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Arbitrary Stat Notices in Valuation Cases, or Arbitrary Ninth Circuit?

By Leandra Lederman

I. Introduction

Valuation disputes are some of the most factually complex cases considered by the United States Tax Court.¹ Which party, the taxpayer or the government, should bear the burden of proving the value of such an asset as a minority stock interest in a closely held corporation, for example? As with any other factual matter in a tax case, the taxpayer generally bears the burden of proof, subject to several exceptions.² The principal exceptions are fraud;³ "new matter, increases in deficiency, and affirmative defenses";⁴ issues with respect to which the taxpayer produces credible evidence and meets several other requirements;⁵ and "arbitrary and erroneous" deficiency notices in cases involving unreported income.⁶

In the past few months, the Court of Appeals for the Ninth Circuit has reversed the Tax Court in three estate tax cases involving valuation of minority stock interests.⁷ In each of these cases, the IRS determined a

higher deficiency in its deficiency notice than it subsequently pursued in the Tax Court trial. In each instance, the Ninth Circuit interpreted the IRS's reduction in the deficiency to mean that the deficiency notice was "arbitrary," requiring a shift in the burden of persuasion to the IRS.

The Ninth Circuit's approach to decreased deficiencies appears to stem from a longstanding misunderstanding of the burden of proof rules in tax cases. This article analyzes its approach. It also considers the incentives the rule raises and the unfortunate IRS position it encourages.

A. The Three Cases

The three cases referenced above, raising the issue of the procedural effect of a decreased deficiency, are *James J. Morrissey v. Commissioner*, *Estate of Richard R. Simplot v. Commissioner*, and *Estate of Paul Mitchell v. Commissioner*. In each of these cases, an individual died owning shares in an extremely profitable closely held corporation. In each case, the estate filed a return reporting a valuation of the shares that was later questioned by the IRS. Each estate received a deficiency notice and petitioned the Tax Court. Each case was appealed to the Court of Appeals for the Ninth Circuit, which reversed the Tax Court, sometimes remanding the case. In each case, the Court of Appeals held that the Tax Court had improperly failed to place the burden of proof on the IRS.

In the first of these cases, *James J. Morrissey v. Commissioner*, Alice Kaufman had died in 1993 owning 46,000 shares of stock in Seminole Manufacturing Co., a privately held company that is the largest seller of professional uniforms in the United States.⁸ Most of the Seminole shareholders were related to each other by blood or marriage.⁹ The block of shares held by Kaufman's estate, nearly 20 percent, was the largest block of Seminole stock owned by any one shareholder. James J. Morrissey was an executor of the Kaufman estate.¹⁰

The estate valued Kaufman's shares at \$29.77 per share on her estate tax return, relying primarily on two sales that had occurred two months after the valuation date. The IRS determined an estate tax deficiency, as-

¹See, e.g., *Messing v. Commissioner*, 48 T.C. 502, 512 (1967) (criticizing parties' sometimes "overzealous effort, during the course of the ensuing litigation, to infuse a talismanic precision into an issue which should frankly be recognized as inherently imprecise and capable of resolution only by a Solomon-like pronouncement."); *Gardner v. Commissioner*, T.C. Memo. 1983-171 ("because each valuation case turns on its own unique set of facts, previously decided valuation cases are of little assistance").

²See Tax Court Rules of Practice and Procedure 142(a).

³See section 7454.

⁴Section references are to the Internal Revenue Code of 1986, as amended.

⁵See section 7491.

⁶See, e.g., *Anastasato v. Commissioner*, 794 F.2d 884, 887 (3d Cir. 1986); *Weimerskirch v. Commissioner*, 596 F.2d 358, 360 (9th Cir. 1979); *Gerardo v. Commissioner*, 552 F.2d 549, 553-54 (3d Cir. 1977); *Dellacroce v. Commissioner*, 83 T.C. 269, 276 (1984).

⁷See *Estate of Richard R. Simplot v. Commissioner*, 249 F.3d 1191 (9th Cir. 2001), No. 00-70013, *Doc 2001-13797* (13 original pages), 2001 TNT 95-13; *Estate of Paul Mitchell v. Commissioner*, 250 F.3d 696 (9th Cir. 2001), No. 99-70421, *Doc 2001-12687* (15 original pages), 2001 TNT 87-12; *Morrissey v. Commissioner*, 243 F.3d 1145 (9th Cir. 2001), No. 99-71013, *Doc 2001-7737* (6 original pages), 2001 TNT 53-72.

⁸*Estate of Alice Friedlander Kaufman*, T.C. Memo. 1999-119, *Doc 1999-12947* (36 original pages), 1999 TNT 66-8.

⁹*Id.*

¹⁰*Id.*

serting that the fair market value of the estate's stock was \$70.79 per share.¹¹ After concessions, the IRS lowered its valuation to \$56.50 per share. Based on the facts surrounding the two stock sales, the Tax Court rejected them as evidence of value. Instead, using values of comparable companies, reduced by applicable discounts, the Tax Court upheld the IRS's valuation.¹²

On appeal, the Court of Appeals for the Ninth Circuit found that because the IRS had abandoned its deficiency notice values for the stock, the IRS bore the burden of proving whether any deficiency existed and, if so, how much.¹³ Based on the facts, it found "[n]o good reason existed to reject" the two sales as evidence of the fair market value of the stock.¹⁴ Thus, it reversed the Tax Court, and upheld the estate's valuation.

Estate of Richard R. Simplot was released next. In that case, Richard Simplot had died in 1993 owning 18 of the 76 shares (23.68 percent) of the voting stock, and 3,942 of the 141,288 shares (2.79 percent) of the nonvoting stock of J.R. Simplot Co., a family-owned corporation.¹⁵ J.R. Simplot Co. is the successor corporation to the company that, among other things, developed the technique for producing frozen french fries.¹⁶ Currently, J.R. Simplot Co. is the single largest supplier of french fries to McDonald's.¹⁷ On its return, the Simplot estate valued both classes of stock at \$2,650 per share. The IRS determined that the value was \$3,585.50 per share.¹⁸

Despite the fact that Simplot held a minority interest in the company, the Tax Court applied a premium for voting privileges equal to three percent of the company's equity. It also applied lack of marketability discount of 35 percent.¹⁹ The court found that the voting stock was worth \$215,539 per share and the nonvoting stock was worth \$3,417 per share.²⁰ A majority of a three-judge panel in the Ninth Circuit Court of Appeals found that because the IRS had "conceded that the assessed deficiency was erroneous, [it] thereby forfeit[ed] any presumption of correctness."²¹ The appellate majority also found numerous errors in the Tax Court's approach to the valuation. Thus, the appeals court reversed and remanded the case to the Tax Court for entry of judgment in favor of the estate.²²

Estate of Paul Mitchell v. Commissioner involved the famous hair stylist behind the Paul Mitchell line of hair care products, Paul Mitchell.²³ In 1979, Mitchell had joined with John Paul "Jones" DeJoria to market his hair styling products through hair salons.²⁴ DeJoria had experience in the sale, marketing, promotion, and distribution of beauty products as an employee of Redken,²⁵ a manufacturer of various haircare products sold through salons.²⁶ In 1980, Mitchell and DeJoria formed Paul Mitchell Systems, Inc., which later changed its name to John Paul Mitchell Systems (JPMS).²⁷ Mitchell and DeJoria granted JPMS the rights to any hair and skin products that Mitchell developed.²⁸

In 1984, Mitchell assigned his JPMS shares to the Paul Mitchell Trust, a revocable trust he established (the Trust).²⁹ At the time of Mitchell's death, on April 21, 1989, the Trust owned 1,226 shares of JPMS, which constituted 49.04 percent of the stock.³⁰ On its estate tax return, the executor, Patrick T. Fujieki, valued the 1,226 shares at \$28.5 million.³¹ This was based on a valuation analysis prepared for Fujieki by KPMG Peat Marwick (KPMG). The KPMG valuation used both comparable companies and discounted cash-flow analyses.

In its deficiency notice, the IRS determined that the 1,226 shares were worth \$105 million.³² The estate petitioned the Tax Court. After the trial, the estate asserted in an amended petition that the stock was worth \$23,062,000.³³ The IRS lowered its valuation to \$81 million. The Tax Court ultimately determined that the proper valuation was \$41,532,600.³⁴ In part, valuation depended on the appropriate discounts for a minority interest and lack of marketability.

Of the three cases, *Estate of Mitchell* involved the most litigation of the burden of proof issue. In that case, the estate filed a motion in the Tax Court to shift the burden of proof to the IRS, arguing that the IRS should bear the burden of justifying its assessment or submitting a more accurate one.³⁵ The Tax Court denied the motion without explanation.³⁶ The estate appealed to the Ninth Circuit on this and other issues.³⁷

The Ninth Circuit reversed the Tax Court on the burden of proof issue. It found the deficiency notice "arbitrary and excessive" based on two facts. First, at

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*James J. Morrissey v. Commissioner*, 243 F.3d 1145, 1148 (9th Cir. 2001).

¹⁵*Estate of Richard R. Simplot v. Commissioner*, 112 T.C. 130, 131 (1999), *Doc 99-10978 (78 original pages)*, 1999 TNT 55-10.

¹⁶*Id.* at 133. "In 1953, Simplot produced and sold the first commercial frozen french fry." See http://www.simplot.com/annual_report/food_group.html (visited on May 23, 2001).

¹⁷<http://www.poleseclancy.com/services/ARS/MarcamAR.html> (visited on May 23, 2001).

¹⁸*Estate of Richard R. Simplot*, 112 T.C. 130, 131 (1999).

¹⁹*Id.*

²⁰*Id.*

²¹*Estate of Richard R. Simplot*, 249 F.3d at 1193.

²²*Estate of Richard R. Simplot*, 112 T.C. at 132.

²³*Estate of Paul Mitchell v. Commissioner*, T.C. Memo. 1997-461, *Doc 97-28161 (49 pages)*, 97 TNT 197-13.

²⁴*Id.*

²⁵*Id.*

²⁶See <http://redken.com/about/history.cfm> (visited on May 22, 2001).

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵See *Estate of Paul Mitchell*, 250 F.3d 697.

³⁶*Id.* at 699.

³⁷*Id.* at 700.

trial, an expert witness for the IRS valued the JPMS stock at \$81 million, which was \$34 million less than the valuation in the deficiency notice. Second, a letter written by the IRS's appraiser revealed that the appraiser initially valued the trust's interest as a minority interest, but, at the IRS's request, treated the estate's interest as a controlling interest, which increased the valuation from \$85 million to \$105 million. Thus, the appellate court found that the Tax Court should have shifted the burden of proof "because the Commissioner's determination was demonstrated, by its own experts, to be invalid. . . ." ³⁸ It remanded the case to the Tax Court with instructions that the IRS bear the burden of proving the amount of estate tax in excess of that reported on the return. ³⁹

In each of these cases, the IRS's reduction during Tax Court litigation of its valuation of stock included in the estate of a decedent played a role in the Ninth Circuit's reversal of the Tax Court holdings. In *Morrissey* and *Simplot*, the IRS lost cases it had won below, and, in *Mitchell*, it will be faced with bearing the burden of proving value in excess of that determined by the estate in its return. In all three cases, the holding rested on the procedural ruling that because the IRS had abandoned the valuation in the deficiency notice, the IRS had the burden of proving the existence of a deficiency and its amount. ⁴⁰ More specifically, each case rested its ruling on the "arbitrariness" of the deficiency notice. Thus, the role that arbitrary notices of deficiency play in the burden of proof in Tax Court cases is discussed below.

II. The Burden of Proof Regime in Tax Court

Litigation of a tax deficiency in Tax Court requires a taxpayer to timely petition the court in response to a deficiency notice. In Tax Court, the deficiency notice is accorded a "presumption of correctness," ⁴¹ and the taxpayer bears the burden of proof. ⁴² The presumption of correctness is the source of much confusion, but it is best understood to mean that the taxpayer bears the

burden of going forward. ⁴³ In other words, in general, the notice of deficiency presents a *prima facie* case that the taxpayer must rebut. This provides some incentive for the IRS to lay out the basis of its case in the deficiency notice.

The incentive for IRS disclosure in the deficiency notice is backstopped by Rule 142(a), which provides that the IRS bears the burden of proof on increased deficiencies and "new matter" ⁴⁴ not raised in the notice. ⁴⁵ In general, a "new matter" is anything requiring different or additional evidence from that needed with respect to the issues raised in the deficiency notice. ⁴⁶ Consequently, to the extent that the IRS does not make its entire case in the deficiency notice, it will bear a procedural burden on the matters it raises later.

A key reason that the taxpayer bears both the burden of production and the burden of persuasion is that the taxpayer that has the records and other evidence of its activities. ⁴⁷ If the IRS were required to produce the evidence, it would first have to obtain much of it from the taxpayer. Even the new statutory burden of proof rule, code section 7491, which "shifts" the burden of

⁴³ See Leandra Lederman Gassenheimer, "The Dilemma of Deficient Deficiency Notices," 73 *Taxes* 83, 84-85 (1995), *Doc 95-2585*, 95 *TNT* 46-42 (Mar. 8, 1995); see also, e.g., *Shell Oil Co. v. Commissioner*, 89 T.C. 371, 409 n.22 (1987) ("On petitioner's motion we ruled that the statutory notice of deficiency was arbitrary and that its presumption of correctness was destroyed. Consequently, the burden of going forward was shifted to respondent with respect to factual issues."); *Russo v. Commissioner*, T.C. Memo. 1992-104 ("The presumption [of correctness] is a procedural device that places the burden of producing evidence to rebut the presumption on the taxpayer."); *Estate of Gilford v. Commissioner*, 88 T.C. 38, 51 (1987) ("This presumption is a procedural device which requires petitioner to come forward with enough evidence to support a finding contrary to the [IRS's] determination. Petitioner also bears the burden of proof. . . . This burden is a burden of persuasion; it requires petitioner to demonstrate the merits of its claim by at least a preponderance of the evidence. Respondent's presumption and petitioner's burden of proof thus impose two separate and distinct obligations: (1) The burden of going forward, and (2) the burden of persuasion.") (citations omitted).

⁴⁴ Unfortunately, as I have discussed before, the Tax Court's interpretation of the "new matter" rule to encourage broadly worded notices of deficiency, and its interpretation of *Shea* that conflates the section 7522 standards into the "new matter" standards undermines this incentive. See, e.g., Leandra Lederman, "Deficient Statutory Notices and the Burdens of Proof: A Reply to Mr. Newton," *Tax Notes*, July 2, 2001, p. 117 [hereinafter, Reply to Newton]; Leandra Lederman, "Taxpayer Rights in a Lurch: A Response to Professor Johnson," *Tax Notes*, Aug. 21, 2000, p. 1041; Lederman Gassenheimer, *supra* note 43, at 84.

⁴⁵ This disclosure is helpful to the taxpayer, and therefore, to the dispute-resolution process. Cf. *Scar v. Commissioner*, 814 F.2d 1363, 1374-1375 (9th Cir. 1987) (Hall, J., dissenting) ("Because it is to the taxpayer's advantage that the Commissioner disclose his theory when the notice is sent, I believe it is undesirable to establish a rule which would discourage him from doing so.")

⁴⁶ See, e.g., *Achiro v. Commissioner*, 77 T.C. 881, 890 (1981) ("The assertion of a new theory which . . . either alters the original deficiency or requires the presentation of different evidence, . . . [is] a new matter."); *Wayne Bolt & Nut Co. v. Commissioner*, 93 T.C. 500, 507 (1989) ("A new theory that is presented to sustain a deficiency is treated as a new matter when it either alters the original deficiency or requires the presentation of different evidence. . . .")

⁴⁷ See Lederman, Reply to Mr. Newton, *supra* note 44.

³⁸ *Id.* at 702.

³⁹ *Id.* at 704-05.

⁴⁰ See *Estate of Richard R. Simplot v. Commissioner*, 249 F.3d at 1193-94 ("Before the Tax Court the Commissioner conceded that the assessed deficiency was erroneous, thereby forfeiting any presumption of correctness.") (citing *Clapp v. Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989); *Herbert v. Commissioner*, 377 F.2d 65, 69 (9th Cir. 1967)); *James J. Morrissey v. Commissioner*, 87 AFTR 2d Par. 2001-643 (9th Cir. 2001) ("Because the Commissioner abandoned the valuation in his notice of deficiency, the Commissioner had the burden of proving whether any deficiency existed, and, if so, the amount." (citing *Clapp v. Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989); *Herbert v. Commissioner*, 377 F.2d 65, 69 (9th Cir. 1966)); *Estate of Paul Mitchell v. Commissioner*, 2001 U.S. App. LEXIS 7990 (9th Cir. 2001) ("We conclude that the Tax Court erred in denying the Estate's Motion to Shift the Burden of Persuasion. . . . [B]ecause the Commissioner's determination was demonstrated, by its own experts, to be invalid, the Commissioner — and not the Estate — had the burden of proving whether any deficiency exists and if so the amount.") (quoting *Cohen v. Commissioner*, 266 F.2d 5, 11 (9th Cir. 1959)).

⁴¹ *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

⁴² U.S. Tax Court Rules of Practice and Procedure 142(a).

SUMMARIES / TAX PRACTICE

proof to the IRS, reflects this concern.⁴⁸ That is, before the burden shifts, section 7491(a) requires, among other things, that the taxpayer present “credible evidence” on the factual issue in question.⁴⁹

An important, judicially developed, exception to the general burden of proof cases, the “arbitrary and erroneous” or “arbitrary and excessive” deficiency notice doctrine,⁵⁰ fits this paradigm. Those cases involve an unsupported allegation of unreported income. Although the taxpayer has the evidence regarding its transactions and activities, how can the taxpayer prove that it did *not* engage in a particular activity alleged by the IRS? The difficulties of proving a negative are evident to the courts in cases involving allegations of unreported income from illegal sources such as narcotics trafficking⁵¹ — sometimes called “naked assessment” cases.⁵² In those cases, courts do not let the deficiency notice present the IRS’s *prima facie* case in the face of a taxpayer’s denial of receipt, unless the IRS

provides evidence of a connection between the taxpayer and the tax-generating activity.⁵³

There is some dispute among courts as to what shifts to the IRS if the notice is arbitrary and erroneous. Most courts hold that only the burden of production shifts.⁵⁴ Thus, if the IRS can’t meet the burden of production, it will lose the case, but if it presents evidence connecting the taxpayer to the tax-generating activity in question, the burden shifts back to the taxpayer. This approach seems more consistent with the policies underlying the burden of proof rules. That is, there is no reason for the IRS to bear the burden of persuasion once it makes its *prima facie* case by connecting the taxpayer to the tax-generating activity in question. At that point, the burden should be on the taxpayer to demonstrate that he did not receive the amounts alleged, or the like.⁵⁵ In fact, even the Court of Appeals for the Ninth Circuit has held that the burden of persuasion remains with the taxpayer.⁵⁶

An incorrect deficiency notice is not the same as one that is “arbitrary and erroneous” under the line of cases discussed above.⁵⁷ Many notices are “incorrect” in the sense that the Tax Court does not confirm the entire

⁴⁸ See section 7491(a).

⁴⁹ Section 7491(a)(1). The section further requires that (1) the taxpayer has complied with the code’s substantiation requirements; (2) the taxpayer has maintained all records required by the code; and (3) the taxpayer has cooperated with reasonable requests by the IRS “for witnesses, information, documents, meetings, and interviews.” See section 7491(a)(2). Cf. *Higbee v. Commissioner*, 116 T.C. No. 28 (June 6, 2001) (taxpayer’s failure to produce “credible evidence” resulted not only in lack of burden shift, but also failure to meet burden of persuasion under Tax Court Rule 142(a)).

⁵⁰ Some cases use one phrase and some use the other. See, e.g., *Portillo v. Commissioner*, 932 F.2d 1128, 1134 (5th Cir. 1991) (“arbitrary and erroneous”); *Zuhone v. Commissioner*, 883 F.2d 1317, 1325 (7th Cir. 1989) (“arbitrary and excessive”); *Berkery v. Commissioner*, 91 T.C. 179, 186 (1988) (same), *aff’d* 872 F.2d 411 (3d Cir.), *cert. denied* 493 U.S. 862 (1989); *Levine v. Commissioner*, T.C. Memo. 1998-383 (“arbitrary and erroneous”). *Janis*, the original United States Supreme Court case raising this issue used the phrase “arbitrary and erroneous”: “Certainly, proof that an assessment is utterly without foundation is proof that it is arbitrary and erroneous.” *United States v. Janis*, 428 U.S. 433, 442 (1976).

⁵¹ See *Llorente v. Commissioner*, 649 F.2d 152, 156 (2d Cir. 1981) (“Where it lacks a rational basis the presumption [of correctness] evaporates. Otherwise the Commissioner could, merely by arbitrarily issuing a naked assessment, place upon the taxpayer the unfair, and at time [sic] impossible, burden of proving a negative, that he did not receive the illegal income assessed against him.”).

⁵² See, e.g., *United States v. Janis*, 428 U.S. 433, 441 (1976); *Anastasato v. Commissioner*, 794 F.2d 884, 887 (3d Cir. 1986) (“The presumption of correctness establishes a *prima facie* case, but it arises only if supported by foundational evidence connecting the taxpayer with the tax-generating activity.”); *Guercio v. Commissioner*, T.C. Memo. 1982-28.

Janis coined the term “naked assessment”: “What we have is a ‘naked’ assessment without any foundation whatsoever if what was seized by the Los Angeles police cannot be used in the formulation of the assessment.” *Janis*, 428 U.S. at 441. *Janis* was a refund case, so the IRS had in fact assessed the taxes due, see *id.* at 437. The term “naked assessment” is often used in deficiency (Tax Court) cases, see, e.g., *Cozzi v. Commissioner*, 88 T.C. 435, 444 (1987); *Graham v. Commissioner*, 82 T.C. 299, 309 (1984), but it is not technically accurate, as, in those cases, the IRS generally has not yet assessed the taxes in dispute. See section 6213.

⁵³ See, e.g., *Anastasato v. Commissioner*, 794 F.2d 884, 886 (3d Cir. 1986) (illicit “override commissions”); *Weimerskirch v. Commissioner*, 596 F.2d 358, 361 (9th Cir. 1979) (illegal drug sales); *Gerardo v. Commissioner*, 552 F.2d 549, 553 (3d Cir. 1977) (illegal gambling); *Dellacroce v. Commissioner*, 83 T.C. 269, 276 (1984) (racketeering payoff).

⁵⁴ See, e.g., *Frazier v. Commissioner*, 91 T.C. 1, 10 n.10 (1988) (“If in ‘looking behind’ a deficiency notice we find that respondent did not have sufficient information to make a determination or that the determination was based upon illegally seized evidence, the notice would not be afforded the usual presumption of correctness. That determination would shift the burden of going forward to respondent.”); *Cozzi v. Commissioner*, 88 T.C. 435, 443 (1987) (a strong showing that the statutory notice of deficiency is arbitrary and excessive within the rule of *Helvering v. Taylor*, 293 U.S. 507 (1935), has the effect of shifting to the Commissioner the burden of going forward.); see also John T. Piper and James M. Jerge, “Shifting the Burden of Proof in Tax Court,” 31 *Tax Law* 303, 313 (1978) (“Despite some statements about the presumption of correctness ‘disappearing’ and that the burden of proof will shift, it seems likely that the courts mean only a shifting of the burden of going forward.”).

⁵⁵ Cf. *Kenyatta Corp. v. Commissioner*, 86 T.C. 171, 181 n.12 (1986) (“The *Weimerskirch-Llorente* line of cases . . . does not, in any event, alter the rule on the burden of proof.”) (citations omitted).

⁵⁶ See *Hardy v. Commissioner*, 181 F.3d 1002, 1004 (9th Cir. 1999), *Doc 1999-23078 (11 original pages)*, 1999 *TNT* 130-3 (“if the Commissioner introduces some evidence that the taxpayer received unreported income, the burden shifts to the taxpayer to show by a preponderance of the evidence that the deficiency was arbitrary or erroneous.”); *Rapp v. Commissioner*, 774 F.2d 932, 935 (9th Cir. 1985) (“Once the Government has carried its initial burden of introducing some evidence linking the taxpayer with income-producing activity, the burden shifts to the taxpayer to rebut the presumption by establishing by a preponderance of the evidence that the deficiency determination is arbitrary or erroneous.”).

⁵⁷ See Lederman, “Reply to Mr. Newton,” *supra* note 44, see also Leandra Lederman, “Civilizing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency,” 30 *U.C. Davis L. Rev.* 183, 231-40 (1996); cf. *Shriver v. Commissioner*, 85 T.C. 1, 4 (1985) (“Having found that the notice of deficiency was not arbitrarily issued, we must decide whether respondent’s determination was incorrect.”).

deficiency. However, most incorrect notices do not warrant a shift in a burden of proof to the IRS.⁵⁸ Instead, the burden shifts to the IRS only to buttress an otherwise unsupported notice in instances in which the taxpayer is logically unable to come forward with evidence to rebut the notice — unreported income cases in which the taxpayer denies receiving the income in question. Although it might seem worse for a notice to have a foundation that is entirely incorrect, in fact, taxpayers can rebut those notices on the merits.

What about post-notice concessions by the IRS — do they render the deficiency notice arbitrary? In a long line of cases, The Tax Court has held that they do not.⁵⁹ Even the Court of Appeals for the Ninth Circuit has held that the IRS's concession that assessments were incorrect for some years did not vitiate the presumption of correctness for other years in issue.⁶⁰ It stated, “[i]f we were to hold otherwise, the Commissioner would have a disincentive to stipulate to certain issues before trial, a result that we do not endorse.”⁶¹ This is an important principle, and is discussed further below.

III. Allocating Burdens When Notice Is Incorrect

A. Where Is the Ninth Circuit Coming From?

The apparent oddity of a lowered deficiency resulting in the IRS bearing the burden of proving the amount of any deficiency raises the question of how the Court of Appeals for the Ninth Circuit got there. There were two components to its holding: (1) incorrectness in the deficiency amount (at least if admitted by the IRS) demonstrates the arbitrariness of the deficiency notice, thereby vitiating its “presumption of correctness,” and (2) if the notice loses the benefit of the presumption, the IRS must bear the burden of proving the existence and amount of any deficiency. Its authority for these connected propositions was *Clapp v. Commissioner*⁶² and *Herbert v. Commissioner*⁶³ in

⁵⁸See *Keogh v. Commissioner*, 713 F.2d 496, 502 (9th Cir. 1983) (reduction in the deficiency by the Tax Court did not deprive the notice of a rational foundation).

⁵⁹See, e.g., *United States Holding Co. v. Commissioner*, 44 T.C. 323, 328 (1965) (concession of some issues); *Mensik v. Commissioner*, 37 T.C. 703, 725 (1962) (some items were conceded, and some others were reduced), *aff'd* 328 F. 2d 147 (7th Cir. 1964), *cert. denied*, 379 U.S. 827 (1964); *O'Dwyer v. Commissioner*, 28 T.C. 698, 705 (1957) (concession of major item at issue), *aff'd* 266 F. 2d 575 (4th Cir. 1959), *cert. denied*, 361 U.S. 862 (1959); *Gobins v. Commissioner*, 18 T.C. 1159, 1168-69 (1952) (reducing deficiency resulting from use of bank deposits method), *aff'd per curiam*, 217 F. 2d 952 (9th Cir. 1954); *Hardy v. Commissioner*, T.C. Memo. 1997-97, *Doc 97-5561* (20 pages), 97 *TNT* 38-15 (concession of some issues), *aff'd* 181 F.3d 1002 (9th Cir. 1999), *Doc 1999-23078* (11 original pages), 1999 *TNT* 130-3; *William W. Halle, et ux. v. Commissioner*, T.C. Memo. 1996-116, *Doc 96-7488* (30 pages), 96 *TNT* 50-10 (same).

⁶⁰*Cathy Miller Hardy v. Commissioner*, 181 F.3d 1002, 1005 (9th Cir. 1999).

⁶¹*Id.* Interestingly, *Hardy* cited *United States Holding Co. v. Commissioner*, 27 T.C. 703, 725 (1962); and *Gobins v. Commissioner*, 18 T.C. 1159, 1168-69 (1952), *aff'd* 217 F.2d 952 (9th Cir. 1954), the Tax Court cases establishing that IRS concessions that reduce the deficiency do not thereby render the notice arbitrary.

⁶²875 F.2d 1396, 1403 (9th Cir. 1989).

⁶³377 F.2d 65, 69 (9th Cir. 1967).

Simplot and Morrissey. In *Mitchell*, its authority was primarily *Cohen v. Commissioner*.⁶⁴ As discussed below, this authority does not establish those principles. In addition, if the court's concern was with the possibility of the IRS arbitrarily inflating deficiencies, its remedy is worse than that prospect.

In *Clapp*, the Ninth Circuit stated, “if the taxpayer establishes that the Commissioner's determination is arbitrary, courts generally shift the burden onto the Commissioner, putting the Commissioner in the same position as a civil plaintiff.” This might imply that an “arbitrary” deficiency amount results in a burden shift, but that is not the law. Consider the following passage from *Zuhone v. Commissioner*:⁶⁵

If the taxpayer establishes that the Commissioner's determination is arbitrary, courts generally shift the burden of production to the Commissioner. *Clapp v. Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989). However, the taxpayer's argument, which presumes that the failure of the government to adhere to its promulgated procedures in calculating a tax deficiency necessarily results in an arbitrary and excessive deficiency notice, seriously misconstrues the inquiry required under the arbitrary and excessive doctrine.

The Ninth Circuit's confusion is slightly different, but it has misconstrued what constitutes an “arbitrary” notice, as well. For example, consider *Jones v. Commissioner*.⁶⁶ a Tenth Circuit case in which the taxpayer alleged that the IRS's notice of deficiency based on \$33 million of unreported income from the sale of narcotics over a 10-month period was arbitrary and unreasonable.⁶⁷ In part, *Jones'* argument was that the magnitude of the unreported income alleged demonstrated that the notice was arbitrary and erroneous.⁶⁸ However, even though the police admittedly only used estimates they developed to calculate the figure,⁶⁹ the Tenth Circuit upheld the Tax Court's decision sustaining the deficiency in the notice.⁷⁰

It is important to distinguish between the merits of the IRS's determination and procedural aspects relating to the notice.⁷¹ As indicated above, not all incorrect deficiency notices are “arbitrary” so as to require a procedural remedy. As the Court of Appeals for the Eighth Circuit has stated, the IRS's “assessment is in-

⁶⁴266 F.2d 5 (9th Cir. 1959).

⁶⁵*Zuhone v. Commissioner*, 883 F.2d 1317, 1325 (7th Cir. 1989).

⁶⁶903 F.2d 1301 (10th Cir. 1990).

⁶⁷*Id.* at 1303.

⁶⁸*Id.* at 1304.

⁶⁹*Id.* at 1305.

⁷⁰*Id.* at 1306.

⁷¹*Cf. Zuhone v. Commissioner*, 883 F.2d 1317, 1325 (7th Cir. 1989) (“The arbitrary and excessive doctrine is a challenge to the deficiency assessment itself on the basis that it bears no factual relationship to the taxpayer's liability, not a challenge to any proof offered by the Commissioner at trial. . . .”).

tended to be an estimate. It is expected to be rational not flawless.”⁷² The *Jones* holding also supports the construction of “arbitrary” as “lacking a rational basis”⁷³ — essentially the phrase that has been used by the Supreme Court.⁷⁴

In addition, an arbitrary notice is not necessarily an “arbitrary and erroneous” naked assessment-type notice. The Seventh Circuit’s opinion in *Pittman v. Commissioner*⁷⁵ provides an example of the distinction between an incorrect notice and a “naked assessment” notice that loses the presumption of correctness. In *Pittman*, the taxpayer argued that the IRS had made a number of mistakes in calculating the earnings and profits of his corporation, and therefore its determination should not be accorded the presumption.⁷⁶ The court stated:

Pittman seriously misconstrues the nature of the showing required to eviscerate the presumption of correctness. . . . All that is required to support the presumption is that the Commissioner’s determination have some minimal factual predicate. It is only when the Commissioner’s assessment is shown to be “without rational foundation” or “arbitrary and erroneous,” that the presumption should not be recognized.⁷⁷

A true naked assessment will result in the IRS, when challenged, bearing the burden of going forward.⁷⁸ The rationale is not that the notice is incorrect, but rather, that the taxpayer should not bear the difficulties inherent in proving a negative. An arbitrary or erroneous notice in other types of cases should be litigated on its merits.⁷⁹ In fact, a truly baseless notice or inflated deficiency likely will be the subject of IRS concessions even before the case is tried, as the matter passes through the hands of various IRS personnel.

⁷²*Dodge v. Commissioner*, 981 F.2d 350, 353 (8th Cir. 1993), cert. denied, 510 U.S. 812 (1993); cf. *Zuhone v. Commissioner*, 883 F.2d 1317, 1325 (7th Cir. 1989) (“the taxpayer’s argument, which presumes that the failure of the government to adhere to its promulgated procedures in calculating a tax deficiency necessarily results in an arbitrary and excessive deficiency notice, seriously misconstrues the inquiry required under the arbitrary and excessive doctrine”).

⁷³See *Benness M. Richards v. Commissioner*, T.C. Memo 1997-299, Doc 97-19299 (24 pages), 97 TNT 126-21 (Normally, an allegation that a notice of deficiency lacks a rational basis is tantamount to an argument that the notice is arbitrary.”), *aff’d*, 165 F.3d 917 (9th Cir. 1998), Doc 98-34750 (3 pages), 98 TNT 234-19.

⁷⁴See *United States v. Janis*, 428 U.S. 433, 441 (1976). (“The determination of tax due then may be one ‘without rational foundation and excessive,’ and not properly subject to the usual rule with respect to the burden of proof in tax cases.”) (quoting *Helvering v. Taylor*, 293 U.S. 507, 514-515 (1935)).

⁷⁵100 F.3d 1308 (7th Cir. 1996).

⁷⁶*Id.* at 1317.

⁷⁷*Id.* (citations omitted).

⁷⁸See, e.g., *Anastasato v. Commissioner*, 794 F.2d 884, 887 (3d Cir. 1986); *Weimerskirch v. Commissioner*, 596 F.2d 358, 360-61 (9th Cir. 1979), rev’g 67 T.C. 672 (1977); *Zuhone v. Commissioner*, 883 F.2d 1317, 1325 (7th Cir. 1989).

⁷⁹See Lederman, *supra* note 57, at 230.

Even in naked assessment cases, most courts do not shift the burden of persuasion to the IRS.⁸⁰ The idea is that, if the IRS did not make its *prima facie* case in the deficiency notice, it must do so when challenged, thus facing the burden of going forward, just like a civil plaintiff. In fact, that is an appropriate interpretation of the passage from *Clapp* quoted above, as suggested by the context in which the quoted statement was made:

The notice of deficiency merely hails [sic] the taxpayer into court. . . . Issuing a notice of deficiency is in many ways analogous to filing a civil complaint.

It is true that the Tax Court considers the Commissioner’s determination presumptively correct, and places on the taxpayer the burden of going forward and the burden of persuasion. Yet, if the taxpayer establishes that the Commissioner’s determination is arbitrary, courts generally shift the burden onto the Commissioner, putting the Commissioner in the same position as a civil plaintiff. Given the function of the notice of deficiency, this is the proper remedy for arbitrariness. Courts do not invalidate the notice, but shift the burden to the Commissioner.⁸¹

The primary point *Clapp* was making was that a notice need not be invalidated for arbitrariness. At the end of the passage quoted immediately above, the *Clapp* court cites *Suarez v. Commissioner*⁸² (as citing authorities), and *United States v. Janis*,⁸³ a refund case. Both of those cases involved deficiency notices based solely on evidence seized in violation of the Fourth Amendment. They were naked assessment cases: nothing supported the deficiency notice except for evidence that had been suppressed by a court. *Suarez*, like *Clapp*, held that:

when a petitioner makes a showing casting doubt on the validity of a deficiency determination, the statutory notice itself is not rendered void. . . . We therefore conclude and hold that the determination before us, based entirely on constitutionally inadmissible evidence, carries no presumption of correctness. *Because the presumption of correctness has disappeared, the respondent now has the burden of going forward with the proof to establish the existence of a deficiency with independent evidence, separate and apart from the tainted evidence.*⁸⁴

Thus, it shifted the burden of going forward to the IRS.

In *Janis*, the Supreme Court stated:

⁸⁰See, e.g., *Anastasato v. Commissioner*, 794 F.2d 884, 887 (3d Cir. 1986); *Weimerskirch v. Commissioner*, 596 F.2d 358, 360-61 (9th Cir. 1979); *Frazier v. Commissioner*, 91 T.C. 1, 10 n.10 (1988); *Cozzi v. Commissioner*, 88 T.C. 435, 443-44 (1987).

⁸¹*Clapp v. Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989) (citations and footnote omitted).

⁸²58 T.C. 792, 814 (1972).

⁸³428 U.S. 433, 456-58 (1976).

⁸⁴58 T.C. 792, 814-815 (1972) (citations omitted) (emphasis added).

What we have is a “naked” assessment without any foundation whatsoever if what was seized by the Los Angeles police cannot be used in the formulation of the assessment. . . .

Some courts indicate that the burden of showing the amount of the deficiency then shifts to the Commissioner. Others hold that the burden of showing the correct amount of the tax remains with the taxpayer. However that may be, the debate does not extend to the situation where the assessment is shown to be naked and without any foundation. The courts then appear to apply the rule of the *Taylor* case.⁸⁵

Janis was a refund case. Its discussion of showing the correct amount of the tax has little relevance to Tax Court cases, where the taxpayer never bears that burden.⁸⁶ The *Taylor* rule it refers to is from *Helvering v. Taylor*.⁸⁷ That case stated, in relevant part:

where as in this case the taxpayer's evidence shows the commissioner's determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the apportionment arbitrary and the commissioner's determination invalid. Then, upon appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax.⁸⁸

Taylor is consistent with *Suarez*, and again sets forth an appropriate course of action: “the board should have held the apportionment arbitrary and the commissioner's determination invalid. Then, upon appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax.” In other words, the taxpayer met its burden of going forward but had yet to meet its burden of persuasion. *Taylor*, like *Clapp*, *Suarez*, and *Janis*, does *not* say that the IRS must bear the burden of persuasion if the deficiency notice is erroneous.

Estate of Paul Mitchell relied on *Cohen v. Commissioner*⁸⁹ rather than the line of cases discussed above. The *Mitchell* opinion quotes two paragraphs from *Cohen*.⁹⁰ The first one states:

At the outset of a Tax Court proceeding to redetermine a tax deficiency, the Commissioner's determination is presumed to be correct. The burden of proof is thus placed upon the taxpayer to show that the Commissioner's determination is invalid.

⁸⁵*Janis*, 428 U.S. at 441-442 (citations and footnotes omitted).

⁸⁶The taxpayer does bear it in refund cases. See *Lewis v. Reynolds*, 284 U.S. 281 (1932).

⁸⁷293 U.S. 507 (1935).

⁸⁸*Helvering v. Taylor*, 293 U.S. 507, 514-515 (1935).

⁸⁹266 F.2d 5 (9th Cir. 1959).

⁹⁰See *Estate of Paul Mitchell*, 250 F.3d 696 (9th Cir. 2001).

This is correct, except that “invalid” must mean “in error,” rather than invalid in the sense that vitiates the Tax Court's subject matter jurisdiction.

The second quoted paragraph from *Cohen* states:

When the Commissioner's determination has been shown to be invalid, the Tax Court must redetermine the deficiency. The presumption as to the correctness of the Commissioner's determination is then out of the case. The Commissioner and not the taxpayer then has the burden of proving whether any deficiency exists and if so the amount. It is not incumbent upon the taxpayer under these circumstances to prove that he owed no tax or the amount of the tax which he did owe.

This paragraph is problematic in that it suggests that an erroneous deficiency notice causes the presumption of correctness to evaporate. As discussed above, that is true of only a small subset of cases — those involving “naked assessments” of unreported income. The paragraph also indicates that once the presumption drops out of the case, the taxpayer bears the burden of persuasion. The *Cohen* court provides no authority on that point. As explained above, that is not the best approach, and is followed by only a minority of courts in naked assessment cases.⁹¹ Thus, the *Mitchell* court went wrong in relying on this unsupported aspect of *Cohen*.

B. Remediating Incorrect Notices

Given the shaky foundation of the position of the Ninth Circuit, what should the burden of proof rule be with respect to deficiencies decreased by the IRS during Tax Court litigation? As indicated above, an increase in the deficiency requires the IRS to bear the burden of proof on the facts supporting the increased deficiency. The logic behind the rule is that the IRS

⁹¹See, e.g., *Frazier v. Commissioner*, 91 T.C. 1, 9 n.10 (1988); *Shell Oil Co. v. Commissioner*, 89 T.C. 371, 409 n.22 (1987); *Suarez v. Commissioner*, 58 T.C. 792, 814 (1972).

In *Janis*, the Supreme Court hedged on the issue of which party bears the burden of proving the correct amount of the tax in a refund suit where the assessment was incorrect. *Janis*, 428 U.S. at 441-442. As discussed above, the taxpayer does not bear the burden of proving the correct amount of the tax as this is not an issue in deficiency cases.

Admittedly, outside of the “arbitrary and erroneous” notice area, a number of circuits have stated that the IRS bears the burden of persuasion once the taxpayer's proof overcomes the presumption of correctness. See, e.g., *O'Reilly v. Commissioner*, 973 F.2d 1403, 1409 (8th Cir. 1992); *Cebollero v. Commissioner*, 967 F.2d 986, 990, 992 (4th Cir. 1992); *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991); *Muserlian v. Commissioner*, 932 F.2d 109, 112 (2d Cir. 1991); *Zuhone v. Commissioner*, 883 F.2d 1317, 1325 (7th Cir. 1989).

However, given the function of the presumption of correctness, properly understood, to place the burden of going forward on the taxpayer, the contrary view, which is that of the Tax Court and at least two circuits, seems correct. See, e.g., *Joseph P. Delaney v. Commissioner*, 99 F.3d 20, 23 (1st Cir. 1996), *Doc 96-29336 (17 pages)*, 96 *TNT 216-11*; *Anastasato et ux. v. Commissioner*, 794 F.2d 884, 887 (3d Cir. 1986); *Borchers v. Commissioner*, 95 T.C. 82, 89-90 (1990), *aff'd* 943 F.2d 22 (8th Cir. 1991); *Kluger v. Commissioner*, 83 T.C. 309, 310 n.1 (1984); cf. Piper and Jerge, *supra* note 54, at 313 (“Despite some statements about the presumption of correctness ‘disappearing’ and that the ‘burden of proof will shift,’ it seems likely that the courts mean only a shifting of the burden of going forward.”).

should provide fair notice to the taxpayer of its case in the formal, statutorily required, deficiency notice. Shifting the burden to the IRS on issues it raises later (whether new matter or resulting in an increased deficiency) provides an incentive for the IRS to do that.

Should a decrease in a deficiency require the IRS to bear the burden of proof? More to the point, what if a notice of deficiency that does not involve unreported income is just plain wrong or even intentionally inflated? An incorrect deficiency notice is not for that reason “invalid.”⁹² That is, the notice is still effective to provide the taxpayer with an opportunity to litigate in Tax Court, with all of the procedural wrinkles that entails, such as tolling the statute of limitations on assessment.⁹³

Should such an incorrect notice lose its “presumption of correctness”? That is largely a matter of semantics. Proof that the notice is wrong overcomes the IRS’s *prima facie* case, so it could be said that the presumption “drops out” of the case. The quantum of evidence necessary to meet the burden of going forward is not the same as the amount necessary to meet the burden of persuasion, however. Once the burden of going forward is met, so the presumption “drops out,” what is left is the underlying factual question, on which the taxpayer should bear the burden of producing sufficient evidence to persuade the court it is right.

In applying the “arbitrary and erroneous” exception to unreported income cases, some courts distinguish between unreported income cases and erroneous deduction cases. Estate tax valuation cases are neither. However, they are cases, like erroneous deduction cases, in which the taxpayer has greater knowledge of and access to the evidence than the IRS does. They are not cases that would force the taxpayer to prove a negative. Therefore, there is no reason to protect the taxpayer by requiring the IRS to add evidence to a deficiency notice containing a particular valuation. The arbitrary and erroneous line of cases is simply inapposite.

What if, as in *Morrissey*, *Simplot*, and *Mitchell*, the IRS changes its valuation after its agents made the determination reflected in the deficiency notice? It is not unlikely that after Tax Court discovery, formal or informal, the IRS might adjust its valuation. A higher valuation than that in the notice would raise the deficiency in an estate tax case, requiring the IRS to bear the burden of proving the facts behind the increased deficiency. The IRS therefore has an incentive to err on the high side in the deficiency notice. This is unfortunate from the perspective of the taxpayer, but probably better than the IRS increasing the deficiency

at trial, after the taxpayer has largely developed its case.

In contrast to a relatively low valuation, a relatively high valuation that is reduced in light of evidence presented by the taxpayer is a form of concession to the taxpayer. Should the IRS bear the burden of proving valuation if it makes such a partial concession? That is the result of the Ninth Circuit’s holding in *Morrissey*, *Simplot*, and *Mitchell*. The IRS has the procedural incentive discussed above to err on the side of a high valuation. Under *Morrissey*, *Simplot*, and *Mitchell*, it is discouraged from backing off of that valuation — *not* discouraged from making an inflated valuation in the first instance.

One message could be that the IRS should get its valuation neither high nor low, but hit it precisely. Obviously, that is unrealistic. Valuation cases are peculiarly factually complex.⁹⁴ In general, there is no single, “correct” value for an asset that is not publicly traded, such as the stock in the three cases discussed in this article. Even experts differ on valuation, as reflected in many court cases. It would therefore be unreasonable for the IRS to predict the value that the Tax Court or a Court of Appeals will assign. That leaves the IRS facing an incentive to err on the high side and then refuse to back off of that valuation. That will hinder, not help, the adjudication process.

In 1952, in a case in which the IRS had lowered the deficiency as a result of discovering an explanation for certain previously unexplained bank deposits, the Tax Court stated:

It is the contention of counsel for the [taxpayer] petitioner that, by reason of . . . concessions at or in the course of the trial, the burden of proof as to the correctness of the deficiency has shifted from the petitioner to the respondent. The contention is wholly devoid of merit. The concessions made by counsel were not only in the interest of orderly procedure, but they relieved petitioner of a substantial portion of her burden of proof and this court of what could have been an even longer and more burdensome trial. His action was in keeping with his duty as a lawyer and officer of the Court. To rule with petitioner, would be to say that counsel, whether for respondent or petitioner, who, by concession or stipulation of pertinent facts, relieves opposing counsel of a portion of his burden of proof and the Court of needless labor, does so at the jeopardy of having the burden of the opposing party as to remaining matters shift to himself. Justice and common sense would countenance no such rule.⁹⁵

The Court of Appeals for the Ninth Circuit should adopt this eminently sensible position.

⁹²See, e.g., *Richards v. Commissioner*, T.C. Memo. 1997-149 (“Of course, it is well settled that an arbitrary determination does not render a notice of deficiency invalid.”); *Hart v. Commissioner*, T.C. Memo. 1982-553 (“Even if the notice of deficiency had contained no change to income except the 1976 NOL adjustment and the patently erroneous tax computation, it would be a valid notice of deficiency under the statute.”), *aff’d* 165 F.3d 917 (9th Cir. 1998).

⁹³See section 6503.

⁹⁴See, e.g., *Estate of Obering v. Commissioner*, T.C. Memo. 1984-407 (“many cases deal with items whose [sic] valuations are quite unique or complex”).

⁹⁵*Gobins v. Commissioner*, 18 T.C. 1159, 1168-69 (1952), *aff’d* 217 F.2d 952 (9th Cir. 1954).

IV. Conclusion

Two misunderstandings of how burden of proof rules operate in Tax Court cases have led the Ninth Circuit to apply the strange principle that the IRS should bear the burden of proving value in any valuation case in which it backs off from its valuation in the deficiency notice. An examination of the authority cited in *Simplot*, *Morrissey*, and *Mitchell* reveals that (1) the Ninth Circuit misunderstands the effect of an incorrect deficiency notice, and (2) it requires a burden of persuasion shift when, if anything should shift, it is merely the burden of going forward.

The current burden of proof regime generally works to provide appropriate incentives for each party to Tax Court litigation to provide notice to the other of its case. However, the likely result of *Simplot*, *Morrissey*, and *Mitchell* will be to discourage the IRS from reducing its valuation in cases appealable to the Ninth Circuit. The Court of Appeals for the Ninth Circuit should realize that a decreased deficiency should not result in a shift of the burden of proof to the IRS. Instead, the court should support rules that encourage both disclosure in the deficiency notice and appropriate compromise and concessions by the parties.

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