

ADMINISTRATIVE LAW AND JUDICIAL REVIEW OF TAX COLLECTION DECISIONS

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INTRODUCTION

The pervasive involvement of the United States tax system¹ with individual members of society and the importance of tax collection to government operation make a sound system of tax administration imperative. Good tax policy is often said to require efficiency, equity, transparency, simplicity, and administrability.² An efficient tax system requires a high rate of voluntary self-reporting, reducing the costs of tax collection and increasing administrability.³

A high rate of voluntary compliance requires, in part, that the tax system be equitable. Equity is often separated into two components: vertical and horizontal equity.⁴ Vertical equity is concerned with a taxpayer's ability to pay and requires that those with a greater ability to do so pay a greater amount of tax.⁵ Horizontal equity concerns whether similarly situated taxpayers are treated similarly.⁶ Both types of equity can have substantive, as well as procedural components.⁷

Although most taxpayers pay their taxes when due, some taxpayers do not.⁸ The importance of tax collection to government operations requires that fewer restrictions be placed on the collection of tax debts than the collection of other debts.⁹ Less restrictive collection rules are necessary to ensure efficient,

1. Every person working in the United States, most United States citizens, and every entity doing business in the United States are likely to have some interaction with the federal tax system at least annually. I.R.C. § 6012(a) (2000 & Supp. IV 2004) (setting forth requirements for individuals, estates, trusts, and corporations to file annual tax returns); *id.* § 6031(a) (2000 & Supp. IV 2004) (requiring partnerships to file information returns).

2. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. GAO-05-1009SP, UNDERSTANDING THE TAX REFORM DEBATE: BACKGROUND, CRITERIA, & QUESTIONS 24 (2005) [hereinafter GAO, UNDERSTANDING THE TAX REFORM DEBATE], available at <http://www.gao.gov/new.items/d051009sp.pdf>.

3. Overall taxpayer voluntary compliance is estimated to be 83.7 percent. OFFICE OF RESEARCH, IRS, TAX YEAR 2001 FEDERAL TAX GAP (2006) [hereinafter FEDERAL TAX GAP] (reporting a noncompliance rate of 16.3%), available at http://www.irs.gov/pub/irs-news/tax_gap_figures.pdf. The voluntary compliance rate is highest among taxpayers with little opportunity to underreport, for example, wage earners who are subject to information reporting, and lowest among those with the greatest opportunity to underreport, for example, self-employed persons who are not subject to information reporting. NAT'L TAXPAYER ADVOCATE SERV., IRS, 2006 ANNUAL REPORT TO CONGRESS 6 (2006) [hereinafter NAT'L TAXPAYER ADVOCATE, 2006 REPORT] (citing IRS News Release, IRS Updates Tax Gap Estimates (Feb. 14, 2006)).

4. GAO, UNDERSTANDING THE TAX REFORM DEBATE, *supra* note 2, at 27–28.

5. *Id.* at 28. An alternative view of vertical equity suggests that taxes should be paid according to the benefits the taxpayer received. *Id.* at 29.

6. *Id.* at 27.

7. *See id.* at 26–30.

8. FEDERAL TAX GAP, *supra* note 3.

9. *Phillips v. Comm'r*, 283 U.S. 589, 595 (1931) (“Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure

i.e. prompt and cost-effective, tax collection. Despite the need to limit the courts' intrusion into tax collection, Congress has interposed additional procedural safeguards in favor of taxpayers.

Judicial review of tax collection decisions is limited,¹⁰ but it is similar to the review of discretionary decisions of other administrative agencies. As this Article demonstrates, the most efficient and equitable standards to be applied during judicial review of tax collection decisions would be those used during judicial review of similar agency decisions.¹¹ Similarities between tax collection decisions and other agencies' decisions suggest that the well-established standards used to review administrative decisions should be used during the review of tax collection decisions. The standard of review applied to a case has a significant impact on the court's approach to that case. Well-established standards provide certainty as to both result and judicial procedure.¹² Traditional standards of review, applied as commonly understood in administrative law, better promote a sound tax system than special standards of judicial review used only in tax collection cases.

Despite the need to limit the courts' intrusions into tax collection, Congress has interposed additional procedural safeguards in favor of taxpayers. Consistent use of administrative law standards of judicial review, along with administrative law's substantive and procedural rules, would minimize the courts' intrusions into tax collection and ensure that taxpayers are treated consistently. However, the Tax Court, which has concurrent or exclusive jurisdiction in most taxpayer-initiated tax collection cases,¹³ has concluded that administrative law is inapplicable in tax collection cases.¹⁴ Even when conducting abuse of discretion review, the Tax Court has concluded that in tax collection cases it is not required to use the rule of record review that is applied by other courts.¹⁵ Because the Internal Revenue Service

prompt performance of pecuniary obligations to the government have been consistently sustained."); see also Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 20–31 (2004) [hereinafter Camp, *Tax Administration as Inquisitorial Process*].

10. See I.R.C. §§ 6015, 6320, 6330(c), 6404(e) (West Supp. 2007).

11. "Traditional" abuse of discretion review is the kind performed by the district courts when reviewing discretionary decisions of administrative agencies. This standard is more fully discussed in Part III.A.2, *infra*.

12. Christopher M. Pietruszkiewicz, *Reinterpreting the Role of Special Trial Judges Through Standards of Review* (forthcoming 2008) (draft at 2, on file with author).

13. Most decisions regarding the collection of taxes are not reviewable. I.R.C. § 7422(a) (2000). The primary means for review of tax questions is through deficiency jurisdiction in the Tax Court, I.R.C. § 6213 (2000 & Supp. IV 2004), or refund jurisdiction in the district courts and the United States Court of Federal Claims, I.R.C. § 7422.

14. See *infra* Part III.B.

15. *Robinette v. Comm'r*, 123 T.C. 85, 95 (2004), *rev'd*, 439 F.3d 455, 465 (8th Cir. 2006).

is an agency,¹⁶ judicial review of its decisions should be conducted using the same standards of review used by courts reviewing other agencies' decisions, applying administrative law and using traditional abuse of discretion review, including limiting the review to the administrative record.

Part I begins with a brief discussion of the evolution of federal income tax litigation to provide context for the debate over the appropriate approach to and applicability of administrative law in judicial review of tax collection decisions. Next, Part II discusses some of the relatively recent changes to the courts' jurisdiction to review certain tax collection decisions. This discussion compares and explains the different approaches used by the Tax Court and district courts. Part III summarizes the relevant rules of administrative law. This section discusses the difference between formal and informal agency action and the approaches courts commonly use to review an agency decision made following informal adjudication. It also discusses the historical uses of administrative law in tax cases and the courts' approach to the review of tax collection decisions. Part IV describes the benefits to tax administration of applying administrative law during the review of tax collection decisions.¹⁷ The benefits include efficient tax collection, cost-effective protection of taxpayers, increased certainty of result, and increased horizontal equity. This Article concludes that judicial review of tax collection decisions should be conducted like the review of comparable administrative decisions, using the rules and standards of administrative law.

I. INCOME TAX LITIGATION

This section provides a brief overview of the history of income tax litigation. While much is omitted, this background may help explain the approaches taken by the courts in income tax litigation.

Sovereign immunity bars suits against the government, except when the government consents to being sued.¹⁸ The United States government has waived sovereign immunity in many circumstances. However, suits to prevent the assessment or collection of taxes remain an exception. In most cases, the government has not waived sovereign immunity in cases brought to enjoin tax

16. Throughout this Article, the Internal Revenue Service is interchangeably referred to also as the "IRS" and the "Service."

17. This Article does not question the continued need for tax collection to proceed expeditiously with minimal intrusion by the courts. In addition, this Article does not advocate increasing the limitations imposed on tax collection. Tax collection is and should be subject to fewer restrictions than those imposed on private creditors to ensure that all taxpayers bear their share of the burden and that others' tax dollars are not used to pursue and force noncompliant taxpayers into compliance.

18. *Cheatham v. United States*, 92 U.S. 85, 88–89 (1875).

collection.¹⁹ Unless a deficiency notice is issued, taxpayers are not entitled to judicial relief until after the tax is paid.²⁰ However, relatively recent changes in the tax law have created additional exceptions to the general rule that taxpayers cannot sue to stop tax collection.²¹

Although judicial involvement in tax collection slows the process, some judicial intervention has been viewed as necessary to ensure fairness; however, that involvement is strictly limited to prevent the use of the judicial system to halt tax collection and impede the government's operation.²² Not only would excessive judicial involvement harm operations, but widespread opportunities to slow tax collections could encourage other taxpayers to engage in dilatory taxpaying behavior at the expense of taxpayers who promptly comply with their tax obligations.²³ Permitting excessive delays or opportunities to avoid payment of taxes potentially requires everyone else to pay more taxes.²⁴ Moreover, courts and juries could be sympathetic to taxpayers experiencing financial hardship or opposed to government policies. Unrestricted access to the courts to challenge tax assessment and collection could be very harmful; "the very existence of the government might be placed in the power of a hostile judiciary."²⁵

Although the Constitution places significant limits on governmental interference with private property, due process does not require that a taxpayer be given a pre-deprivation opportunity to challenge a tax assessment.²⁶

19. For example, suits to enjoin or restrain tax collection or assessment are not available in most cases. I.R.C. § 7421(a) (2000).

20. *Flora v. United States*, 362 U.S. 145, 150–51 (1960). In many instances, prior to the assessment of the tax, it is possible for the taxpayer to seek prepayment review in the Tax Court. However, if a request for deficiency redetermination is not timely made, or a notice of deficiency is not issued, prepayment review is unavailable. I.R.C. § 6213 (2000 & Supp. IV 2004).

21. See *infra* Part II.

22. *Cheatham*, 92 U.S. at 89.

23. The current tax gap is estimated to cost each taxpayer an additional \$2,200 per year. NAT'L TAXPAYER ADVOCATE, 2006 REPORT, *supra* note 3. Research indicates that the perception that others do not pay their share of taxes will reduce voluntary compliance. See, e.g., Robert B. Cialdini, *Social Motivations to Comply: Norms, Values, and Principles*, in 2 TAXPAYER COMPLIANCE: SOCIAL SCIENCE PERSPECTIVES 211–14 (Jeffrey A. Roth & John T. Scholz eds., 1989); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 340–44 (2001); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1487 (2003); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2185 (1996); Richard C. Stark, *A Principled Approach to Collection and Accuracy-Related Penalties*, 91 TAX NOTES 115, 123 (2001).

24. *Cheatham*, 92 U.S. at 89.

25. *Id.*

26. *Phillips v. Comm'r*, 283 U.S. 589, 595–97 (1931). In *Cheatham*, the Supreme Court stated:

While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the

Because of the importance of tax collection to government operations, fewer restrictions are placed on tax collectors than other creditors.²⁷ Historically, taxpayers were required to pay the tax and then sue for a refund.²⁸ This approach has long been held to adequately protect taxpayer rights.²⁹

Legislators also understand the need for tax collection to occur with minimal outside interference. Even then, refund suits are subject to limitations:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary³⁰

During a refund case, the court conducts a trial de novo to determine whether the taxpayer is entitled to the requested refund.³¹

tax claimed . . . a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal-revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable.

92 U.S. at 89.

27. *Phillips*, 283 U.S. at 595 (“Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.”); *see also* *Camp, Tax Administration as Inquisitorial Process*, *supra* note 9.

28. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 282 (1855).

[P]robably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

Id.

29. *See, e.g., Phillips*, 283 U.S. at 595–97. Taxpayers may file a refund suit following a denial of the refund request or after receiving no response to the claim for six months.

30. I.R.C. § 7422 (2000).

31. *Id.* (granting jurisdiction to the district courts after a request for refund has been denied or allowed to go unanswered for six months). The United States district courts and the United States Court of Federal Claims make their own findings of fact and apply the tax law to those facts to determine whether the taxpayer is entitled to a refund and whether any offsets are

An effective tax system must be fair. To this end, Congress has repeatedly expanded taxpayers' rights,³² often by providing additional opportunities for judicial intervention. In 1924, there were concerns that some taxpayers, who could not afford to pay first, would be harmed if refund litigation was the only means available to challenge individual tax liabilities.³³ As a result, Congress created the Board of Tax Appeals (BTA), an executive agency that exercised semi-judicial power.³⁴ The BTA and its successor, the United States Tax Court, provided an opportunity for pre-payment, pre-assessment review of tax determinations.³⁵ The BTA's jurisdiction was limited to redetermination of a taxpayer's income and profits taxes, estate taxes, or gift taxes.³⁶

applicable. *Id.* In addition to permitting taxpayers to challenge a tax due without payment, the Tax Court offers a specialized forum and judges who generally practiced tax law before their appointment to the court. 1 GERALD A. KAFKA & RITA A. CAVANAGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES § 1.07 (2nd ed. 1996).

32. This has been compared to attempts to round out the square corners of the tax law by applying notions of equity. Bryan T. Camp, *The Unhappy Marriage of Law and Equity in Joint Return Liability*, 108 TAX NOTES 1307, 1307 (2005).

33. Revenue Act of 1924, ch. 234, 43 Stat. 253 (1924). See also Charles D. Hamel, *United States Board of Tax Appeals*, 13 GEO. L.J. 20, 20–21 (1924). There were earlier, unsuccessful proposals to create a board of tax appeals. Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part II, Creation of the Board of Tax Appeals—The Revenue Act of 1924*, 40 ALB. L. REV. 53, 57–58 (1975) [hereinafter Dubroff, *Part II*] (discussing prior proposals by the Treasury, the American Mining Congress, the United States Chamber of Commerce, Senator Pomerene, and the Tax Simplification Board).

34. Hamel, *supra* note 33, at 22 (“The Board of Tax Appeals is in effect a judicial tribunal of limited jurisdiction.”).

35. See generally Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part I, The Origins of the Tax Court*, 40 ALB. L. REV. 7, 41–42 (1975) [hereinafter Dubroff, *Part I*]; Dubroff, *Part II*, *supra* note 33; Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part III, The Revenue Act of 1926—Improving the Board of Tax Appeals*, 40 ALB. L. REV. 253 (1976) [hereinafter Dubroff, *Part III*]; Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part IV, The Board Becomes a Court*, 41 ALB. L. REV. 1 (1977) [hereinafter Dubroff, *Part IV*]; Joseph R. Cook & Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part V, Pretrial Procedure*, 41 ALB. L. REV. 639 (1977); Harold Dubroff & Dan S. Grossman, *The United States Tax Court: An Historical Analysis, Part VI, Trial and Post-Trial Procedure*, 42 ALB. L. REV. 191 (1978). In 1942, recognizing its inherently judicial nature, Congress changed the BTA's name to the Tax Court of the United States, but continued its status as an executive agency. Revenue Act of 1942, ch. 619, § 504, 56 Stat. 730; Dubroff, *Part IV*, *supra*, at 11–20. In 1969, the Tax Court was removed from the executive branch, became an Article I court, and was renamed the United States Tax Court. Steve Johnson, *The Phoenix and the Perils of Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235, 281 (1998) [hereinafter Johnson, *The Phoenix and the Perils of Second Best*]. This compromise followed an unsuccessful bid to make the Tax Court an Article III court. Dubroff, *Part IV*, *supra*, at 3. Efforts to remove the Tax Court from the executive branch began in 1926. Dubroff, *Part III*, *supra*, at 24; Dubroff, *Part IV*, *supra*, at 3.

36. Hamel, *supra* note 33, at 22.

Although the BTA was part of the Department of Treasury, it was separate from and independent of the BIR.³⁷ Instead of relying on the administrative record,³⁸ the BTA conducted a de novo review and made its own determination of the tax liability.³⁹ The Tax Court continues to use de novo review in deficiency cases.⁴⁰

In deficiency cases, the Tax Court has jurisdiction to redetermine income, gift, estate, and certain excise tax deficiencies.⁴¹ But, even in deficiency cases the Tax Court's jurisdiction is not plenary: "The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund . . . 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."⁴²

Over time, Congress has expanded the Tax Court's jurisdiction to include many other types of tax cases.⁴³ The Tax Court's jurisdiction now includes authority to make certain declaratory judgments;⁴⁴ determine employment

37. *Id.* at 22–25 (describing the newly-created Board of Tax Appeals: "It is not merely a newly created higher division of the Bureau [of Internal Revenue] or even of the Treasury Department. It is, in the language of the statute, 'an independent agency in the executive branch of the Government,' and as such it is expected to act independently in all its determinations.") To create credibility and encourage taxpayers and their advisors to view it as an alternative to refund litigation, the independence of the BTA from the BIR was essential. *Id.*

38. The burden of proof generally remains with the taxpayer to establish that there is no deficiency. However, the taxpayer, having all of the records, is in the best position to establish the correct tax liability. See, e.g., Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Tax Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 414 (1999); Adriana Wos-Mysliwiec, Note, *The Internal Revenue Restructuring And Reform Act Of 1998: Does It Really Shift The Burden Of Proof To The IRS?*, 14 ST. JOHN'S J. LEGAL COMMENT. 301 (1999); but see I.R.C. § 7491 (2000).

39. I.R.C. § 6213 (2000 & Supp. IV 2004).

40. I.R.C. § 7459(b) (2000).

41. I.R.C. § 6213(a).

42. *Id.*

43. See, e.g., I.R.C. § 6015 (West Supp. 2007) (requests innocent spouse relief); § 6320 (West Supp. 2007) (collection due process hearings relating to the filing of a Notice of Federal Tax Lien); § 6330 (West Supp. 2007) (collection due process hearings relating to notices of intent to levy); § 6404 (West Supp. 2007) (requests for abatement of interest); § 7476(a) (2000) (declaratory judgments relating to certain qualified plans); § 7477 (2000) (declaratory judgments relating to valuation of gifts); § 7478 (2000) (declaratory judgment relating to status of government obligations); § 7479 (2000) (declaratory judgments relating to the eligibility of an estate for an installment plan under section 6166).

44. I.R.C. § 7428 (West Supp. 2007) (allowing Tax Court to issue declaratory judgment about status and classification of 501(c)(3) organizations); § 7476 (allowing the Tax Court to issue a declaratory judgment relating to the qualification of certain retirement plans); § 7477 (allowing the Tax Court to issue a declaratory judgment regarding the value of certain gifts); § 7478 (allowing the Tax Court to issue a declaratory judgment regarding the status of certain government obligations); § 7479 (allowing the Tax Court to issue a declaratory judgment regarding the availability of installment payments for an estate under I.R.C. section 6166).

status;⁴⁵ and review IRS determinations regarding requests for innocent spouse relief,⁴⁶ the availability of interest abatement,⁴⁷ and certain collection decisions.⁴⁸ Nonetheless, the Tax Court remains a specialized court with limited jurisdiction.⁴⁹

The Tax Court's jurisdiction is only a subset of tax litigation and is generally not exclusive. The generalist judges in the district courts, Court of Federal Claims, and the bankruptcy court also have jurisdiction to decide many of the same tax cases.⁵⁰ Thus, these courts frequently are called on to interpret the tax law. Because concurrent jurisdiction exists in some cases, the taxpayer often has a choice of forum.⁵¹ However, in other cases, a single court possesses exclusive jurisdiction.⁵²

The next section discusses how Congress has expanded the availability of judicial consideration of challenges to tax collection. This part also looks at the approach the courts have used in collection cases.

45. I.R.C. § 7436(a) (2000).

46. I.R.C. § 6015(f) (West Supp. 2007); *see, e.g.*, *Cheshire v. Comm'r*, 115 T.C. 183 (2000), *aff'd*, 282 F.3d 326 (5th Cir. 2002).

47. I.R.C. § 6404(h)(1) (West Supp. 2007) ("The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion . . .").

48. I.R.C. §§ 6320, 6330 (West Supp. 2007).

49. *See Comm'r v. McCoy*, 484 U.S. 3, 7 (1987); *Comm'r v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 419–20 (1943); Christine K. Lane, *On-the-Record Review of CDP Determinations: An Examination of Policy Reasons Encouraging Judges to Stick to the Administrative Record*, 6 FLA. ST. U. BUS. L. REV. 149, 164–66 (2007) (discussing the impact that the Tax Court's limited jurisdiction may have in CDP cases).

50. The district courts, the United States Court of Federal Claims, the United States Courts of Appeals, and the United States Supreme Court all handle tax cases. I.R.C. § 7422 (2000); 28 U.S.C. § 1346 (2000). None of these courts specialize in tax law. Although there has long been debate about the need for specialized courts in tax cases, either at the trial or appellate level, generalist judges have navigated the tax code throughout its history. There has been robust scholarly debate about the need for specialized courts in tax cases. *See generally*, Louis A. Del Cotto, *The Need for a Court of Tax Appeals: An Argument and a Study*, 12 BUFF. L. REV. 5 (1962); Deborah A. Geier, *The Tax Court, Article III, and The Proposal Advanced by the Federal Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985 (1991); Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17 (1995); David Lupi-Sher, *National Court of Tax Appeals: An Idea That Never Quite Goes Away*, 81 TAX NOTES 1159 (1998); H. Todd Miller, Comment, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975).

51. I.R.C. § 6213 (2000 & Supp. IV 2004); I.R.C. § 7422; 28 U.S.C. § 1346.

52. I.R.C. §§ 6015(e)(1), 6330(d)(1) (West Supp. 2007). An example is the choice a taxpayer has between paying the tax and suing for a refund and not paying the tax and petitioning for a redetermination of the tax.

II. TAX COURT JURISDICTION RELATING TO IRS COLLECTION DECISIONS

One way that Congress has expanded taxpayers' rights is to increase the opportunities available to taxpayers to challenge tax collection decisions, both administratively and judicially. Many of the newer opportunities permit judicial review of the matter by the Tax Court. The questions that can be raised administratively and judicially are often different than the questions raised in deficiency cases; the focus is on means of collection, rather than on the amount of tax owed.

One way to consider the Tax Court's current jurisdiction is to divide it based on the type of inquiry that the court conducts. The first category requires de novo review. This category includes deficiency redeterminations,⁵³ issuing declaratory judgments,⁵⁴ and determining employment status.⁵⁵ The questions presented in these cases require that the Tax Court receive evidence and make findings of fact and arrive at conclusions of law.

In the second category, the primary inquiry is whether the Service permissibly exercised its discretion. These cases include tax collection cases, such as innocent spouse, collection due process, and interest abatement determinations.⁵⁶ The authorizing statutes direct the court, either explicitly or implicitly, to determine whether there was an abuse of discretion.⁵⁷ To determine whether an agency abused its discretion, the courts generally review only the record created during the agency proceeding.⁵⁸ When conducting abuse of discretion review, the court usually will not substitute its judgment for that of the agency.⁵⁹

The district courts and the Court of Federal Claims oversee review actions of numerous federal executive agencies. Thus, these courts apply the APA and administrative law frequently. Historically, the Tax Court has not had many opportunities to use administrative law or apply deferential standards to the considerations of agency decisions. Perhaps because most of its jurisdictional grants require that the Tax Court conduct de novo review, the Tax Court has concluded that it is not bound by the APA and need not apply administrative

53. I.R.C. § 6213(a).

54. I.R.C. § 7428 (West Supp. 2007); § 7476 (2000); § 7478 (2000) (permitting the Tax Court to issue declaratory judgments regarding exempt organizations, pension plans, and the tax exempt status of certain bonds, respectively).

55. I.R.C. § 7436 (2000).

56. I.R.C. §§ 6015(e)(1), 6330(d)(1), 6404(i) (West Supp. 2007).

57. I.R.C. §§ 6015(e)(1), 6330(d)(1), 6404(i); *Sego v. Comm'r*, 114 T.C. 604, 609–10 (2000) (looking to the legislative history to determine that review of CDP determinations is for abuse of discretion, except when the underlying liability is at issue).

58. *See infra* Part III.A.2.

59. 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 10.6 (2d ed. 1997).

law principles even when conducting abuse of discretion review.⁶⁰ The court has rationalized this approach in part by looking to its deficiency jurisdiction.⁶¹ Commentators have suggested that one reason that the Tax Court does not apply administrative law broadly is because it is an Article I court.⁶² As this Article demonstrates, this approach is not justified by the APA, decisions applying and interpreting administrative law, or the APA's legislative history.

In deficiency cases, the Tax Court's de novo fact-finding ensures the taxpayer an opportunity to have her tax liability fully reviewed and independently determined by a court.⁶³ This promotes a full and final adjudication. Full adjudication is necessary because, following the redetermination of a deficiency, challenges to the same tax and year in a refund case are usually barred by res judicata.⁶⁴

The nature of the review needs to be adjusted to reflect the nature of the question presented. Whether de novo fact-finding is required depends on the nature of the substantive rights that are involved. "It is not necessary that the proceeding to be judicial should be one entirely de novo. It is enough that, before the judgment which must be final has been invoked as an exercise of judicial power, it shall have certain necessary features."⁶⁵ For instance, de novo review is unnecessary if the only question that the court can consider is whether the agency abused its discretion or acted outside the scope of its authority. Generally, abuse of discretion, or lack thereof, can be determined based on the administrative record.

Before enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998),⁶⁶ public hearings in 1997 and 1998 drew attention to concerns about the means the Service used to collect unpaid taxes

60. *Robinette v. Comm'r*, 123 T.C. 85, 96–97 (2004) (citing *Ewing v. Comm'r*, 122 T.C. 32, 50 (2004) (Thornton, J., concurring)); see also Eliza Mae Scheibel, Note, *Mixing It Up: The Tax Court Pairs a De Novo Scope of Review with an Abuse of Discretion Standard of Review Under Section 6330(d) in Robinette v. Commissioner*, 58 TAX LAW. 941, 943–44 (2005).

61. *Ewing*, 122 T.C. at 37–39 (majority opinion).

62. See, e.g., Johnson, *The Phoenix and the Perils of Second Best*, *supra* note 35, at 282 ("In short, the Tax Court is now and from its inception has been more a court than an administrative agency. History therefore undercuts an argument for Chevron deference to the Tax Court.").

63. See *supra* note 53 and accompanying text.

64. 2 KAFKA & CAVANAGH, *supra* note 31, §§ 22.01–22.03; MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 11.05[6] (2nd ed. 1991); see also *Fluor v. United States*, 44 A.F.T.R.2d 79–5287, 79–5288 (C.D. Cal. 1979) (prior Tax Court decision bars reconsideration in a refund suit under doctrine of res judicata).

65. *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 723 (1929) (discussing the authority of the Board of Tax Appeals).

66. Pub. L. No. 105-206, 112 Stat. 685 (1998) (codified as amended in various sections of 26 U.S.C.).

and the treatment of taxpayers during collections.⁶⁷ Congress decided to increase taxpayer rights during the collection process, making taxpayer rights more like the rights of general debtors.⁶⁸ Congress also attempted to reduce some of the inequities possible in cases involving joint and several liability.⁶⁹ To accomplish this, Congress created a right to an administrative hearing and judicial review before forcible collection of unpaid taxes and expanded the availability of innocent spouse relief.⁷⁰

The changes were tailored to address the perceived problems with tax collection that were brought to the fore during the hearings, including reports that in some cases IRS employees abused their power in collections against taxpayer assets. Although the new rights increased the opportunities for judicial review in tax collection cases, these rights did not create an unlimited or unending opportunity for post-assessment and pre-payment review. For instance, in the context of a tax lien or levy, the taxpayer has only thirty days from the date of the notice issued by the IRS to request a hearing and a failure to make the request in that time will preclude judicial review.⁷¹ Moreover, the taxpayer can challenge a liability and tax year only once in a collection action subject to judicial review.

In most post-assessment, pre-payment cases, the only issue before the Service is the appropriate means of collecting the assessed tax liability.⁷² During a CDP hearing, a taxpayer can propose collection alternatives and raise innocent spouse and other defenses. Requiring these hearings and permitting judicial review represent a significant expansion of taxpayer rights. The Service historically had the discretion to determine how to collect a tax liability. Now, after RRA 1998, the courts are permitted to provide some

67. This concern was manifested in both the widely publicized Congressional hearings and in the media coverage of the hearings. See, e.g., *Practices and Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong. (1997). These hearings were convened on September 23, 24, and 25, 1997. Hearings on "IRS Restructuring" were held on January 28 and 29 and February 5, 11, and 25, 1998. *IRS Restructuring: Hearings Before the S. Comm. on Finance*, 105th Cong. (1998). Hearings on "IRS Oversight" were held on April 28, 29, 30, and May 1, 1998. *IRS Oversight: Hearings Before the S. Comm. on Finance*, 105th Cong. (1998); see also Camp, *Tax Administration as Inquisitorial Process*, *supra* note 9, at 81 (discussing the selection of the stories to be told during the hearing and their effect).

68. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998); see also *infra* Part II.A.

69. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3201, 3401, 112 Stat. 734, 746-747 (1998) (codified at I.R.C. §§ 6015, 6320, 6330).

70. *Id.* § 3401, 112 Stat. 746-747 (codified at I.R.C. §§ 6320 and 6330). Moreover, that opportunity runs from the time of the issuance of the first notice of federal tax lien or notice of intent to levy.

71. *Kennedy v. Comm'r*, 116 T.C. 255, 260-61 (2001).

72. I.R.C. §§ 6015, 6320, 6330, 6404 (West Supp. 2007).

oversight over the tax collection process, allowing the courts to consider whether the Service's decision was a proper exercise of its discretion.

Not all courts approaching new oversight role have done so in the same manner. The district courts apply the APA and administrative law in tax collection cases. However, the Tax Court has been slow to apply traditional abuse of discretion review and administrative law in tax collection cases.⁷³ This reluctance to apply administrative law is understandable in light of the historical jurisdiction of the Tax Court, which was limited to cases that required de novo trials.⁷⁴ In addition, tax law is often treated as separate and different from other areas of the law.⁷⁵ Nevertheless, administrative law and its principles are applicable to most tax collection cases, and conducting a de novo trial is inconsistent with abuse of discretion review.⁷⁶

The next sections examine RRA 1998's expansion of taxpayer rights and the Tax Court's jurisdiction. The nature of the expansions will help demonstrate the need to apply administrative law in tax collection cases.

A. *Collection Due Process*

Before RRA 1998, taxpayers could not challenge their tax liability in court after assessment and before payment.⁷⁷ Similarly, in most cases taxpayers could not challenge the chosen means of collection.⁷⁸ Post-RRA 1998, taxpayers may request that an impartial appeals officer conduct a hearing before levy on a taxpayer's property, after a Notice of Federal Tax Lien

73. However, it has applied administrative law in other areas, such as the review of Treasury Regulations. *See Swallows Holding, Ltd. v. Comm'r*, 126 T.C. 96, 143–44 (2006).

74. *See supra* notes 60–61 and accompanying text.

75. Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) (addressing the concern that “tax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law” and that “this misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate”); Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183, 183 (1996) (“Tax law tends to be uninformed by other areas of law. This insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization.”).

76. Prior to the creation of the Board of Tax Appeals, the predecessor to the Tax Court, taxpayers were not entitled to pre-payment judicial review of the asserted tax liability. Dubroff, *Part I*, *supra* note 35, at 34.

77. *See* I.R.C. § 7421 (2000) (this is the Anti-Injunction Act, which prohibits suits to restrain the collection of taxes in most instances). Prior to CDP, although some limited administrative remedies were available, judicial review was unavailable because that was an area committed to the discretion of the IRS. *See infra* Part III.B.1.

78. I.R.C. § 7421.

(NFTL), and sometimes in both situations.⁷⁹ These hearings are referred to as “collection due process,” “CDP,” and section 6320 or 6330 hearings.

CDP hearings provide taxpayers, often through a representative, an opportunity to resolve an unpaid tax liability with an appeals officer who has had no prior involvement with the specific tax and tax year.⁸⁰ During the hearing, the taxpayer can raise any relevant issues, including proposing collection alternatives and innocent spouse defenses.⁸¹ The underlying liability can be challenged during the hearing only if the taxpayer did not receive a notice of deficiency or otherwise have an opportunity to challenge the underlying liability in a prior judicial or administrative proceeding.⁸²

A CDP hearing request stops collection action until the taxpayer receives a hearing; the suspension of collections frequently continues during judicial review of the determination.⁸³ CDP hearings are informal⁸⁴ and can be

79. I.R.C. §§ 6320, 6330 (West Supp. 2007). These rights, available with respect to collection actions instituted after January 19, 1999, rapidly became one of the most litigated tax issues. NAT’L TAXPAYER ADVOCATE, 2006 REPORT, *supra* note 3, at 556 (noting that collection due process litigation has led tax litigation each year since 2003). Taxpayers are entitled to only one CDP hearing for any tax and tax period and then only if it is requested within thirty days of the notice of intent to levy. I.R.C. § 6330(a)(3). Similarly, a taxpayer must make a request within thirty days after the date that is five days after the filing of a Notice of Federal Tax Lien (NFTL). I.R.C. § 6320(a)(3)(B). A taxpayer who makes a late request for a CDP hearing may have an equivalent hearing, but judicial review of the appeals officer’s notice of decision will be unavailable. Treas. Reg. § 301.6320-1(i) (2006); Treas. Reg. § 301.6330-1(i) (2006).

80. I.R.C. § 6330(b)(3). The appeals officer who hears the CDP case must have no prior involvement in the tax and tax period at issue, unless this is waived by the taxpayer. I.R.C. § 6320(b)(3) (for CDP hearing requested after filing of Notice of Federal Tax Lien); § 6330(b)(3) (for CDP hearing requested after Notice of Intent to Levy). The trend to centralize many of the Service’s activities means that most CDP cases are sent to a central campus. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, U.S. DEP’T OF TREASURY, THE OFFICE OF APPEALS NEEDS TO IMPROVE THE MONITORING OF ITS CAMPUS OPERATIONS QUALITY 3 fig.2 (2007), available at <http://www.treas.gov/tigta/auditreports/2007reports/200710071fr.html>.

81. I.R.C. § 6330(c). Collection alternatives that can be raised during a CDP hearing include installment agreements, substitution of property, and offers-in-compromise. I.R.C. § 6330(c)(2)(A). Certain issues are not properly raised, including the underlying liability in most cases and issues raised and considered in a prior administrative hearing. *Id.* During the CDP hearing, the appeals officer need not consider all possible collection alternatives, only those properly raised by the taxpayer. *Id.* Failure to raise an issue at the hearing is likely to result in the Tax Court refusing to consider the issue on an appeal of CDP determination. *Magana v. Comm’r*, 118 T.C. 488, 493–94 (2002).

82. I.R.C. § 6330(c)(2)(B). However, a taxpayer is not considered to have not received a notice of deficiency if the taxpayer willfully avoided receipt by refusing delivery. *See, e.g., Sego v. Comm’r*, 114 T.C. 604 (2000) (refusing to consider the underlying liability when that taxpayer had failed to collect certified mail containing the notice of deficiency).

83. I.R.C. § 6330(e).

conducted by correspondence,⁸⁵ by telephone,⁸⁶ face-to-face, or by a combination of methods.⁸⁷

During the CDP hearing, the appeals officer must verify compliance with applicable laws and regulations, consider relevant issues raised during the hearing, and balance the taxpayer's interest in having tax collection be no more intrusive than necessary against the government's need for efficient collection of taxes.⁸⁸ This balancing is usually set forth in the determination, which is often useful during judicial review. After the hearing, the appeals officer issues a notice of determination describing the issues raised during the hearing and concluding that collection can go forward, permitting collection to go forward in a modified manner, or preventing collection.⁸⁹ Within thirty days after the determination is issued, a taxpayer can request judicial review.⁹⁰

84. Treas. Reg. § 301.6320-1(d)(2), Q&A (6)(d); Treas. Reg. § 301.6330-1(d)(2), Q&A (6)(d) (concluding that the APA does not apply to CDP hearings); *Cox v. Comm'r*, 126 T.C. 237, 246 (2006) (citing *Katz v. Comm'r*, 115 T.C. 329, 337 (2000)).

85. Treas. Reg. § 301.6320-1(d)(2), Q&A (6)(d); Treas. Reg. § 301.6330-1(d)(2), Q&A (6)(d); *Cox*, 126 T.C. at 246 (citing *Katz*, 115 T.C. at 337–38).

86. Treas. Reg. § 301.6320-1(d)(2), Q&A (6)(d); Treas. Reg. § 301.6330-1(d)(2), Q&A (6)(d); *Katz*, 115 T.C. at 337–38.

87. Treas. Reg. § 301.6320-1(d)(2), Q&A (6)(d); Treas. Reg. § 301.6330-1(d)(2), Q&A (6)(d); *Greene-Thepadi v. Comm'r*, 126 T.C. 1, 3 (2006). These methods of conducting a hearing are consistent with the methods approved for the conduct of informal hearings by other agencies. 2 KOCH, *supra* note 59, §§ 5.13[5], 5.14. Informal hearings are more fully discussed, *infra*, Part III.A.1. Recently revised regulations limit the circumstances under which a taxpayer will be granted a face-to-face hearing. Treas. Reg. § 301.6330-1(d)(2), Q&A (7)(d) (as amended 2006).

88. Treas. Reg. § 301.6330-1(e)(3), Q&A (8)(e). Appeals retains jurisdiction to reconsider issues in the event that there is a change in circumstance.

89. I.R.C. § 6330(c)(3) (West Supp. 2007).

90. I.R.C. § 6330(d). Late appeals strip the Tax Court of jurisdiction. *Boyd v. Comm'r*, 124 T.C. 296, 303 (2005). Similarly, the Tax Court does not have jurisdiction to review a decision letter issued following an equivalent hearing because the CDP request was not made timely. *Offiler v. Comm'r*, 114 T.C. 492, 498 (2000).

CDP rights have been widely criticized.⁹¹ Judicial review is perhaps the most controversial element of CDP rights.⁹² Initially, district courts and the Tax Court shared jurisdiction over CDP appeals. CDP appeals were to the Tax Court if it would have had jurisdiction over the underlying liability⁹³ and to the district courts if the Tax Court would not have had jurisdiction over the underlying liability.⁹⁴ Bifurcated review of individual CDP determinations was possible.⁹⁵ However, in 2006 jurisdiction over all collection due process cases was consolidated in the Tax Court.⁹⁶

The Code does not address the standard of review that the courts must use in CDP cases.⁹⁷ However, the legislative history indicates Congress's expectation that abuse of discretion review would be used, except when the tax liability is at issue.⁹⁸ When the underlying liability is at issue, the courts conduct de novo review.⁹⁹

91. NAT'L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS 379 (2004); Leslie Book, *The Collection Due Process Rights, A Misstep or a Step in the Right Direction*, 41 HOUS. L. REV. 1145 (2004); Bryan T. Camp, *The Costs of CDP*, 105 TAX NOTES 1445 (2004); Bryan T. Camp, *The Failure of Collection Due Process, Part 1: The Collection Context*, 104 TAX NOTES 969 (2004) [hereinafter Camp, *The Failure of CDP, Part 1*]; Bryan T. Camp, *The Failure of CDP, Part 2: Why it Adds No Value*, 104 TAX NOTES 1567 (2004) [hereinafter Camp, *The Failure of CDP, Part 2*]; Bryan T. Camp, *Replacing CDP*, 107 TAX NOTES 1039 (2005); Camp, *Tax Administration as Inquisitorial Process*, *supra* note 9; Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021 (2005) [hereinafter Cords, *The Scope and Nature of Judicial Review*]; Danshera Cords, *How Much Process is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51 (2004) [hereinafter Cords, *How Much Process is Due?*]; Danshera Cords, *Reforming, Not Replacing, CDP*, 108 TAX NOTES 817 (2005) [hereinafter Cords, *Reforming, Not Replacing, CDP*]; Diane L. Fahey, *The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453 (2003).

92. Camp, *Replacing CDP*, *supra* note 91; Cords, *Reforming, Not Replacing CDP*, *supra* note 91; Fahey, *supra* note 91.

93. I.R.C. § 6330(d)(1)(A).

94. § 6330(d)(1)(B). Appeals from either the district courts or the Tax Court were to the appropriate court of appeals. § 6330.

95. A number of bills have been introduced in Congress to consolidate jurisdiction over all CDP hearings in the Tax Court. This approach also has been advocated by the National Taxpayer Advocate. NAT'L TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS 372 (2005).

96. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat 780, 1019 (2006).

97. *Sego v. Comm'r*, 114 T.C. 604, 609–10 (2000); *Goza v. Comm'r*, 114 T.C. 176, 181 (2000). Because the underlying liability is seldom at issue, under this approach the vast majority of CDP determination appeals should be reviewed for abuse of discretion.

98. H.R. REP. NO. 105-599, at 266 (1998) (Conf. Rep.), *as reprinted in* 1998 U.S.C.A.N. 288, 289. The legislative history does not address the nature of the review to be used in cases with both questions of the underlying liability and the appropriateness of a particular collection method.

99. *Id.*

The determination of the appeals officer may be appealed to Tax Court or, where

Despite claiming to use the abuse of discretion standard of review, the Tax Court's approach in tax collection cases has more closely resembled *de novo* review.¹⁰⁰ Generally, the court weighs all of the evidence and may even receive new evidence rather than limiting the consideration to whether the appeals officer improperly considered or refused to consider certain evidence. As discussed below, the Tax Court may be less comfortable applying a deferential standard of judicial review because of its limited experience with abuse of discretion review. Thus, while consolidating jurisdiction in the Tax Court may reduce the disparity of treatment between taxpayers in CDP cases,¹⁰¹ it does not reduce the importance of having the Tax Court apply the appropriate standard.

B. *Innocent Spouse Relief*

Although innocent spouse relief has been available since 1971,¹⁰² Congress expanded its availability in RRA 1998, permitting relief in additional circumstances.¹⁰³ "Innocent spouse" relief is based on the idea that, in certain cases, tax debts should not be collected from one spouse, even though joint and several liability exists.¹⁰⁴ Like CDP, innocent spouse relief provides an exception to the Anti-Injunction Act's prohibition on actions to stop tax

appropriate, the Federal district court. Where the validity of the tax liability was properly at issue in the hearing, and where the determination with regard to the tax liability is a part of the appeal, no levy may take place during the pendency of the appeal. The amount of the tax liability will in such cases be reviewed by the appropriate court on a *de novo* basis. Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion. In such cases, the appeals officer's determination as to the appropriateness of collection activity will be reviewed using an abuse of discretion standard of review. Levies will not be suspended during the appeal if the Secretary shows good cause why the levy should be allowed to proceed.

Id.

100. Book, *supra* note 91, at 1194–97.

101. The possibility of bifurcated review created several potential problems. First, multiple appeals could be required in a single case. Second, inconsistent results could occur with respect to a single taxpayer and a single tax year. Third, the tax collection process could be further slowed while waiting for two courts' decisions. Cords, *The Scope and Nature of Judicial Review*, *supra* note 91, at 1048–55.

102. Pub. L. No. 91-679, 84 Stat. 2063 (1971) (amending the Internal Revenue Code of 1954 to provide that in certain cases a spouse will be relieved of liability arising from a joint income tax return).

103. Internal Revenue Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 739–740 (codified as amended at I.R.C. § 6015); H. REP. NO. 105-599, at 249–55 (1998) (Conf. Rep.), as reprinted in 1998 U.S.C.C.A.N 288, 288–95.

104. I.R.C. § 6015 (West Supp. 2007).

collection actions,¹⁰⁵ permitting judicial review of a request for innocent spouse relief.¹⁰⁶

RRA 1998 made innocent spouse relief available in three instances. First, innocent spouse relief is available to a spouse if the following conditions exist: (1) a joint return was filed; (2) there is an understatement of tax attributable to the non-requesting spouse; (3) the requesting spouse did not know or have reason to know of the understatement; (4) holding the spouse liable for the tax would be inequitable; and (5) innocent spouse relief is requested no later than two years after the requesting spouse receives notice of the innocent spouse rights.¹⁰⁷ Second, innocent spouse relief is available if: (1) the couple is no longer married; (2) the couple is legally separated, or has not lived together for twelve months prior to the request for innocent spouse relief; and (3) the spouse requesting relief did not actually know of the item giving rise to the liability when the return was signed.¹⁰⁸ Third, innocent spouse relief is available under the equitable relief provisions if it would be inequitable to hold the taxpayer liable for the unpaid tax or deficiency under all of the facts and circumstances, and the taxpayer does not otherwise qualify for innocent spouse relief.¹⁰⁹

The Tax Court and the district court share jurisdiction over innocent spouse cases. The Tax Court has jurisdiction over these cases if a deficiency has been asserted¹¹⁰ or the taxpayer has been denied equitable relief, regardless of the existence of a deficiency.¹¹¹ The district courts have jurisdiction over innocent spouse determinations in tax refund cases.¹¹² The Tax Court loses its jurisdiction to the extent that the district court or the United States Court of Federal Claims acquires jurisdiction over an innocent spouse claim.¹¹³

The Tax Court conducts abuse of discretion review when it hears appeals from the Service's denials of taxpayer's requests for stand alone equitable innocent spouse relief. There was some question as to whether the Tax Court had jurisdiction over stand alone requests for equitable relief in innocent spouse cases after the Ninth Circuit Court of Appeals concluded that the Tax Court's jurisdiction over innocent spouse cases was limited to deficiency cases.¹¹⁴ The Tax Court ultimately agreed that it lacked jurisdiction over stand

105. I.R.C. § 6015(e)(1)(B) (West Supp. 2007).

106. § 6015(e).

107. § 6015(b)(1).

108. § 6015(c)(3).

109. § 6015(f).

110. § 6015(e)(1).

111. I.R.C. § 6015(e)(1). Tax Court jurisdiction exists in cases arising and liabilities remaining unpaid after December 20, 2006.

112. *Id.*

113. § 6015(e)(3).

114. *Ewing v. Comm'r*, 439 F.3d 1009 (9th Cir. 2006), *rev'g* 122 T.C. 32 (2004).

alone innocent spouse cases in *Billings v. Commissioner*.¹¹⁵ However, in the Tax and Health Care Relief Act of 2006, Congress assured future access to the Tax Court for those making stand alone requests for equitable relief under the innocent spouse provisions.¹¹⁶ By amending Code section 6015(e), Congress ensured that the Tax Court had jurisdiction over requests for innocent spouse relief under section 6015(f), even if no deficiency was asserted.¹¹⁷

In *Ewing*, the Tax Court explained:

The Tax Code has long provided a specific statutory framework for reviewing deficiency determinations of the Internal Revenue Service. Section 6015 is part and parcel of this statutory framework. This Court's de novo review procedures emanate from this statutory framework. Accordingly, the APA judicial review procedures do not supplant this Court's longstanding de novo review procedures in cases arising under section 6015.

Moreover, the fact that section 6015 postdates the APA does not render the APA judicial review procedures applicable here. APA section 559 provides that the APA does "not limit or repeal additional requirements imposed by statute or otherwise recognized by law." When the APA was enacted in 1946, this Court's de novo procedures for reviewing IRS functions were well established and "recognized by law" within the meaning of APA section 559. . . . These de novo trial procedures, which have remained essentially unchanged since the APA's enactment, provide a stricter scope of review of the Commissioner's determinations than would obtain under APA review procedures. Consequently, pursuant to APA section 559, the APA does not limit or repeal "additional requirements" arising from this Court's de novo review procedures.

. . . .

The mere fact that judicial review is for abuse of discretion in a spousal relief case arising under section 6015(f) does not trigger application of the APA record rule or preclude this Court from conducting a de novo trial.¹¹⁸

115. 127 T.C. 7 (2006). On remand, following statutory revisions that gave the Tax Court jurisdiction, the Tax Court considered the case on the merits. *Billings v. Comm'r*, 94 T.C.M. (CCH) 183 (2007).

116. The Tax Relief and Health Care Act of 2006, Pub. L. 109-432, § 408(a), 120 Stat. 2922, 3061.

117. *Id.* This grant of jurisdiction applies to cases arising with respect to unpaid liabilities in existence on December 20, 2006.

118. 122 T.C. at 52–53 (Thornton, J., concurring), *rev'd*, 439 F.3d 1009 (9th Cir. 2006) (citations and footnotes omitted). The Tax Court has reaffirmed its position that its review is not limited to the administrative record following the statutory grant of Tax Court jurisdiction in equitable relief cases brought for relief under section 6015(f). *Van Arsdalen v. Comm'r*, 93 T.C.M. (CCH) 953 (2007) (noting that it was not required to look outside the record to find an abuse of discretion in this case).

Here also, the Tax Court has refused to apply true abuse of discretion review. This approach violates the congressional directive regarding judicial review, despite the fact that the Tax Court is a court of limited jurisdiction. In addition, “a stricter scope of review” as used by the Tax Court is likely to be slower and require more resources. This impedes the tax collection process by slowing payment and using more court time and IRS and taxpayer resources.

C. *Interest Abatement*

Code section 6404(e) permits the Service to abate interest on certain tax liabilities if the interest accrued because of the Service’s failure to perform a ministerial act. Although abatement is a discretionary function, taxpayers can request judicial review of the denial of a request for interest abatement in the Tax Court.¹¹⁹ The Tax Court has exclusive jurisdiction in these cases.¹²⁰ As in CDP and innocent spouse cases, judicial review is conducted for abuse of discretion. Here, the Tax Court uses an approach to judicial review like that used in CDP and innocent spouse cases.

The distinctions between the redetermination of a deficiency and judicial review of tax collection decisions, which involve judicial review of discretionary administrative decisions, will be more fully developed in Part IV of this Article. First, the next section of this article will review the applicable principles of administrative law.

III. ADMINISTRATIVE LAW

This section begins with a brief description of the administrative law principles used during judicial review of agency decisions, and that should inform the courts’ review of tax collection decisions. Next, it will consider how administrative law should apply to judicial review of tax collection decisions.

A. *The Administrative Procedure Act and Administrative Law Generally*

During the New Deal, as administrative agencies proliferated, Congress recognized that there were problems with agencies’ and courts’ use of inconsistent approaches to accomplish similar functions. After much debate,¹²¹ Congress adopted the Administrative Procedure Act (APA) in 1946,¹²² which

119. I.R.C. § 6404(h) (West Supp. 2007). The Tax Court has exclusive jurisdiction in denials of a request for interest abatement under section 6404(e). *Hinck v. United States*, 127 S. Ct. 2011, 2015 (2007).

120. *Hinck*, 127 S. Ct. 2015.

121. 1 KOCH, *supra* note 59, § 2.31.

122. Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2000)).

attempts to codify prior law and clarify ambiguities.¹²³ The APA is applicable to all agency actions, unless the agency is specifically exempt from the APA,¹²⁴ or there is a more specific rule in the governing statute.¹²⁵

Agencies include “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.”¹²⁶ The nature of courts’ activities necessarily exclude them from the APA’s definition of agencies.¹²⁷

In most instances, administrative agencies have great flexibility to determine how to do their work. One of the overriding principles behind the APA rules is that the agency should be able to “exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence.”¹²⁸ To guide their work, the APA sets the standards for agency actions, such as rulemaking, the conduct of hearings, and the performance of certain actions.¹²⁹ In addition, a large body of administrative law provides guidance for agency actions when the APA is ambiguous or silent on an issue.

Judicial review is preferred under the APA. Under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹³⁰ However, in most cases only final agency actions are reviewable.¹³¹ The APA directs courts to apply certain presumptions and standards of review when reviewing agency decisions and actions.¹³²

Despite the strong preference for judicial review of agency decisions, the APA recognizes that under certain circumstances judicial review is not appropriate.¹³³ Among the circumstances that do not give rise to a right to

123. 1 KOCH, *supra* note 59, § 2.31.

124. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 275–79 (3d ed. 1999). No IRC provision specifically supersedes the requirements under APA § 553 providing for notice and comment rulemaking. SALTZMAN, *supra* note 64, ¶ 1.03.

125. This is also referred to as the enabling act. 1 KOCH, *supra* note 59, § 2.30.

126. 5 U.S.C. § 551(1) (2000).

127. § 551(1)(B); § 701(b)(1)(B) (2000).

128. Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 333 (1976); *see also* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 544 (1978).

129. *See, e.g., Vermont Yankee Nuclear Power*, 435 U.S. at 545 (citing S. REP. NO. 752, at 14–15 (1945) (legislative history of section 4 of the APA)).

130. 5 U.S.C. § 702 (2000).

131. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable . . .”).

132. *See generally* § 701.

133. § 702.

judicial review are cases where judicial review is statutorily prohibited or the decision is clearly committed to agency discretion.¹³⁴ However, these circumstances rarely occur.¹³⁵

Even after acknowledging the strong preference for judicial review, the courts have accepted the need for and approved limits to the availability of judicial review.¹³⁶ For example, the separation of powers doctrine makes it more appropriate for the executive branch to set policy than the judicial branch.¹³⁷ Under this view, deference is often afforded to the agency interpretation of an ambiguous statute.¹³⁸ One of the most important factors in determining whether the agency acted within its authority is whether formal adjudication, with much more rigorous procedures than informal adjudication, was required. Formal versus informal proceedings are discussed in the following section. The end of the section discusses the appropriate scope of judicial review of an agency decision.

1. Formal Versus Informal Agency Adjudication

Formal adjudications are conducted by agencies using trial-like procedures. These proceedings are more time consuming and resource intensive than informal adjudication. Formal adjudication is necessary only when specifically required by statute.¹³⁹ As the name suggests, informal adjudications are usually much less trial-like than is typical of formal agency

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id.

134. § 701(a).

135. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 354, 410 (1971); S. REP. NO. 752, at 26 (1945).

136. *Heckler v. Chaney*, 470 U.S. 821, 827–31 (1985).

137. 3 KOCH, *supra* note 59, § 12.12.

138. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (creating two-step analysis for determining the permissibility of an agency interpretation). A number of cases have since considered and explained how and when this approach applies. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

139. 5 U.S.C. § 555 (2000); *PIERCE ET AL.*, *supra* note 124, at 298 (formal adjudication is required where the “adjudication [is] required by statute to be determined on the record after an opportunity for an agency hearing . . .” (quoting 5 U.S.C. § 554(a) (2000))). Formal adjudication by an agency is procedurally similar to a trial. Under the APA, during formal adjudication (1) the agency must provide an impartial decision-maker; (2) the party must be given notice of the proceedings, a right to be represented, and an opportunity to make arguments and present evidence orally; (3) the party must have a right to cross-examine opposing witnesses and know about opposing evidence; (4) the resolution of factual disputes must be based solely on the evidence presented at the adjudication; and (5) there must be written findings and conclusions. 5 U.S.C. §§ 554–556 (2000).

adjudication.¹⁴⁰ The lessened formality provides the advantage of allowing faster, less expensive, individual action on specific issues. Informal adjudications may also be more flexible. If the agency's governing statute does not require formal adjudication, the agency may use informal adjudication.¹⁴¹

For a variety of reasons, including flexibility and rapid resolution of the issues, most agency actions use informal rather than formal procedures.¹⁴² Notwithstanding that most agency actions are informal, the APA provides limited guidance regarding the conduct of informal adjudications; the only section directly applicable to the procedure for informal adjudications deals with "Ancillary Matters."¹⁴³ However, many courts have considered the adequacy of informal administrative hearings and significant commentary has attempted to develop the appropriate standards for informal agency actions.¹⁴⁴

Because of the strong preference for judicial review, the courts usually will review a final decision made during either formal or informal agency proceedings.¹⁴⁵ In most cases, judicial review of an agency action is available only to determine whether the action or decision of the agency was an abuse of discretion or was "arbitrary" and "capricious."¹⁴⁶ Many courts have concluded that following informal adjudication, the standard to be applied is whether the decision was arbitrary.¹⁴⁷ The nature and scope of the court's review depends

140. 1 KOCH, *supra* note 59, § 2.13.

141. PIERCE ET AL., *supra* note 124, at 276–77, 342–43.

142. See generally Ronald J. Krotoszynski, Jr., *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1058 (2004) ("[O]ver ninety percent of agency actions constitute 'informal adjudication.'").

143. 5 U.S.C. § 555; see also Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004) (advocating extending the APA's adjudication provisions to a variety of situations not currently covered).

144. See, e.g., Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333 (1982); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997); Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984); Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record,"* 10 ADMIN. L.J. AM. U. 179 (1996). This is by no means a comprehensive list of articles discussing the appropriate role of the courts that review informal agency action; it is merely meant as a sample of the writings in this area. See also 1 KOCH, *supra* note 59, §§ 2, 4, 5.

145. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414–15, 419–20 (1971).

146. 5 U.S.C. § 706(2)(A) (2000).

147. See, e.g., *Duke Power Co. v. U.S. Nuclear Regulatory Comm'n*, 770 F.2d 386, 389 (4th Cir. 1985); 3 KOCH, *supra* note 59, § 10.4.

primarily on the issue under review, not on the type of procedure the agency used.¹⁴⁸

2. Abuse of Discretion

Among the standards that are applied to review of agency actions is abuse of discretion. This standard is commonly applied when the agency is granted discretion in the performance of its duties. In these cases, the court does not substitute its judgment for that of the agency.¹⁴⁹ Rather, the court considers whether the decision made by the agency was within the proper range of decisions it could make and was based on consideration of adequate and proper evidence; that is, the decision was not an abuse of discretion.

During abuse of discretion review courts conduct a “thorough, probing, in-depth review” of the record.¹⁵⁰ “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”¹⁵¹ This protects the participant and the agency’s independence.

Many formulations of abuse of discretion have been used. Abuse of discretion has been equated with an action that was arbitrary, capricious, or clearly erroneous.¹⁵² Other definitions have also been used. The court must determine the agency’s discretion and whether its decision is an abuse of that discretion.¹⁵³

148. However, challenges can and have been made when a participant wants or is entitled to a formal proceeding, but receives only informal procedures. Similarly, many cases have challenged the adequacy of informal procedures in a variety of contexts. *See, e.g.,* *Ardestani v. INS*, 502 U.S. 129 (1991).

149. *Overton Park*, 401 U.S. at 416.

150. *Id.* at 415.

151. *Id.* at 416.

152. *Sutton v. U.S. Dep’t of Housing and Urban Dev.*, 885 F.2d 471, 475 (8th Cir. 1989) (citing *Frigsby v. U.S. Dep’t of Housing and Urban Dev.*, 755 F.2d 1052, 1055 (3d Cir. 1985)); *Perez-Alvarez v. INS*, 857 F.2d 23, 25 (1st Cir. 1988); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1387 (7th Cir. 1987); 3 KOCH, *supra* note 59, § 10.6[1]; Ronald Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 292 (1986).

153. 3 KOCH, *supra* note 59, § 10.6; Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1491–93 (1983).

3. Record Review

To facilitate judicial review, even under the very deferential standards of abuse of discretion or arbitrariness, an agency must create a record that supports the agency's action. An administrative record is required even in an informal adjudication.¹⁵⁴ The Supreme Court has acknowledged that while justification of an agency decision is important, it is also important not to turn informal agency proceedings into formal agency adjudications or rulemakings.¹⁵⁵ A tension is created by the need to create a record and also to permit agencies to use less formal procedures. The development of the record is important because of the reliance courts place on the record when reviewing agency actions.

During abuse of discretion review, little independent fact-finding is required. When a court relies on the information developed by the agency, it is said to use "review on the record."¹⁵⁶ During review on the record, the court looks at the record created by the agency to determine whether the agency's action was within its discretion. This review requires the court to determine whether, on the record, the agency's action can be justified. Courts are directed to "review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."¹⁵⁷ To permit this type of review, the agency must create a record.

A complete record, including transcript, is not created during most informal hearings, although a record is created.¹⁵⁸ The official record of an informal adjudication may not be clearly defined, but usually includes correspondence, file notes, and records reviewed during the hearing.¹⁵⁹ To protect participants, the APA provides that

154. 3 KOCH, *supra* note 59, § 11.2.

155. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 547–48 (1978) ("[A]gencies, operating under [a] vague injunction to employ the 'best' procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance."); *Camp v. Pitts*, 411 U.S. 138, 145 (1973).

156. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); Young, *supra* note 144, at 213. Because of the rule of record review, often at issue during judicial review is what constitutes the record. *Id.* at 208. The record is generally comprised of all of the documents and information considered by the hearing officer in making a decision. *Overton Park*, 401 U.S. at 419–20 (reviewing court considers the decisions in light of "the full administrative record that was before [the agency decision maker] at the time he made his decision").

157. 5 U.S.C. § 706 (2000).

158. See generally *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of an informal agency action in which a hearing has not occurred.").

159. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 9.2 (2001).

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interest person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.¹⁶⁰

Thus, the hearing officer must justify the decision, which is part of the administrative record.¹⁶¹

Even when a court concludes that the agency erred, under the rule of prejudicial error, the court must consider whether the error was prejudicial to the outcome.¹⁶² This rule, which is akin to the rule of harmless error used by the courts of appeals,¹⁶³ directs the reviewing court to consider whether any errors during a hearing or the creation of the record prejudiced the decision¹⁶⁴ but provides for no remedy if no prejudice resulted from the error.¹⁶⁵

When the record is inadequate to permit the necessary review of the agency's decision the court can remand the case to the agency to supplement the record.¹⁶⁶ "[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."¹⁶⁷ Alternatively, the court may accept additional evidence to complete the record.¹⁶⁸ However, even when the record is inadequate, the court is not to substitute its judgment for that of the agency except when trial de novo is permitted.¹⁶⁹ Often, therefore, additional evidence is used to bolster the agency's decision.

Review on the record is not without teeth; a decision will not be upheld unless it is supported by the record, requiring the agency to support its decision

160. 5 U.S.C. § 555(e) (2000).

161. *Id.*

162. § 706; *see also* 3 KOCH, *supra* note 59, § 10.7.

163. *See, e.g.,* *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49, 61 (1st Cir. 2001) ("The doctrine of harmless error is as much a part of judicial review of administrative action as of appellate review of trial court judgments.").

164. *See, e.g.,* *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996); 3 KOCH, *supra* note 59, § 10.7.

165. 3 KOCH, *supra* note 59, § 10.7.

166. *See* *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985).

167. *Id.* at 744; *see also* *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 718 (1963).

168. *McMillan & Peterson*, *supra* note 144, at 334.

169. 3 KOCH, *supra* note 59, §§ 10.1, 10.2. Some commentators have suggested that the debates about the appropriate scope of the record in individual cases have essentially caused the exceptions to swallow the rule. *Stark & Wald*, *supra* note 144, at 343–44 (identifying eight categories of exceptions that have been judicially created to the rule of on the record review). *But see*, *Young*, *supra* note 144, at 219–29 (critiquing *Stark and Wald's* conclusions). The exceptions to the record rule that courts have used to remedy administrative failings do not entirely eviscerate the rule of record review. *Id.* at 218–19.

with facts.¹⁷⁰ Both the rule of record review and the rule of prejudicial error further the principle that the agency should be making the policy decisions delegated to it by Congress, not the courts.¹⁷¹

B. Administrative Law

1. In General

The IRS is an agency under the APA definition and is not specifically exempt from the application of the APA.¹⁷² Notwithstanding the fact that some of its actions are exempt from the APA and judicial review, the APA is still applicable to many IRS actions and decisions.¹⁷³ However, administrative law, like other areas that overlap, is often overlooked in the context of tax proceedings.¹⁷⁴

During the drafting and adoption of the APA, most of those involved believe that tax cases would not be subject to administrative law. In fact, the recommendations regarding administrative procedure in the Attorney General's report in 1946 stated that review of tax liabilities would not be subject to the APA.¹⁷⁵ At that time, in 1946, tax litigation was permitted only for pre-assessment deficiency redeterminations and post-payment refund suits.¹⁷⁶ Challenges to unpaid tax liabilities were limited to proceedings before the BTA, which remained an executive agency, subject to review by the circuit courts of appeals, and suits for refund.¹⁷⁷ There was no post-assessment, pre-payment opportunity for a judicial challenge to an IRS collection decision.

170. *But see* Krotoszynski, *supra* note 142, at 1060 (“[W]ith the possible exception of procedural due process claims, this feedback loop is an imperfect mechanism for ensuring fair process in the first instance.”).

171. *See infra* Part IV.A.2.

172. SALTZMAN, *supra* note 64, ¶1.03.

173. *Id.* As discussed below, such exclusions include courts, including the Tax Court. *See infra* Part IV.B.

174. SALTZMAN, *supra* note 64, ¶1.03.

175. *See* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945) (noting that “the tax functions of the Bureau of Internal Revenue (which are triable de novo in The Tax Court)” are exempt from the APA); S. REP. NO. 752 (1945) (APA adjudication provisions are not applicable when a court will make a de novo finding, providing as an example “tax assessments . . . not made upon an administrative hearing and record, [where] contests may involve a trial of the facts in the Tax Court”). *See generally* H.R. REP. NO. 1980 (1946) (discussing legislative history and substance of the APA).

176. *See generally supra* notes 32–49 and accompanying text (discussing the Tax Court's expanded jurisdiction over time).

177. *See generally supra* note 35 and accompanying text.

Sovereign immunity, coupled with the Anti-Injunction Act, barred all suits to stop the assessment or collection of taxes.¹⁷⁸

The IRS and the Treasury Department acknowledge the applicability of the APA and administrative law in some situations. For example, when the Treasury issues regulations it usually uses a notice and comment procedure. Notice and comment rulemaking is often used to promulgate “interpretive regulations,” which are exempt from the notice and comment requirements.¹⁷⁹

There are many situations where the APA is inapplicable as well. The Anti-Injunction Act broadly prohibits judicial intervention in many of the Service’s decisions.¹⁸⁰ In addition, the notice and comment process is not used to issue temporary regulations or revenue procedures.¹⁸¹ Moreover, many IRS actions do not involve rulemaking or adjudication, including the issuance of informal guidance and determination of tax liabilities.¹⁸²

The APA is not applicable to judicial review of an agency decision when a court is authorized to conduct a trial de novo.¹⁸³ In most instances, application of administrative law is unnecessary because the taxpayer is entitled to seek de novo review of the question later. Thus, the APA does not apply in deficiency

178. See *supra* notes 18–20 and accompanying text.

179. See Treas. Reg. § 601.601 (2006). However, the use of the term “interpretive regulation” in tax is often distinguishable from its use in administrative law. See generally Steve R. Johnson, *Swallows As It Might Have Been: Regulations Revising Case Law*, 112 TAX NOTES 773 (2006) [hereinafter Johnson, *Swallows As It Might Have Been*]; Steve R. Johnson, *Swallows Holding As It Is: The Distortion of National Muffler*, 112 TAX NOTES 351 (2006) [hereinafter Johnson, *Swallows Holding As It Is*].

180. I.R.C. § 7421(a) (2000).

181. Some commentators have argued that the notice and comment procedures should be used even in many of these cases. See e.g., Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2095–02 (2005); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 524 (1977); Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 344 (1991).

182. Examples of informal guidance include Technical Advice Memoranda, Revenue Rulings, and Revenue Procedures, all of which may be challenged in a deficiency or refund case and are often viewed only as the Service’s litigating position, rather than statements of law. *Peracchi v. Comm’r*, 143 F.3d 487, 492 n.13 (9th Cir. 1998) (“A revenue ruling is entitled to some deference as the stated litigating position of the agency which enforces the tax code, but not nearly as much as a regulation.”); *McLaulin v. Comm’r*, 115 T.C. 255, 263 (2000) (“We generally treat a revenue ruling as merely the Commissioner’s litigating position not entitled to any judicial deference or precedential weight.”). However, the existence of such guidance may be used by a taxpayer to avoid penalties under the theory that there is substantial authority for a reporting position based on the existence of such guidance. Treas. Reg. § 1.6662-3(b)(2) (2006).

183. Examples include deficiency redeterminations by the Tax Court under I.R.C. § 6213 and refund cases under I.R.C. § 7422 in the district courts and 28 U.S.C. § 1491(a) in the United States Court of Federal Claims.

and refund cases.¹⁸⁴ Both the Tax Court and the district court conduct de novo review.

Notwithstanding the direction to or expectation that the Tax Court will use abuse of discretion review, the Tax Court has refused to consult administrative law in the context of CDP determination appeals¹⁸⁵ and denials of innocent spouse relief.¹⁸⁶ Interestingly, despite its statements pertaining to the inapplicability of the APA in cases before it, the Tax Court recognizes the application of the APA in some, but not all, non-collection circumstances.¹⁸⁷

The intersection of tax and administrative law outside the rulemaking context has received relatively little consideration by scholars.¹⁸⁸ In recent years, that trend has started to change.¹⁸⁹ Some commentators have suggested that tax is unique and the review of collection decisions should be performed differently than the decisions of other agencies.¹⁹⁰ Other commentators have pointed out that tax is no more technical than other areas that are regulated by

184. I.R.C. § 6213(a) (2000 & Supp. IV 2004); 5 U.S.C. § 703 (2000) (providing that the APA is inapplicable where de novo review is provided, “[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement”).

185. *Robinette v. Comm’r*, 123 T.C. 85, 95 (2004), *rev’d*, 439 F.3d 455, 459–62 (8th Cir. 2006); *Johnson v. Comm’r*, No. 20594-03S, T.C. Summ. Op. 2005-47, 2005 WL 883701 (U.S. Tax Ct. Apr. 18, 2005) (rejecting the Service’s contention that the APA’s judicial review provisions governed review of the CDP determination); *Vierow v. Comm’r*, T.C.M. (RIA) 2004-255 (2004) (rejecting the taxpayers’ claim that the APA should limit review to the administrative record noting that “[i]n *Robinette*, we held that when reviewing the Commissioner’s determination pursuant to section 6330, our review is not limited by the Administrative Procedure Act, the evidence we may consider is not limited to the administrative record, and we conduct trials de novo”); *Armstrong v. Comm’r*, 84 T.C.M. (CCH) 287, 291–92 (2002) (concluding that I.R.C. section 6330 did not require a formal hearing under the APA, as well as not requiring an informal face-to-face hearing); *Nestor v. Comm’r*, 118 T.C. 162, 172–74 (2002) (majority opinion fails to address APA issues raised by Judge Halpern’s concurring opinion); *Lunsford v. Comm’r*, 117 T.C. 159, 167–69 (2001) (majority opinion fails even to acknowledge discussion of the applicability of the APA raised by Judge Halpern’s concurrence).

186. *Ewing v. Comm’r*, 122 T.C. 32, 35–36 (2004), *rev’d on jurisdictional grounds*, 439 F.3d 1009 (9th Cir. 2006).

187. *Mailman v. Comm’r*, 91 T.C. 1079, 1082–83 (1988); *Estate of Gardner v. Comm’r*, 82 T.C. 989, 994 (1984); *Dittler Bros., Inc. v. Comm’r*, 72 T.C. 896, 909–10 (1979), *aff’d without published opinion*, 642 F.2d 1211 (5th Cir. 1981).

188. Book, *supra* note 91, at 1159.

189. *Id.*; see also *Johnson, Swallows Holding As It Is*, *supra* note 179; *Johnson, Swallows As It Might Have Been*, *supra* note 179; see generally Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B. U. L. REV. 185 (2004) (arguing that Treasury check-the-box regulations are invalid in light of Supreme Court precedent, and, therefore, *Chevron* deference is irrelevant).

190. John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35 (1995).

administrative agencies.¹⁹¹ In addition, courts specialize in the interpretation of statutes.¹⁹² Increasingly commentators are calling for tax law to embrace the legal principles commonly applied to other areas of law.¹⁹³ Despite the Tax Court's unwillingness to apply administrative law in the review of tax collection decisions,¹⁹⁴ the IRS has taken the position that it should be applied in these cases.¹⁹⁵

Common standards of review develop a widely understood meaning from frequent use. That certainty is reduced or eliminated when courts use common formulations in uncommon ways. "The standard of review adopted by the Tax Court does not fit within the customary matrix inasmuch as it uses non-traditional terms to define a standard of review. By not applying terminology with which courts interact frequently, consistency in the application of a standard of review is not possible."¹⁹⁶ Thus, the unusual use the Tax Court makes of the abuse of discretion standard has potential adverse systematic consequences.

In many tax collection cases, the Tax Court must determine whether the Service abused its discretion. As with other courts and agency decisions, the issue is not whether the Tax Court would arrive at the same conclusion.¹⁹⁷ Whether there is an abuse of discretion is a very different question than is presented by the determination of the correct liability. Moreover, there are instances where the Code specifically directs the Tax Court to review for abuse of discretion.¹⁹⁸ This congressional direction places the Tax Court in the same position as the district courts during the review of discretionary administrative decisions.¹⁹⁹ When it conducts a *de novo* trial in this situation, the Tax Court is acting outside its jurisdictional grant.²⁰⁰

191. Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1598–1600 (2006).

192. *Id.* at 1542. Other scholars have criticized the tendency of tax professionals, scholars, and judges to view tax as a law unto itself. *See generally* Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637 (1996); Caron, *supra* note 75; Lederman, *supra* note 75.

193. Book, *supra* note 91, at 1148–49.

194. *See supra* note text accompanying note 185.

195. *Vierow v. Comm'r, T.C.M. (RIA) 2004-255* (2004) (taxpayer argued on brief that the CDP provisions were governed by the APA).

196. Pietruszkiewicz, *supra* note 12.

197. I.R.C. §§ 6015(e), 6330(d)(1), 6404(h)(1) (West Supp. 2007); *Washington v. Comm'r*, 120 T.C. 137, 146 (2003); *Sego v. Comm'r*, 114 T.C. 604, 610 (2000).

198. *See, e.g.*, I.R.C. § 6404(i).

199. *See infra* Part IV.A.2.

200. I.R.C. § 6404(i).

The Tax Court acknowledges that abuse of discretion review is required in innocent spouse, interest abatement, and collection due process appeals.²⁰¹ However, the Tax Court has concluded that it is not required to apply administrative law, the APA, or the rule of record review.²⁰² In these cases, the Tax Court often conducts a careful review of the facts present both at the hearing and at trial, rather than limiting its inquiry to the permissibility of the conclusion reached on the evidence available to the Service.²⁰³ As a result of its approach, the Tax Court is not performing traditional abuse of discretion review. This risks diluting or undermining the commonly understood meaning of abuse of discretion review.

The Tax Court has expressly rejected contentions relating to application of administrative law, concluding that rather than limiting its review to the administrative record, it is free to supplement the administrative record liberally.²⁰⁴ The Tax Court has stated that even when reviewing for abuse of discretion it conducts de novo review.²⁰⁵ Notwithstanding the Tax Court's refusal to be limited in its inquiry by the rule of record review, the Tax Court also refuses, in most circumstances, to consider issues not present at the hearing.²⁰⁶ This position is somewhat inconsistent with limited review. However, the Tax Court bases its conclusion on its reading of its jurisdiction to review the appeals office's determination.²⁰⁷

Moreover, the Tax Court has also refused to apply the judicial review standards found in APA section 706.²⁰⁸ Even when it applies an abuse of discretion standard, the Tax Court's review more closely resembles a trial de

201. I.R.C. § 6404(i) (permitting the Tax Court to review denials of interest abatement for abuse of discretion); *Washington*, 120 T.C. at 146 (concluding that to prevail on an appeal of a denial of innocent spouse relief on equitable grounds under I.R.C. § 6015(f) the Service must have abused its discretion); *Sego*, 114 T.C. at 609–10 (concluding that, consistent with the legislative history, CDP cases are to be reviewed for abuse of discretion unless the underlying liability is at issue).

202. *Robinette v. Comm'r*, 123 T.C. 85, 95 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006); *see also* *Giamelli v. Comm'r*, 129 T.C. 107, 117 (2007) (Wherry, J., concurring) (“[T]he ‘record’ in a section 6320 and/or section 6330 case is not sacrosanct.”).

203. *Robinette*, 123 T.C. at 101.

204. *Id.* at 95 (“[W]e hold that, when reviewing for abuse of discretion under section 6330(d), we are not limited by the Administrative Procedure Act (APA) and our review is not limited to the administrative record.”); *see also* *Fisher v. United States*, 45 F.3d 396 (10th Cir. 1995).

205. *Ewing v. Comm'r*, 122 T.C. 32, 38–39, *rev'd on other grounds*, 439 F.3d 1009 (9th Cir. 2006).

206. *Giamelli*, 129 T.C. 107, 112–13 (majority opinion); *Magana v. Comm'r*, 118 T.C. 488, 493 (2002).

207. *Giamelli*, 129 T.C. 107, 112–13.

208. *Robinette*, 123 T.C. at 95–96.

novo than a deferential review of an agency decision.²⁰⁹ Rather than applying the expected deference, de novo review encourages the court to substitute its judgment for that of the Service. Although the Eight Circuit Court of Appeals reversed the Tax Court's conclusion that it did not have to apply the APA or conduct record review in CDP cases, the Tax Court could continue to use its traditional approach in all other circuits.²¹⁰

By expanding the scope of review beyond the administrative record, the Tax Court may uphold decisions that would otherwise constitute an abuse of discretion. For instance, in a number of cases the Tax Court has concluded that even though the appeals office had not conducted a hearing, remanding for a hearing was not necessary because it would not be productive.²¹¹ Because a hearing is required by statute before issuance of a CDP determination, this seems an abuse of discretion that would require remand.²¹² The Tax Court also has been willing to view compliance with the verification requirements broadly.²¹³ For example, the Tax Court has upheld a CDP determination,

209. Book, *supra* note 91, at 1173–74, 1194–97 (2004) (“[T]he proceedings closely resemble other Tax Court proceedings that are completed on a de novo basis.”); *see also* Camp, *The Failure of CDP*, Part 2, *supra* note 91.

210. *Robinette v. Comm’r*, 439 F.3d 455, 465 (8th Cir. 2006). The Tax Court follows its own precedent in subsequent cases raising the same issue, unless the appellate jurisdiction lies with a Circuit Court of Appeals that has concluded that the Tax Court’s approach is incorrect. *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970). At that time, the Tax Court may choose to reconsider its approach, but will continue to follow its precedent in other circuits unless and until it reverses its prior holding. *Id.*; *see also* *Bowman v. Comm’r*, 93 T.C.M. (CCH) 1204, 1207 (2007) (noting that appeal would lie in the Eighth Circuit, but stating the Tax Court “shall follow *Robinette* in the instant case only if that opinion is squarely in point.”). *But see* NAT’L TAXPAYER ADVOCATE, 2006 REPORT, *supra* note 3, at 573 (suggesting that the reversal in *Robinette* would likely eliminate the Tax Court’s refusal to apply the rule of record review).

211. *See, e.g.*, *Leggett v. Comm’r*, 92 T.C.M. (CCH) 551, 553 (2006); *Sapp v. Comm’r*, 91 T.C.M. (CCH) 1177, 1181 (2006); *Lunsford v. Comm’r*, 117 T.C. 169, 173 (2001). This does not seem analogous to cases where the decision is fully committed to agency discretion. *See Heckler v. Chaney*, 470 U.S. 821 (1984). In those cases, no review is available. In these cases, judicial review is specifically permitted. *Hinck v. United States*, 127 S. Ct. 2011, 2015 (2007); *see also* *Fisher v. United States*, 45 F.3d 396, 397 (10th Cir. 1995) (reversing the Tax Court’s conclusion that the Commissioner had not abused her discretion because there was no evidence supporting the denial of a waiver of penalties).

212. *See Heckler*, 470 U.S. at 832–33.

[S]uch a decision has traditionally been “committed to agency discretion,” . . . [W]e emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. . . . Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.

Id.

213. *See Nestor v. Comm’r*, 118 T.C. 162, 167 (2002) (concluding that the petitioner was not prejudiced when he was provided with the verification of assessment prior to trial, even if not at

despite the appeals officer's conclusion that all statutory and regulatory requirements were met, though the taxpayer requested proof of assessment, which was not provided until after the CDP hearing.²¹⁴ In addition, the Tax Court has concluded that it is permitted to receive additional evidence not included in the administrative record to determine whether the taxpayer was entitled to reinstatement of his offer-in-compromise.²¹⁵ Although in *Robinette* the taxpayer had attempted to present the evidence to the appeals officer, the Tax Court could have used other approaches, including a remand to the appeals office. In these cases the Tax Court may be substituting its judgment for that of the appeals officer, despite the applicability of the abuse of discretion review. This approach may reduce the common understanding of abuse of discretion review. However, the Tax Court seems to recognize at least some of the potential pitfalls. To prevent abuse of the CDP hearing process, the Tax Court has limited the additional evidence it will receive to evidence offered to and refused by the appeals officer. The Tax Court will not consider an issue that was not raised at an administrative hearing.²¹⁶ This limitation is intended to prevent a taxpayer or adviser from holding back an issue during the appeals proceeding and saving it for the case during judicial review.²¹⁷ Such holdbacks would make the process much less conclusive and more time consuming. Moreover, the Tax Court has held that it is without jurisdiction to consider issues not raised during the hearing.²¹⁸ However, a dissent in *Giamelli v. Commissioner* argued that the jurisdictional grant permitted the court to review "matters" rather than "determinations."²¹⁹ Judge Swift felt that the use of the term "matters" was important. He noted that the issue was the underlying liability and the legislative history was consistent with his interpretation anticipating de novo review.²²⁰

The majority applied the regulations which were narrower, permitting review only of issues raised by the taxpayer at the hearing.²²¹ In response, Judge Swift's dissent raised the concern that the majority's position might limit

the hearing). The appeals officer must verify compliance with the applicable law and regulations. I.R.C. § 6330(c) (West Supp. 2007).

214. *Nestor*, 118 T.C. at 166–67, 179–80 (holding no abuse of discretion despite the requirement of Treas. Reg. § 301.6203-1 that, if requested, the Service must provide a copy of the Assessment to the taxpayer). The Service agrees with this conclusion. Rev. Rul. 2007-21, 2007-14 I.R.B. 865, 866.

215. *Robinette v. Comm'r*, 123 T.C. 85, 95 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006).

216. *Murphy v. Comm'r*, 125 T.C. 301, 315 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006); *Magana v. Comm'r*, 118 T.C. 488, 493 (2002).

217. *Robinette*, 123 T.C. at 114–15 (Well, J., concurring).

218. *Giamelli v. Comm'r*, 129 T.C. 107, 113 (2007).

219. *Id.* at 120 (Swift, J., dissenting). This dissent was joined by four other judges. *Id.* at 124.

220. *Id.* at 120.

221. *Id.* at 116 (majority opinion).

the court's ability to remand a case to appeals to consider an issue that the taxpayer had not previously raised at the hearing.²²²

The district courts, on the other hand, have consistently applied traditional abuse of discretion review to CDP determinations when there were no properly raised challenges to the underlying liability. The district courts have been unwilling to substitute their judgment for that of the appeals office.²²³ The courts of appeals have approved of this more limited review, acknowledging the need to limit review to prevent unnecessary judicial interference with the tax collection system.²²⁴ Courts have repeatedly noted that "without a clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS, as contemplated by Congress, the judiciary will inevitably become involved on a daily basis with tax enforcement details that judges are neither qualified, nor have the time, to administer."²²⁵

Even in light of increased taxpayer rights, hampering tax collection unnecessarily would have an adverse effect on the tax collection system. The posture and context under which tax collection cases enter the judicial system make the limited availability of a challenge to the underlying liability in taxpayers' best interests. However, another dissent in *Giamelli* argued that, "Congress knew that proceedings in Tax Court would be conducted de novo."²²⁶ *Giamelli* highlights one of the challenges that the Tax Court faces when addressing tax collection cases. Its history as a pre-payment forum may mean that it is much more comfortable as a finder of fact than it is providing oversight of administrative processes. This tension seems to be illustrated by the tension in the dissents between the ideas that Congress would expect de novo fact-finding and that the majority might be limiting the court's ability to order remand. If de novo fact-finding is warranted or necessary, remand should not be. If remand is appropriate, as it would be in many instances using traditional abuse of discretion review, then de novo fact-finding would not be appropriate.

Post-assessment, the focus is necessarily on collection. CDP hearings slow the judicial process, but should not be allowed to bring the tax collection system to a halt. As a result, CDP proceedings are not an appropriate forum to determine the liability; the time and resources necessary to fully develop the case are not available. Moreover, if no deficiency case was conducted, the taxpayer is entitled to make a refund claim after payment or collection. Rushing through evidence collection and determination of the tax liability in

222. *Id.* at 123–24 (Swift, J., dissenting).

223. *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005); *Living Care Alternatives of Utica v. United States*, 411 F.3d 621, 625 (6th Cir. 2005).

224. *Olsen*, 414 F.3d at 150; *Living Care Alternatives*, 411 F.3d at 625.

225. *Living Care Alternatives*, 411 F.3d at 631.

226. *Giamelli v. Comm'r*, 129 T.C. 107, 127 (2007) (Vasquez, J., dissenting).

court ultimately does not serve the best interest of either the taxpayer or the government.

The district courts have more experience conducting abuse of discretion review than does the Tax Court. Since the rise of the administrative state, the district courts have often been called upon to conduct abuse of discretion review of the actions and decisions of many different agencies. This additional experience may make district court judges more comfortable conducting abuse of discretion review. On the other hand, the Tax Court's historical jurisdiction, making deficiency redeterminations, has asked the judge only to arrive at the "right" result.²²⁷ There is a risk that observers and taxpayers may conclude that a failure to conduct abuse of discretion review in tax collection cases makes the process more result driven in the Tax Court. Perceptions of this nature can be detrimental to effective tax collection as it may encourage more appeals and, therefore, may reduce the perception of fairness of the system.²²⁸

The Tax Court's failure to consider the rules of administrative law as used by the district courts in this area has resulted in inconsistent results to similarly situated taxpayers, in contravention of the norms and goals of sound tax policy.²²⁹ In addition, the difference in approach by the district court and the Tax Court could lead to inconsistency within cases of concurrent or overlapping jurisdiction.

When reviewing tax collection decisions for abuse of discretion, special knowledge of the Tax Code and Regulations is generally unnecessary.²³⁰

227. See *Fredkin v. Comm'r*, 870 F.2d 801, 804 (1st Cir. 1989); *Fitzgerald Motor Co. v. Comm'r*, 508 F.2d 1096, 1102 (5th Cir. 1975); *Abegg v. Comm'r*, 429 F.2d 1209, 1218 (2d Cir. 1970).

228. Curtis J. Berger, "Voluntary" Self-Assessment? *The Unwilling Extraction of Taxpayer Information*, 42 U. PITT. L. REV. 759, 759 n.3 (1981) (noting perceptions of cheating affecting compliance); Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1021 (2003) (noting a correlation between declines in IRS enforcement and taxpayer compliance); Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 378–80 (2002) (discussing how perceptions of cheating on taxes affect compliance).

229. Book, *supra* note 91, at 1161; Richard A. Musgrave, *Equity and the Case for Progressive Taxation*, in *TAX JUSTICE: THE ONGOING DEBATE* 9 (2002) (noting that the desirability of horizontal equity is "hardly debatable").

230. In contrast, in other areas of substantive tax law, specialized knowledge is often required, or at least desirable. See, e.g., *Foxman v. Comm'r*, 41 T.C. 535, 551 n.9 (1964).

The distressingly complex and confusing nature of the provisions of subchapter K present a formidable obstacle to the comprehension of these provisions without the expenditure of a disproportionate amount of time and effort even by one who is sophisticated in tax matters with many years of experience in the tax field. If there should be any lingering doubt on this matter one has only to reread [I.R.C.] section 736 . . . and give an honest answer to the question whether it is reasonably comprehensible to the average lawyer or even to the average tax expert who has not given special attention and extended study to the tax problems of partners. Surely, a statute has not achieved

Unless the underlying liability is at issue, the question presented to the court is whether the appeals officer abused her discretion. A court must understand what constitutes an abuse of discretion. This standard is widely used to determine whether the agency acted “arbitrarily, capriciously, or without sound basis in fact or law.”²³¹ Without a common understanding of the standard, proper action can become unclear to both actors and courts.²³²

Abuse of discretion review generally requires a determination of whether the decision was arbitrary, capricious, or clearly erroneous. This determination can and should be made on the available record. As in most tax matters, the taxpayer has the burden of proof.²³³ If the record is inadequate, remand may be necessary. In many cases, remand to the appeals office to complete the record will be preferable to the court accepting evidence and substituting its judgment for that of the appeals officer. De novo review, accepting new evidence, and adding to the administrative record should be limited to cases where the underlying liability is properly at issue.²³⁴ However, the underlying liability is rarely at issue during tax collection cases.²³⁵ In other cases, the taxpayer has either had (and may even have taken advantage of) an opportunity to challenge the liability in a deficiency proceeding. If the tax is paid without challenge to the underlying liability the taxpayer can still make a claim for refund.

2. In the Collection Context

Significant limits on judicial interference with tax collection are necessary to prevent the tax collection system from screeching to a halt. Before RRA 1998, decisions regarding how to collect previously assessed taxes were almost entirely committed to the Service’s discretion.²³⁶ Not only was there no waiver of sovereign immunity, but the Anti-Injunction Act barred suits to prevent tax assessment or collection “[e]xcept as [otherwise] provided.”²³⁷ Notwithstanding very narrow exceptions to the Anti-Injunction Act,

“simplicity” when its complex provisions may confidently be dealt with by at most only a comparatively small number of specialists who have been initiated into its mysteries.

Id. (citations omitted).

231. *Woodral v. Comm’r*, 112 T.C. 19, 23 (1999).

232. *Id.*

233. See Pietruszkiewicz, *supra* note 12, at 3. In another context within the Tax Court, Professor Pietruszkiewicz takes the position that “[s]tandards of review should be limited to a familiar set of traditional review mechanisms.” *Id.* at 2.

234. Some commentators have urged that the opportunity to challenge the underlying liability during the CDP process be reduced or eliminated altogether. See, e.g., NAT’L TAXPAYER ADVOCATE SERV., IRS, 2005 ANNUAL REPORT TO CONGRESS (2005).

235. I.R.C. §§ 6320, 6330 (West Supp. 2007).

236. Book, *supra* note 91, at 1165.

237. I.R.C. § 7421(a) (2000).

administrative law could inform and improve the fairness, effectiveness, and efficiency of judicial review in tax collection cases, which is more frequently available after RRA 1998.²³⁸

In several cases, a majority of the Tax Court has justified its use of de novo review in CDP²³⁹ and innocent spouse cases²⁴⁰ by considering its approach to deficiency cases. The majority opinion in *Ewing v. Commissioner* attempted to explain the Tax Court's approach:

The legislative history of the APA confirms this understanding. See S. Comm. on the Judiciary, 79th Cong., 1st Sess., Administrative Procedure Act (Comm. Print 1945), reprinted in Administrative Procedure Act Legislative History, 1944–46, at 22 (1946) (stating that there are exempted from APA formal adjudication requirements matters that are subject to de novo review of facts and law such “as the tax functions of the Bureau of Internal Revenue (which are triable de novo in The Tax Court)”; S. Rept. 752, 79th Cong., 1st Sess. (1945), reprinted in Administrative Procedure Act Legislative History, 1944–46, at 214 (1946) (explaining that pursuant to APA provisions governing the scope of judicial review, courts establish facts de novo where the agency adjudication is not subject to APA formal adjudication provisions “such as tax assessments . . . not made upon an administrative hearing and record, [where] contests may involve a trial of the facts in the Tax Court”); H. Rept. 1980, 79th Cong., 2d Sess. (1946), reprinted in Administrative Procedure Act Legislative History, 1944–46, at 279 (1946) (same).²⁴¹

However, this opinion does not properly distinguish between the nature of the judicial inquiry required in deficiency cases and that are required in tax collection cases. Instead of focusing on the review required, the majority focused on the approach that the Tax Court has used in other cases where the standard of review is for abuse of discretion.²⁴² In doing so, the majority

238. See generally *Nestor v. Comm’r*, 118 T.C. 162, 172–74 (2002) (Halpern, J., concurring); *Lunsford v. Comm’r*, 117 T.C. 159, 166–175 (2001) (Halpern, J., concurring). For a discussion on applying the APA to the conduct of CDP hearings, see generally Cords, *How Much Process is Due?*, *supra* note 91.

239. *Robinette v. Comm’r*, 123 T.C. 85, 97–98 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006).

240. *Ewing v. Comm’r*, 122 T.C. 32, 37 (2004), *rev’d*, 439 F.3d 1009 (9th Cir. 2006).

241. *Id.* at 53 (Thornton, J., concurring).

242. *Id.* at 39–40.

Examples of actions in which we conduct a trial de novo are whether it was an abuse of discretion for the Commissioner to (1) determine that a taxpayer's method of accounting did not clearly reflect income under section 446; (2) reallocate income or deductions under section 482; (3) fail to waive penalties and additions to tax; (4) refuse to abate interest under section 6404; (5) refuse to grant the taxpayer's request for an extension of time to file; and (6) disallow a bad debt reserve deduction. We are aware of no reason to depart from this longstanding practice in making our determination under section 6015(f).

Id. at 40–41 (citations omitted).

overlooked the rationale for requiring different standards for varying circumstances. In addition, the Tax Court could have taken into account the benefits of applying a single standard, particularly when there is overlapping jurisdiction in the Tax Court and the district courts.

As Professor Bryan T. Camp has demonstrated, RRA 1998 resulted in a shift from an inquisitorial model to an adversarial model of IRS action and tax collection.²⁴³ As Professor Camp explains, the Service has the history and experience to know what collection actions should be taken.²⁴⁴ This move toward a more adversarial tax collection system is largely a result of efforts by Congress to increase taxpayer rights.

The Tax Court's failure to apply a deferential standard of review will result in a greater shift away from the historically inquisitorial process whereby the Service determined the most appropriate way to collect assessed tax liabilities.²⁴⁵ The extent to which the courts interpose themselves in tax collection decisions raises concerns for efficient, timely tax collection. Judicial proceedings are time consuming and inevitably slow the collection process. Interposing the courts in more collection cases will increase the strain on judicial resources, lower tax collections, and may undermine the Service's collection functions.²⁴⁶ Voicing these concerns, the Sixth Circuit Court of Appeals, in *Living Care Alternatives of Utica v. United States*, expressed concern that the courts might become involved in day-to-day collection decisions, an area clearly outside their expertise.²⁴⁷

There is no need to rely on any one of these explanations alone. It is clear that the IRS was well within its discretion to reject . . . an offer in compromise. If the Appeals Officer mistakenly felt his hands were tied . . . there are administrative remedies available to point out such mistakes and allow the IRS an opportunity to re-examine its earlier decision. . . . [W]ithout a clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS, as contemplated by Congress, the judiciary will inevitably become involved on a

243. Camp, *Tax Administration as Inquisitorial Process*, *supra* note 9, at 133 (concluding that adversarial aspects of the reforms should be minimized while favoring a more inquisitorial interpretation). Whether these changes are well advised is debatable. Compare Camp, *Replacing CDP*, *supra* note 91 and Camp, *The Costs of CDP*, *supra* note 91 and Camp, *The Failure of CDP, Part 2*, *supra* note 91 and Camp, *Failure of Collection Due Process, Part 1*, *supra* note 91 with Cords, *Reforming, Not Replacing, CDP*, *supra* note 91.

244. See Professor Camp's articles cited *supra* note 243.

245. Camp, *Tax Administration as Inquisitorial Process*, *supra* note 9, at 22.

246. Cords, *Scope and Nature of Judicial Review*, *supra* note 91, at 1022.

247. 411 F.3d 621, 631 (6th Cir. 2005); see also *supra* text accompanying notes 223–25.

daily basis with tax enforcement details that judges are neither qualified, nor have the time, to administer.²⁴⁸

Thus, the courts of appeals recognize that they are not to substitute their judgment for that of the appeals office in tax collection cases and need not know how to determine the tax liability to understand whether the appeals officer or the agency considered the correct factors in arriving at the challenged tax collection decision.

In *Robinette v. Commissioner*, the Tax Court allowed the taxpayer to introduce evidence that the appeals officer had refused to consider during the hearing, evidence regarding whether the taxpayer had violated the terms of an offer in compromise, allowing the Service to reinstate the original liability.²⁴⁹ The Tax Court concluded that the APA was not applicable to it (the Tax Court), it was not bound by the rule of record review, and it could consider information not included in the administrative record.²⁵⁰ After considering the additional evidence that the taxpayer offered during the CDP hearing, a majority of the Tax Court concluded that the appeals officer had improperly concluded that he did not have the authority to reinstate the offer in compromise, and that it was an abuse of discretion for the appeals officer to issue a CDP determination allowing collection to proceed.²⁵¹ The Tax Court substituted its judgment for that of the appeals office. Further, the Service has contended that administrative law, particularly the APA provisions relating to judicial review and the rule of record review, apply to judicial review of collection determinations, even when appeal lies in the Tax Court.²⁵² This argument has also been made by taxpayers appealing unfavorable CDP determinations.²⁵³

The Service is charged with collecting taxes and making decisions about the most appropriate way to collect taxes. With the possible exception of when the underlying liability is properly at issue, review of most CDP determinations does not require the substitution of the court's judgment for the Service's judgment. In those instances, if the underlying liability is properly raised during the CDP hearing, the court should conduct a de novo review and,

248. *Living Care Alternatives*, 411 F.3d at 631 (citation omitted). *But cf.* *Robinette v. Comm'r*, 123 T.C. 85 (2004) (overruling an appeals officer's erroneous conclusion that he could not reinstate an offer in compromise), *rev'd*, 439 F.3d 455 (8th Cir. 2006).

249. 123 T.C. at 102–03.

250. *Id.* at 96–97.

251. *Id.* at 112.

252. *Robinette v. Comm'r*, 439 F.3d 455, 459 (8th Cir. 2006) (the Service argued that the APA and the record rule were applicable to Tax Court review of CDP determinations); *Johnson v. Comm'r*, No. 20594-03S, T.C. Summ. Op. 2005-47, 2005 WL 883701, at *1 (U.S. Tax Ct. Apr. 18, 2005).

253. *See, e.g., Olson v. Hernandez*, 90 A.F.T.R.2d (RIA) 2002-5669, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,594 (D. Ariz 2002).

in effect, “redetermine” the tax liability because collateral estoppel or res judicata will generally preclude subsequent judicial consideration of a refund claim.

Similarly, when the Service denies a request for equitable innocent spouse relief, it has determined that the requesting spouse is not entitled to equitable relief. The Code permits “the Secretary” to make this determination,²⁵⁴ and the question on review is whether that determination was an abuse of discretion.²⁵⁵ The Tax Court has jurisdiction to review stand-alone innocent spouse requests and deficiency cases.²⁵⁶ In refund cases, innocent spouse claims can be brought in the district court or the Court of Federal Claims.²⁵⁷

The use of different approaches to abuse of discretion simply as a result of the court in which the case is or can be brought violates sound tax policy. Contrary to the approach used by the district courts and approved by the Courts of Appeals that have considered the issue, the Tax Court does not apply administrative law when reviewing tax collection decisions.²⁵⁸ These different approaches undermine the certainty and benefits that should accrue from common standards.

In reaching the conclusion that administrative law and the APA are inapplicable during its review of collection cases, the Tax Court has not fully considered the differences between the court’s deficiency jurisdiction and its jurisdiction with respect to most collection decisions. In this context, Tax Court Judges Halpern and Holmes have written strong dissents favoring an application of administrative law and an abuse of discretion standard in these cases.²⁵⁹

Moreover, an approach to collection cases contrary to the congressional mandate may violate the separation of powers that requires that the Congress create the laws, that the Executive Branch enforce the laws, and that the courts interpret the law.²⁶⁰ The current approach could lead to an even less efficient use of resources. At least some collection decisions would be left to the Tax Court, which does not have the experience or expertise to efficiently make these decisions. This would hamper the functioning of the tax collection system, slowing final findings relating to appropriate means of tax collection.

Moreover, de novo review is not necessary to protect taxpayers. Judicial review of CDP determinations and denials of innocent spouse relief and interest abatement do not eliminate taxpayers’ other opportunities to challenge

254. I.R.C. § 6015(f) (West Supp. 2007).

255. *Ewing v. Comm’r*, 122 T.C. 32, 36–37 (2004), *rev’d*, 439 F.3d 1009 (9th Cir. 2006).

256. I.R.C. § 6015(e)(1).

257. *Id.*

258. *Ewing*, 122 T.C. at 37.

259. *Id.* at 56–71 (Halpern and Holmes, JJ., dissenting).

260. Sargentich, *supra* note 144, at 609. *But see* Pierce, *supra* note 144, at 89–90.

a tax liability. Rather, the more recently created opportunities for taxpayer access to administrative procedures and judicial review in tax collection cases provide taxpayers with additional rights. These rights add to the preexisting opportunities for evaluation and review of the taxpayer's liability and payment options.

Providing additional rights in tax collection cases is costly both in terms of the use of resources and in collection of revenues. Administratively, CDP hearings require appeals officers to conduct hearings and make CDP determinations. Innocent spouse claims require an administrative determination and may permit a request for reconsideration by the appeals office. Because tax collection is slowed by requests for CDP hearings, innocent spouse relief, and interest abatement tax revenues are reduced by these rights. Revenues are also reduced in most cases where relief is granted.²⁶¹ Taxpayer CDP rights are currently the most litigated tax issue.²⁶² While not as frequently litigated, requests for innocent spouse relief and interest abatement also have a substantial cost.

The informality of the CDP hearing procedures usually means that there is no transcript of the hearing.²⁶³ The absence of a transcript limits the record available for review, but that is not a bar to abuse of discretion review.²⁶⁴ However, in many cases taxpayers can record a CDP hearing at their own expense.²⁶⁵

261. Revenues will be decreased if interest is not collected. When innocent spouse relief is granted, the revenue effect is less certain, as the liability remains valid as to the other spouse; however, it may be unknown whether collection is possible. In CDP cases, if a collection alternative is permitted, collections may be reduced (offer in compromise) or may take longer to collect (installment agreement), both of which reduce revenue. However, if other assets are used to pay a liability in a CDP case, there will not be a revenue impact.

262. See generally Cords, *How Much Process is Due*, *supra* note 91, at 60–61 (discussing the projections and realities of the first several years of CDP requests and review). A recent report by the Treasury Inspector General for Tax Administration reported that fully one quarter of the appeals office's case load consists of CDP cases. See NAT'L TAXPAYER ADVOCATE, 2006 REPORT, *supra* note 3, at 556 (noting that collection due process litigation has led tax litigation each year since 2001).

263. The Internal Revenue Manual directs appeals officers to create a recording for the Service in cases where the taxpayer has a right to record the hearing and exercises that right. INTERNAL REVENUE MANUAL § 8.6.1.2.5.

264. *Cox v. Comm'r*, 126 T.C. 237, 247 (2006), *rev'd*, 14 F.3d 1119 (10th Cir. 2008) (“[W]e have never held or implied that any particular type of record is a necessary prerequisite for meaningful review. Rather, our precedent and the administrative records underlying each of those proceedings counsel that a broad continuum exists in terms of the evidence we have found sufficient to support judicial consideration.”).

265. *Keene v. Comm'r*, 121 T.C. 8, 19 (2003) (concluding that I.R.C. § 7521 provided taxpayers with a right to create an audio recording of a CDP hearing); *cf.* *Compucel Serv. Corp. v. Comm'r*, 89 A.F.T.R.2d (RIA) 2002-1286; 2002-1 U.S. Tax Cas. (CCH) ¶ 50,284 (D. Md. 2002) (concluding that there was no need to remand for an additional hearing because an

The Tax Court, along with other courts, has acknowledged that while transcripts may be helpful, they are not essential to permit a determination whether there was an abuse of discretion.²⁶⁶ The documentary record is often more relevant to the determination whether the proposed collection action is appropriate than is the discussion, as the documentary record will establish whether the taxpayer is eligible for a collection alternative or qualifies for innocent spouse relief.²⁶⁷ A transcript may be most helpful when the taxpayer properly raised the underlying liability during an appeals office hearing, but the underlying liability is seldom properly at issue during collection cases.²⁶⁸

However, the use of significant resources does not justify inadequate performance by the agency. One of the reasons that judicial review of agency action is preferred is to ensure that agencies adequately perform their duties.²⁶⁹ In addition, the knowledge that a court may review an agency's decision may provide an additional incentive for the agency to properly conduct its review functions.

Any strain that Congress's grant of additional rights places on the Service should not be cured through active assumption of those duties by the Tax Court. The Tax Court should perform only the review intended by Congress.

adequate record had been created). Many of the courts that have concluded that there is a right to create an audio recording have also concluded that, in many cases, a CDP determination is not invalid even if the taxpayer was not given an opportunity to exercise the right to record the CDP hearing. *See, e.g.,* Frey v. Comm'r, 87 T.C.M. (CCH) 1170, 1181 (2004); Durrenberger v. Comm'r, 87 T.C.M. (CCH) 1000, 1002 (2004); Brashear v. Comm'r, 86 T.C.M. (CCH) 16, 19 (2003); Kemper v. Comm'r, 86 T.C.M. (CCH) 12, 16 (2003). All of these instances where failure to permit a recording have not invalidated the appeals officer's CDP determination have been instances in which the taxpayer has proceeded to participate in the conduct of the CDP hearing despite the denial of an opportunity to create an audio recording. However, as is the case with respect to some other agencies informal proceedings, some courts have noted that the failure to allow or require the creation of a transcript of the hearing makes judicial review of the CDP determination more difficult. *Mesa Oil, Inc. v. United States*, 86 A.F.T.R.2d (RIA) 2000-7312; 2001-01 U.S. Tax Cas. (CCH) ¶ 50,130 (D. Colo. 2000).

266. *Kemper*, 86 T.C.M. (CCH) at 16 (concluding that it was not necessary to remand case to permit a hearing at which the taxpayer could make a recording when the taxpayer had participated in the original hearing). *But cf. Keene*, 121 T.C. at 14-19 (concluding that I.R.C. § 7521(a)(1) required permitting a taxpayer to make an audio recording of a CDP hearing).

267. If not for the lack of sophistication and inarticulateness of many of the taxpayers involved in CDP hearings, correspondence and the submission of documentary information would probably be the primary consideration in most cases. However, limiting CDP hearings to the exchange of documentary information would disadvantage those most likely to benefit from the process. *See Cords, Reforming, Not Replacing CDP*, *supra* note 91, at 818-19.

268. I.R.C. § 6330(c)(2)(B) (West Supp. 2007) (limiting the circumstances under which the underlying liability may be raised to instances where the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability").

269. *Fisher v. United States*, 45 F.3d 396, 397 (10th Cir. 1995); 3 KOCH, *supra* note 59, §10.6[3].

In most cases, courts should not create their own record or the substitute the court's judgment for that of the Service in tax collection cases. The Tax Court's review in most collection cases should be limited to a review of the record the IRS creates, and then only for abuse of discretion. In cases where the record is inadequate to support the collection decision, the most appropriate course of action is to remand the case to the Service to explain its decision or supplement the record. In other cases, the court can reject the Service's decision when that decision represents an abuse of discretion.

3. Application *to* the Tax Court versus *by* the Tax Court

In determining whether the Tax Court ought to apply the rules of administrative law, a distinction needs to be drawn between applying administrative law to the Tax Court and an application of administrative law by the Tax Court. The Eighth Circuit pointed to this distinction in reversing *Robinette*. The Eighth Circuit rejected the Tax Court's conclusion that it was not limited to reviewing the record created at the hearing.²⁷⁰ The Eighth Circuit noted that the Tax Court's position was based on an erroneous position in an earlier case, *Nappi v. Commissioner*.²⁷¹ "*Nappi* focused erroneously on the status of the reviewing court, rather than on the status of the administrative body rendering the decision under review. The Internal Revenue Service, of course, is an agency of the government, and review of its decisions may be governed by the APA."²⁷² Relying on the distinction between the application to and the application by the Tax Court, the court of appeals held that the record rule applied.²⁷³

Notwithstanding the refusal of a majority of the Tax Court to apply the APA and administrative law in collection cases,²⁷⁴ Judge Halpern of the Tax Court has made an excellent case for the applicability of administrative law to the consideration of actions by the IRS.²⁷⁵ In these cases, Judge Halpern persuasively explains the proper approach to the review of CDP determinations under the APA and the principles of administrative law. This approach can and should be extended to judicial review of other tax collection cases.

In *Robinette*,²⁷⁶ dissenting Judges Halpern and Holmes explained the approach that should be used by the Tax Court in CDP cases, including following the rule of record review.²⁷⁷ Judges Halpern and Holmes made

270. *Robinette v. Comm'r*, 439 F.3d 455, 459–62. (8th Cir. 2006).

271. *Id.* at 461 n.5 (citing *Nappi v. Comm'r*, 58 T.C. 282, 284 (1972)).

272. *Id.*

273. *Id.* at 460–62.

274. *Robinette v. Comm'r*, 123 T.C. 85, 95–105 (2004).

275. *See, e.g., Nestor v. Comm'r*, 118 T.C. 162, 172–74 (2002) (Halpern, J., concurring); *Lunsford v. Comm'r*, 117 T.C. 159, 165–75 (2001) (Halpern, J., concurring).

276. 123 T.C. 85 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006).

277. *Id.* at 121 (Halpern and Holmes, JJ., dissenting).

similar arguments relating to innocent spouse cases in *Ewing v. Commissioner*.²⁷⁸

Even though the Eighth Circuit reversed the Tax Court in *Robinette*, the Tax Court could continue to apply its precedent in many other cases. Under *Golsen v. Commissioner*, the reversal of *Robinette* will only apply to taxpayers petitioning the Tax Court from the Eighth Circuit, unless the Tax Court chooses to reverse its holding.²⁷⁹ It is unclear how far the Tax Court might extend its reasoning in *Robinette*. First, the facts in *Robinette* indicate that throughout the hearing process the taxpayer had repeatedly attempted to present evidence regarding the efforts he made to file his tax returns and his pattern of filing at the end of the period of extensions.²⁸⁰ Second, the Tax Court has not overruled its decision in *Magana v. Commissioner*,²⁸¹ which requires that, to be considered on appeal, an issue must be raised at the appeals office. Finally, a number of the Tax Court's judges indicated concern that the Tax Court should not extend its holding in *Robinette* to cases where the taxpayer had withheld information from the appeals officer and then attempted to present it at trial.²⁸² Moreover, the Tax Court has cited *Robinette* in a number of cases, rejecting contentions that the Tax Court's review is limited to the administrative record.²⁸³ This uncertainty in how tax law will be applied and what the tax law is in collection cases is unproductive.

Because the Tax Court is a court and its decisions are reviewed by the courts of appeals with the deference afforded to judicial opinions of other courts, it is clear that administrative law and its standards of review do not apply to the Tax Court. The Tax Court is a court and, throughout most of its history, it has acted as a court, performing quasi-judicial functions even as an executive agency.²⁸⁴ As a court, its decisions are reviewed in the same manner as those of other courts.²⁸⁵

278. 122 T.C. 32, 56 (2004) (Halpern and Holmes, JJ., dissenting).

279. 54 T.C. 742 (1970).

280. *Robinette*, 123 T.C. at 86–92.

281. 118 T.C. 488, 493–94 (2002) (holding that a taxpayer could not raise an issue on review that had not been raised at the CDP hearing).

282. *Robinette*, 123 T.C. at 112–17, 119–21 (Wells, Thornton, Wherry, JJ., concurring).

283. See, e.g., *Enos v. Comm'r*, 123 T.C. 284, 305 n.17 (2004); see also *Negoescu v. Comm'r*, No. 11500-03S, T.C. Summ. Op. 2005-161, 2005 WL 3068362 (U.S. Tax Ct. Nov. 8, 2005).

284. See *supra* Part I.

285. I.R.C. § 7482(a) (2000). Because there was some question historically regarding the deference to be afforded to Tax Court decisions, Congress confirmed that the courts of appeals were to review Tax Court decisions in the same manner as district court decisions rendered after civil bench trials. Section 7482 was enacted to resolve the question of the standard to be applied to Tax Court decisions. As a result of this section, courts of appeals review the Tax Court's application of law de novo and the Tax Court's findings of fact for clear error. *Fargo v. Comm'r*,

Although the Tax Court is not required to conform its procedures to the APA, the APA's provisions relating to judicial review are applicable to the review of agency actions. These provisions are controlling in the same way any other statute applicable to the actions of an agency, such as the Service, is controlling when applicable. The APA framework and administrative law principles should be applied to the review of IRS actions, unless there is a provision to the contrary.²⁸⁶ This approach would increase certainty of result, as well as make review more efficient.

4. Deficiency Cases Versus Other Tax Court Jurisdiction

Congress has specifically provided for de novo review of deficiency redeterminations; the Tax Court is directed to "redetermine" deficiencies.²⁸⁷ The court conducts a trial and makes its own finding of fact and conclusions regarding the correct tax liability.²⁸⁸ Thus, administrative law is not applied during judicial review of deficiency determinations in the Tax Court. Final decisions of the Tax Court can be appealed to the courts of appeals, where they are reviewed in the same manner as the decisions of the district courts.

However, it is not a necessary corollary to the nature of review in deficiency cases that Congress intended that the Tax Court use the same approach in all cases. To determine the nature of the review it is necessary to consider the jurisdictional grant, the nature of the action or decision being reviewed, and the scope of review intended by the grant of jurisdiction.

The standard applied should be determined by the question to be answered. In deficiency and refund cases the question is the correct amount of tax. Determining a tax liability requires that the court collect evidence. To the contrary, in most tax collection cases, the question is whether the appeals officer's collection decision was an abuse of discretion. The former question must be considered de novo. When answering the latter question, the court lacking the experience to make decisions about how best to collect tax liabilities should not substitute its judgment for that of the appeals officer. De novo review is inappropriate.

The next section addresses the benefits of administrative law in judicial review of tax collection decisions. This section demonstrates why the Tax Court should reconsider its approach to these cases.

447 F.3d 706, 709 (9th Cir. 2006); *Lurie v. Comm'r*, 425 F.3d 1021, 1025 (7th Cir. 2005); *Blodgett v. Comm'r*, 394 F.3d 1030, 1035 (8th Cir. 2005).

286. This is not to say that all decisions or actions taken by the IRS are or even should be subject to review.

287. I.R.C. § 6213(a) (2000 & Supp. IV 2004); § 6214(a) (West Supp. 2007).

288. See Cords, *Reforming, Not Replacing, CDP*, *supra* note 91, at 821.

IV. BENEFITS OF APPLYING ADMINISTRATIVE LAW TO REVIEW OF IRS DECISIONS

A. *In General*

It is axiomatic that the tax laws must be applied consistently to all taxpayers.²⁸⁹ Without consistent application of the tax laws, the tax system is subject to claims that it is unfair, which will undermine the system's effectiveness.

Giving taxpayers a way to provide input during collections should increase the perception, if not the reality, that taxpayers receive fair and equitable treatment.²⁹⁰ Permitting all taxpayers the same type of review, ensures that similarly situated taxpayers are treated similarly, furthering the principles of horizontal equity. However, the use of different approaches or standards by different courts will potentially impair horizontal equity.

Although inconsistent results and multiple opportunities to seek relief in tax cases are not uncommon, creating additional such inconsistencies should not be done unnecessarily or lightly.²⁹¹ For instance, when considering the taxpayer's liability, whether during a deficiency case or a refund case, the Tax Court and the district courts use the same approach. Both courts conduct de novo trials in these cases to determine the correct tax liability.

Likewise, in other tax cases, where there is overlapping jurisdiction, and when the decisions being reviewed closely resemble decisions made by other agencies, common standards of review should be used. However, the Tax Court does not apply administrative law rules in nondeficiency cases, while the district courts do.²⁹² As a result of the courts using different approaches, taxpayers may receive inconsistent treatment solely because of the court with jurisdiction over the case. This has nothing to do with the substance of the case. Applying administrative law during judicial review of tax collection cases would increase consistency between similarly situated taxpayers. Additionally, this approach would create more consistency between administrative agencies.

289. There are two axes across which equal treatment may be viewed. The first is horizontal equity, which requires that similarly situated taxpayers be treated similarly. The second is vertical equity, which requires that differently situated taxpayers be treated differently. See generally Jeffrey H. Kahn, *The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity*, 57 HASTINGS L.J. 645 (2006).

290. Cords, *Reforming, Not Replacing*, CDP, *supra* note 91, at 821. This may be a case where perception is reality.

291. But see *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985) (“[U]niformity of decision among the circuits is vitally important on issues concerning the administration of the tax laws.”).

292. Book, *supra* note 91, at 1173–74.

Using administrative law in tax collection cases could increase judicial efficiency. By limiting review to the record created during the administrative proceeding, less fact-finding will be needed, which will permit courts to more quickly and efficiently decide these cases. Moreover, fairness and taxpayer rights should not be harmed by the application of a deferential standard of review because abuse of discretion review is not meaningless. A deferential standard of review provides adequate protection against arbitrary action. Decisions that may be judicially challenged are more likely to be carefully considered than those not subject to review.

The informal nature of the proceedings may result in a limited or even insufficient record.²⁹³ However, that does not prevent the hearing from being fair or limit the availability of meaningful judicial review.²⁹⁴ When the record is inadequate, a court can remand a case for additional proceedings in the appeals office or receive evidence to explain the record and the appeals officer's determination. Remand to the appeals office is not an insignificant remedy. Although it might seem that remand to the same agency, office, and appeals officer would be unlikely to change the result the second time, this may not be the case. In its order remanding a case for further proceedings, the court indicates the reason it found the prior proceeding to be inadequate. Upon remand for an abuse of discretion, it is likely that the decision will either be different or more carefully reasoned, even if the same appeals officer is involved. The agency is likely to try to cure the defect in the proceeding; the second time around the agency may reach a different conclusion than it did first time.²⁹⁵

B. *In Tax Collection Cases*

While a number of courts have used administrative law in tax collection cases, only the Eighth Circuit Court of Appeals has squarely addressed whether administrative law rules apply to the Tax Court's review of tax collection decisions.²⁹⁶ All of the courts considering CDP appeals have approved the use of abuse of discretion review when the underlying liability

293. *Mesa Oil, Inc. v. United States*, 86 A.F.T.R.2d (RIA) 2000-7312, 2000-7318; 2001-01 U.S. Tax Cas. (CCH) ¶ 50,130 (D. Colo. 2000) (“[T]he lack of a record makes it impossible to tell what was discussed at the hearing and what factors were considered . . .”).

294. *Keene v. Comm’r*, 121 T.C. 8, 12 (2003); *Hardy v. United States*, 91 A.F.T.R.2d (RIA) 2003-2668; 2003-2 U.S. Tax Cas. (CCH) ¶ 50,542 (N.D. Ala. 2003); *Compucel Serv. Corp. v. Comm’r*, 89 A.F.T.R.2d (RIA) 2002-1286, 2002-1288; 2002-1 U.S. Tax Cas. (CCH) ¶ 50,284 (D. Md. 2002).

295. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984, 1059–60 (1990) (concluding that data evaluated showed a “major change” by the agency after remand).

296. *Robinette v. Comm’r*, 439 F.3d 455, 459–61 (8th Cir. 2006) (reversing the Tax Court's holding that the Tax Court was not required to apply the rule of review on the record).

was not at issue during the CDP hearing.²⁹⁷ However, the Eighth Circuit's opinion in *Robinette v. Commissioner* may have little impact on most taxpayers requesting review of a tax collection decisions. The potential inconsistency of results may be exacerbated by the consolidation of jurisdiction over CDP appeals in the Tax Court.²⁹⁸ As a result of the Tax Court's conclusion that it does not have to apply the record rule and other principles of administrative law, individuals and businesses that request review of other (nondeficiency) decisions by the Service are likely to receive different treatment and quite possibly different results based solely on whether they are permitted to seek review in the district court or the Tax Court. In most instances, tax collection cases do not afford taxpayers the choice of forum that they have become accustomed to in other tax litigation.

While the deficiency and refund procedures are designed to allow full development of a taxpayer's total liability, in most instances, tax collection cases should be used only to determine, as expeditiously as possible, whether the proposed collection actions are appropriate.²⁹⁹ Tax collection cases provide a supplemental right. Taxpayers do not lose any other available rights. Even taxpayers who have not yet had an opportunity to challenge the underlying liability can make a refund claim after payment.³⁰⁰

In almost all cases in which a taxpayer appeals a tax collection decision, the court need only determine whether the IRS's decision was an abuse of discretion. This will permit the scope of and time for trial to be limited, minimizing the impact on tax collections. De novo trials, which require extensive trial preparation and the presentation of evidence, will dramatically slow tax collection. RRA 1998, CDP rights, increased availability of innocent spouse relief, and provision for interest abatement along with the right for judicial review seems to have been intended to provide a check on the Service's discretion. To entirely restructure the tax collection system, Congress should be explicit. That only certain tax collection decisions are reviewable and Congress has provided for abuse of discretion review does not suggest that Congress intended to set aside unspecified long-standing principles. Moreover, expedient and efficient tax collection remains important.

297. *Action Employment Res., Inc. v. United States*, 158 F. App'x 67 (9th Cir. 2005); *Tinnerman v. Comm'r*, 156 F. App'x 111, 112 (11th Cir. 2005); *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005); *Orum v. Comm'r*, 412 F.3d 819, 820 (7th Cir. 2005); *Living Care Alternative of Utica v. United States*, 411 F.3d 621, 627 (6th Cir. 2005); *Jones v. Comm'r*, 338 F.3d 463, 466 (5th Cir. 2003).

298. *See supra* note 79 and accompanying text.

299. I.R.C. § 6330(c)(2)(A) (West Supp. 2007).

300. I.R.C. § 6330(c)(2)(B). This may not address the concern that some taxpayers may not be able to pay and then sue. However, to the extent that is seen as a problem, there are direct ways that could be addressed, such as granting the Tax Court greater jurisdiction or increasing access to the Tax Court.

To permit challenges to the underlying liability in all cases would slow the tax collection process and require that the entire tax collection process be reconfigured. Systematically permitting challenges to the underlying liability during the collection process would significantly slow the tax collection process. In addition, some taxpayers would obtain an opportunity for review that is not available to taxpayers who promptly paid their taxes.

In most cases, neither the taxpayer's nor the government's interest is advanced by permitting challenges to the underlying liability after the tax has been assessed. Because deficiency and refund procedures are designed to allow a *de novo* determination of the correct tax liability, such litigation can be time consuming. In addition, taxpayers can only avail themselves of a single opportunity to challenge the liability—additional attempts to challenge the liability are generally barred by *res judicata* or collateral estoppel.³⁰¹

Permitting taxpayers to challenge the underlying liability during the collection process usually will not permit a taxpayer to fully develop a case regarding the correct liability because collection must proceed as expeditiously as possible. Post-assessment, pre-collection processes are much better suited to a consideration of whether the taxpayer is entitled to a collection alternative, whether innocent spouse relief is available, or whether other means of collection would balance the government's needs against the taxpayer's interest, minimizing the intrusiveness of the collection.

CONCLUSION

A consistent approach to judicial review of tax collection decisions will benefit taxpayers and tax collection and administration. Moreover, following the relatively clear direction of Congress to review tax collection decisions for abuse of discretion will reduce the workload relating to tax collection cases. Using the rule of record review, it would be unnecessary to conduct time and resource intensive *de novo* trials and increase the incentive for taxpayers to present all relevant issues at the hearing. The Tax Court will be able to more efficiently handle the other cases on its docket that require *de novo* review. All taxpayers should receive a quicker adjudication, reducing the total amount of interest and penalties that will ultimately be due on unpaid liabilities.

To achieve these benefits, the Tax Court must reconsider its approach to the review of judicial appeals of CDP determinations. The Tax Court should realize that not only does the law require that it limit its review in CDP appeals to the record created by the Service, unless the underlying liability is at issue, but also that it is prudent, efficient, and beneficial to tax administration that it do so. The Tax Court should consider the arguments raised by Tax Court Judges Halpern and Holmes in support of the application of administrative law.

301. *Comm'r v. Sunnen*, 333 U.S. 591, 598–99 (1948).

It should also give close attention to the Eighth Circuit's decision in *Robinette*.³⁰²

However, given the Tax Court's long-standing reluctance to apply the APA and administrative law, the Tax Court may be hesitant to significantly change its approach to the review of IRS collection decisions. Rather, it may be necessary for additional cases to be brought to the circuit courts of appeals, requiring the Tax Court to apply the rules of administrative law in cases arising in each circuit. Alternatively, Congress could direct the Tax Court regarding the appropriate approach. Both of these alternatives require external intervention, which could be avoided if the Tax Court heeds the wisdom of the Eighth Circuit's *Robinette* decision. Reconsideration by the Tax Court would be more expeditious. Nonetheless, it is essential to proper operation of the tax collection system that changes occur with respect to judicial review of tax collection decisions. Voluntary change by the courts is preferable, but unless that happens, legislative direction is needed. That almost ten years after the enactment of RRA 1998 the judges of the Tax Court are still debating whether de novo fact-finding or traditional abuse of discretion review is appropriate suggests that there is still a ways to go in settling the debate, and legislative intervention may be unavoidable.

302. See 439 F.3d 455 (8th Cir. 2006).