustrated what may be a “new matter” placing the burden of proof on the Commissioner. Merely asserting a new theory which only clarifies the original determination without being inconsistent, altering the amount of the deficiency, or requiring the presentation of different evidence is not a new matter.¹³¹ There is also case law suggesting a theory is not a new matter when the determination is made in indefinite and general terms and is not inconsistent with some position necessarily implicit in the determination itself.¹³² In contrast, a theory is a new matter if it is

¹²⁸. I.R.C. § 7491(b) (Supp. 1998).
¹²⁹. TAX CT. R. PRACTICE AND P. 142(a). A discussion of the burden of proof with respect to increases in deficiency and affirmative defenses is beyond the scope of this Article. For a discussion of such burdens, see generally 14 MERTENS L. OF FED. INCOME TAX’N § 50:480 (West 2000); 630-2nd TAX MGMT. PORTFOLIOS A-46 to 46(1) (BNA 1999).
¹³⁰. TAX CT. R. PRACTICE AND P. 142(a).
¹³². Prior to the tax court’s decision in Shea v. Commissioner, 112 T.C. 183 (1999), nonacc., 2000-44 I.R.B. 429, some courts held that a theory was not new matter when the Service’s determination was made in indefinite and general terms, and the theory was not inconsistent with some position necessarily implied in the determination itself. See Abatti v. Commissioner, 644 F.2d 1385, 1390 (9th Cir. 1981); Sorin v. Commissioner, 29 T.C. 959, 969 (1958); Renner v. Commissioner, 67 T.C.M. (CCH) 3072, 3073-3 (1994). Shea seems to have done away with this definition of what does not constitute new matter. See infra notes 173-78 and accompanying text.
inconsistent with the original theory or requires the presentation of different evidence.

Courts have inherent authority to sustain the Commissioner's determination for reasons other than those assigned in the notice of deficiency. However, to be properly before the court, any new matter should be included in the Commissioner's answer or any amendments to the answer. The Commissioner may be prohibited from raising a new matter if the taxpayer is surprised or prejudiced. If the Commissioner raises an issue too late, the court is deprived of the complete argument and research of such contentions in the parties' opening and reply briefs. However, the Commissioner does not forfeit the right to rely on a theory by failing to raise it in the notice or answer, as long as the taxpayer is not surprised or disadvantaged when the Commissioner does eventually raise the theory.

If the notice is broadly worded, so as to encompass a new argument raised by the Commissioner, the burden of proof on such new arguments will be placed on the Commissioner if the taxpayer has been led to believe the Commissioner has limited its arguments to one or more theories. To avoid such surprise and disadvantage on the part of the taxpayer, the Tax Court Rules of Practice and Procedure strongly encourage the parties to engage in informal discussions to facilitate the discovery process. Specifically, they provide for an informal conference to develop the facts, enter into a stipulation of facts, discuss the issues, and otherwise prepare for trial.

137. See Sundstrand Corp. and Subsidiaries v. Commissioner, 96 T.C. 226, 347 (1991), aff'd, 17 F.3d 965 (7th Cir. 1994) (holding the taxpayer would be prejudiced when alternative argument was raised for the first time in the Commissioner's opening brief); Seligman, 84 T.C. at 199 (holding the taxpayer would be prejudiced when two additional basis for disallowance of deductions raised for the first time in the Commissioner's opening brief).
138. Seligman, 84 T.C. at 199.
139. Stewart v. Commissioner, 714 F.2d 977, 986-87 (9th Cir. 1983); Schaefer, 63 T.C.M. (CCH) at 2689.
142. The Branerton Corp., 61 T.C. at 692; Stevenson, 43 T.C.M. (CCH) at 291.
B. New Matter and the Burden of Proof after Shea v. Commissioner

The tax court recently clarified the scope of "new matter" in the case of Shea v. Commissioner. The court in Shea held that, with the enactment of section 7522, whether a position is inconsistent with the notice is irrelevant; the real issue is whether the position is described in the notice and requires different evidence.143

Mr. Shea resided in California, a community property state.144 He was married to Flor Shea during the years at issue, 1990, 1991, and 1992, for which he filed a joint return, and divorced in 1993.145 In the notice of deficiency for 1992, the Commissioner changed Mr. Shea's filing status to a married person filing separately.146 Based on bank deposits, the Commissioner determined Mr. Shea had underreported his sole proprietorship income, and increased his income by the full amount, without allocating one-half of the underreported income to his then-wife pursuant to the community property law.147

For federal income tax purposes, married persons who reside in a community property state are generally required to report one-half of their community property income.148 Under I.R.C. § 66(b), the Commissioner may disallow the allocation of one-half of the community property income to the taxpayer's spouse if the taxpayer acted as if he or she were solely entitled to the income and failed to notify the spouse of the nature and amount of the income before the due date of filing the return.149

Mr. Shea petitioned the tax court, alleging, among other things, he was only required to report one-half of the community property income.150 The parties agreed the income Mr. Shea earned from his sole proprietorship in 1992 was community property income.151 They also agreed that one-half of the net profits from the sole proprietorship, which had been transferred to a joint household checking account, was community property income that Mr. Shea was required to report.152 Where the parties disagreed was on the issue of whether the net

144. Id. at 184-85.
145. Id. at 185.
146. Id. at 189.
147. Id. at 190. The Commissioner also determined that Mr. Shea was not entitled to Schedule C deductions. Id. at 185.
149. I.R.C. § 66(b) (1994).
150. Shea, 112 T.C. at 190.
151. Id. at 185, 190.
152. Id. at 190.
profits in excess of this amount should be allocated entirely to Mr. Shea, and none to his then-wife, in contravention of the community property laws.\textsuperscript{153}

Mr. Shea argued the Commissioner had not made a determination in the notice of deficiency that he could not allocate one-half of this community property income to his then-wife.\textsuperscript{154} Accordingly, the Commissioner’s reliance on § 66(b) was a new matter under Rule 142(a), wherefore the Commissioner should bear the burden of proof on this issue.\textsuperscript{155}

The Commissioner responded by arguing the denial of the application of the community property law was implicit in the statutory notice of deficiency.\textsuperscript{156} Although the notice increased Mr. Shea’s taxable income based on bank deposits, it referenced neither § 66(b), community property laws, nor any facts necessary to establish that § 66(b) was applicable.\textsuperscript{157} The court therefore found that the application of § 66(b) was not implied in the notice.\textsuperscript{158}

The Commissioner next argued that whether a new matter had been raised under Rule 142(a) depended on whether the basis for the deficiency advanced at trial was inconsistent with the language contained in the notice of deficiency.\textsuperscript{159} The court began addressing this issue by noting there was some inconsistency in prior decisions. Some decisions seemed to allow an issue not to be treated as a new matter as long as it was not inconsistent with the language in the notice.\textsuperscript{160} The court in \textit{Shea} then noted that the subsequent statutorily imposed requirement\textsuperscript{161} that a notice describe the basis for a deficiency eliminated this inconsistency.\textsuperscript{162} Section 7522 does not provide for raising a basis that is not inconsistent with language in the notice.\textsuperscript{163} Thus, the court in \textit{Shea} found no longer viable any case law supporting the rationale that the burden of proof is not shifted to the Commissioner as long as the theory raised is not inconsistent with the language in the statutory notice of deficiency.\textsuperscript{164} Rather, an issue is a new matter to the extent it was not stated or described in the notice and requires the presentation of different evidence.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{156} \textit{Id.} at 191.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.} at 192.
\item \textsuperscript{159} \textit{Id.} at 193.
\item \textsuperscript{160} \textit{Shea v. Commissioner}, 112 T.C. 183 (1999), \textit{nonacq.}, 2000-44 I.R.B. 429. See also supra note 145.
\item \textsuperscript{161} I.R.C. § 7522 (1994). \textit{See supra} notes 11-16 and accompanying text.
\item \textsuperscript{162} \textit{Shea}, 112 T.C. at 195-96.
\item \textsuperscript{163} \textit{Id.} at 196.
\item \textsuperscript{164} \textit{Id.} at 197.
\item \textsuperscript{165} \textit{Id.}
Because the basis or theory on which the Commissioner relied, § 66(b), was not stated or described in the notice of deficiency, the matter would be considered a new matter if it required presentation of different evidence. The fact necessary to establish Mr. Shea had underreported his income was the identification of bank deposits that should have been included in his income. In contrast, the facts necessary to establish § 66(b) applied were whether Mr. Shea acted as if he were solely entitled to the income and whether he failed to notify his wife of the nature and amount of such income. Because the facts necessary to establish unreported income were different from the facts necessary to establish that § 66(b) was applicable, the court ultimately held that the issue of whether § 66(b) applied was a new matter under Rule 142(a) and that the burden of proof was on the Commissioner.

VI. CONCLUSION

Taxpayers who wish to challenge a determination by the Internal Revenue Service that additional tax is owed may petition the United States Tax Court to redetermine the amount of the deficiency. The tax court may hear such a petition only if the Commissioner has mailed to the taxpayer a valid statutory notice of deficiency. Once a valid notice has been mailed, and jurisdiction of the tax court established, the notice enjoys a presumption of correctness. As a result, the taxpayer generally has the burden of proof as to each contention in tax court proceedings. This burden is actually twofold. First, the taxpayer generally has the burden of production, which requires the taxpayers to go forward with the evidence. Second, the taxpayer typically carries the burden of persuasion, meaning the taxpayer must establish the merits of any claims made.

Over the years, however, quite a few exceptions have been created under which the burden of proof is shifted to the Commissioner. Congress and the tax court recently provided two new exceptions relieving the taxpayer of all or part of the burden of proof. The first of these is found in the IRS Restructuring and Reform Act of 1998. The provision that has been codified at I.R.C. § 7491 shifts the burden of proof to the Commissioner if the taxpayer meets certain evidentiary and substantive requirements. In addition, § 7491 places the burden of proof outright on the Commissioner when the taxpayer is faced with a potential penalty. Lastly, Congress relieved the taxpayer of the burden of proof when the Commissioner has established the taxpayer’s alleged income based on statistical information.

166. Id.
168. Id. at 193.
The very next year, the tax court issued its ruling in *Shea v. Commissioner*. It is well established that the Commissioner has the burden of proof as to any "new matter" brought up in a tax court proceeding. Considering the impact of section 7522, the court in *Shea* held that the Commissioner carries the burden of proof as to each item that was not stated or described in the notice of deficiency and which requires different evidence.
Does the notice make a determination on its face?

- **NO**
  - Tax Court does not have jurisdiction to redetermine deficiency

- **YES**
  - Is the burden placed on the Commissioner by statute, including section 6201(d)?
    - **NO**
    - Did the taxpayer satisfy the requirements of section 7491?
      - **NO**
      - Did the Commissioner determine that the taxpayer received unreported income?
        - **NO**
        - Did the Commissioner raise an issue not described in the notice which requires additional evidence?
          - **NO**
          - Burden of proof is on the taxpayer.
          - **YES**
          - Burden of production is on Commissioner; burden of persuasion is on taxpayer.

  - **YES**
    - Did the taxpayer establish that determination was arbitrary?
      - **YES**
      - Is taxpayer in 2d, 4th, 5th, 6th, 8th, or 9th Circuit?
        - **YES**
        - Burden of proof is on the Commissioner.
        - **NO**
        - Is taxpayer in 1st or 3d Circuit?
          - **YES**
          - Burden of proof is on the Commissioner.