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The Requirement For a Deficiency Notice–When an Absolute Provision is Not Always Absolute

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If there was only one thing in the Code that seemed clear, it was that the IRS was required to issue a statutory notice of deficiency before making an assessment of income taxes. [1] The sanctity of this rule was recently diminished by the Federal Circuit, however, in *Bush, Bush v. U.S.*, 105 AFTR 2d 2010-1687, 599 F3d 1352 (CA-F.C., 2010). The court held that the Service's failure to issue a statutory notice was simply a "harmless error," [2] and sustained an assessment that had not been preceded by a proper notice.

As the concurring judge pointed out, the majority treated the issuance of a notice of deficiency as an empty procedural gesture, and compared the need to issue a notice of deficiency to using the right-size paper or filing enough copies of an appellate brief. Although the concurring judge reached the same ultimate conclusion, he relied on a very different theory.

PROCEDURAL BACKGROUND

Bush involved adjustments arising from two partnerships in which the taxpayers were limited partners: Lone Wolf McQuade (LWM) and Cinema 84. [3] In 1991, the IRS issued notices of final partnership administrative adjustment (FPAAs) for tax years 1983, 1984, 1985, and 1986 to the tax matters partner of LWM, disallowing certain deductions reported on the LWM partnership returns for those years. The Service also issued FPAAs for Cinema 84's 1985-1989 tax years, again disallowing certain deductions reported on the partnership returns for those tax years.

The partnerships disagreed with the FPAAs, and the tax matters partners challenged the proposed adjustments by filing petitions on behalf of the partnerships in the Tax Court on 10/7/91 and 1/8/92, respectively. While the partnership proceedings were still pending before the Tax Court, the Bushes entered into two separate Forms 906 ("Closing Agreement on Final Determination Covering Specific Matters") with the Service on 8/7/99.

The closing agreements were designed to resolve both partnership-level issues and partner-level matters. The parties agreed in the closing agreements that no adjustment was required for any of the items reported on the partnership returns. With regard to partner-level issues, the agreements addressed *and* resolved the question of the partners' amounts at risk in the partnerships, and limited the deductions available at the partner level to the amounts at risk in the partnerships.

In particular, the closing agreements provided that the amounts at risk would initially consist of $50,000 per partner (representing the original capital contribution), and would be adjusted upward if the partnership earned taxable income or the partners made additional cash contributions to the partnership. After signing the closing agreements, the taxpayers were dismissed by the Tax Court from the partnership proceedings.

Section 7121 provides that a closing agreement is final and conclusive, and in any suit, action, or proceeding such agreement (or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith) cannot be annulled, modified, set aside, or disregarded, except on a showing of fraud or malfeasance, or misrepresentation of a material fact. Thus, absent such a showing, the taxpayers were bound by the adjustments agreed to in the closing agreements.

In July of 2000, the IRS issued "notices of adjustment" for the taxpayers' returns for 1985, 1986, and 1987, and assessed deficiencies in accordance therewith in the amounts of:

(1) $16,708 in tax and $42,660 in interest for 1985.
(2) $10,817 in tax and $46,005 in interest for 1986.
(3) $9,635 in tax and $26,730 in interest for 1987.

The IRS calculated these deficiency assessments based on the closing agreements and the Service's determination of the taxpayers' amounts at risk for those years. The Service did not issue any notices of deficiency prior to making these assessments. In August of 2000, before the IRS initiated any collection proceedings on these assessments, the taxpayers paid the amounts owing in full.

In July of 2002, the taxpayers filed refund claims with the Service, which were promptly denied. The taxpayers then filed a refund suit in the Court of Federal Claims, and moved for partial summary judgment.

The taxpayers argued that the IRS was obligated to issue notices of deficiency before making any post-settlement assessments. [4] They claimed that the failure to issue the deficiency notices rendered the assessments unlawful, thus entitling the taxpayers to a refund of their payments of the assessed tax.

The government cross-moved for summary judgment, contending that the Service was not required to issue notices of deficiency because the assessments were solely "computational adjustments" exempt from deficiency procedures. The Court of Federal Claims found for the IRS and granted summary judgment. The taxpayers appealed the decision. [5]

RELEVANT CODE PROVISIONS

When the Service makes a determination that a taxpayer has underpaid income taxes, it generally cannot assess and collect the tax without first issuing a deficiency notice to the taxpayer. Section 6213(a) provides that “no assessment of a deficiency in respect of any tax ... and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.”

On receipt of a notice of deficiency, the taxpayer then has the option either to pay the tax (and then, if the taxpayer wishes, to sue for a refund in either the Court of Federal Claims or a federal district court [6]) or to challenge the Service’s deficiency determination in the Tax Court before making any payments. [7] If the taxpayer elects to challenge the deficiency assessment in the Tax Court, final assessment and all collection activities are stayed until the Tax Court proceedings conclude.

When a partnership is audited and adjustments are determined to be necessary, however, the question of whether a notice of deficiency is required to be issued to the individual partners is less clear cut. When a dispute arises regarding items shown on a partnership return, the Code has specific procedures that must be followed in determining the tax consequences of partnership activities. These procedures are binding on all members of the partnership.

After an administrative proceeding, the IRS issues an FPAA to the tax matters partner and to each individual partner of the partnership setting forth the proposed adjustments. [8] The tax matters partner then has 90 days to file a petition for a readjustment of the partnership items in the Tax Court, the district court in which the partnership’s principal place of business is located, or the Court of Federal Claims. [9] Each individual partner can either participate in the partnership proceeding or opt out and settle on his own with the Service, as the Bushes chose to do. [10]

A computational adjustment is the “change in the tax liability of a partner which properly reflects the treatment ... of a partnership item.” [11] When issues are resolved in the partnership-level proceeding, a notice of deficiency is not required if the IRS is simply assessing or collecting from the partner an amount attributable to a “computational adjustment” [12] unless the adjustment is attributable to a partner-level affected item. A “partner-level affected item” is an “affected item” that requires partner-level determinations (other than penalties, additions to tax, and additional amounts that relate to adjustments to partnership items). [13] An affected item is defined as “any item to the extent that such item is affected by a partnership item.” [14] As described above, a deficiency notice is also required whenever an adjustment does not come within the definition of a “computational adjustment.”

QUESTIONS ON APPEAL

It thus appeared that the Federal Circuit would be required to focus on whether the tax deficiency was simply a computational adjustment and, even if it were a computational adjustment, whether it was attributable to an affected item that required a partner-level determination.

The Majority: Solely Computational

The taxpayers argued that deficiency notices were required because the calculation of the amounts at risk of each partner required a partner-level determination. [15] The government took the position that no partner-level determinations were necessary as the formula and methodology for calculating the taxpayers' amounts at risk were clearly set forth in the closing agreements, and thus all the Service had to do was apply the terms of the closing agreements to the taxpayers' tax returns, a simple computation.

The Court of Federal Claims had agreed with the government and granted its cross-motion for summary judgment, holding that the assessments were "computational adjustments" because they could be calculated based solely on the agreed-to stipulations in the closing agreements and the taxpayers' individual returns, and thus no other partner-level factual determinations were necessary.

On appeal, the government argued that *Olson, Olson v. U.S.*, 83 AFTR 2d 99-759, 172 F3d 1311 (CA-F.C., 1999), an earlier decision of the Federal Circuit, was directly on point. In *Olson*, the taxpayer and his wife entered into a settlement agreement with the IRS regarding his investment in a partnership. The settlement agreement determined the tax treatment of certain partnership items, including the disallowance of an investment tax credit at the partnership level that the taxpayer had claimed on his personal tax return. The Federal Circuit in *Olson* held that assessments are "computational adjustments" when they require "no individualized factual determinations" as to the correctness of the original partnership items or "any other factual matters such as the state of mind of the taxpayer upon filing."

Following this theory, the government argued in *Bush* that when all of the necessary questions of fact have been resolved (such as, and specifically through, a closing agreement with the Service), the application of those stipulated facts to the tax returns in question requires only computational action.

The Federal Circuit in *Bush* distinguished *Olson,* however, holding that the investment tax credits at issue in the earlier case were clearly partnership items. Thus, the determination of each partner's distributive share of the disallowed investment tax credits was a change in tax liability properly reflecting the treatment of a partnership item. As such, the determination fit squarely within the definition of a computational adjustment, whereas in *Bush* there were no partnership items at issue due to the language in the closing agreements.

The court attempted to apply a word-by-word analysis to the definition of a computational adjustment to distinguish *Bush* from *Olson.* As stated previously, a computational adjustment is defined in Section 6231(a)(6) as "the *change* in the tax liability of a partner which properly reflects the *treatment* ... of a partnership item" (emphasis added). The taxpayers' assessments in *Bush* were not typical assessments arising from a TEFRA proceeding. While amounts at risk can be a "partnership item" determined in a TEFRA proceeding, [16] the closing agreements specifically provided that there was no change in "partnership items" as a result of the settlement, but rather simply imposed a $50,000 cap on the initial amount at risk of each partner in the partnership.

The majority held that the reference in Section 6231(a)(6) to "treatment" referred to the "change" in treatment resulting from a TEFRA proceeding or settlement, and noted that "[t]he purpose of a TEFRA proceeding is to determine whether a partnership item should be treated differently than the partnership treated the item in the partnership return, i.e. the purpose of the TEFRA proceeding is to determine whether a change in tax treatment is warranted."[17] The majority reasoned that if such a change in treatment is determined in the TEFRA proceeding, then that change causes a "change in the tax liability" that constitutes a computational adjustment. If there is no "change" in the TEFRA proceeding, then there can be no computational adjustment. Thus, the Service was required to issue a notice of deficiency.

The government also raised the argument that the applicable administrative guidance on computational adjustments, Temp. Reg. 301.6231(a)(6)-1T(a), clearly states that no notice of deficiency was required. The Temporary Regulation provides that "changes in a partner's tax liability with respect to affected items that do not require partner-level determinations" are computational adjustments that are directly assessed. The Federal Circuit dismissed this argument, finding nothing relevant in the language of the Temporary Regulation, and stating that even if a different interpretation of the language could cause the court to find the Temporary Regulation to be relevant, the statute still would override the Regulation.[18]

Thus, the majority concluded that, as the closing agreements provided that no adjustment was to be made to the partnership items for purposes of the settlement, there could not have been a change in tax liability to "properly reflect the treatment of a partnership item" as required in the definition of a computational adjustment. Therefore, the assessments were not computational adjustments, and the IRS should have issued a notice of deficiency prior to assessing tax. This is where the slippery slope began.

The Majority: Harmless Error

Even though the majority found that the Service was *required* to send a notice of deficiency, it concluded that the Service's failure to do so was a "harmless error" that was not prejudicial to the taxpayers' position. Although the taxpayers argued that the failure to issue a notice *was* prejudicial because it deprived them of their ticket to the Tax Court, they had freely entered into the closing agreements, and thus they should not have been entitled a chance to go to the Tax Court to argue the same points that they already conceded.

The primary purpose of the deficiency notice provisions is to prevent the IRS from initiating collection proceedings before the taxpayer has had a prepayment opportunity to contest the assessment. In order to enforce this rule, the government is required to refund taxes that it has collected before such opportunities had been exhausted. Here, the Bushes *voluntarily* paid the assessment before the Service even began any collection proceedings. The IRS did not issue a demand for payment or initiate any other form of collection proceedings that the taxpayers could have contested. The taxpayers were not seeking to prevent the Service from collecting the tax or the repayment of funds improperly collected, for which there are procedural processes firmly in place. Rather, the taxpayers paid the assessments and then sued for a refund, alleging that they were entitled to a refund simply because the Service failed to issue the requisite notice.

In order to justify the court's ultimate conclusion that the Service was allowed to assess even though it did not issue the necessary notice of deficiency, the majority framed the issue as whether the failure to provide the required notice before making an assessment was "harmless error." Title 28 of the U.S. Code, "Judiciary and Judicial Procedure," provides that "the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." [19]

Other circuits have applied the rule of harmless error when the Service has failed to fully comply with the statutory notice requirements. [20] Those cases, however, involved mechanical failures, such as a missing date on the letter, rather than the total absence of the issuance of a notice of deficiency. The failure to issue a notice cannot be compared to simply leaving the date off—this diminishes the importance of the very existence of a notice of deficiency. [21]

The majority justified the application of the harmless error statute by stating that the taxpayers failed to prove that they were denied a substantial right by being denied access to the Tax Court. The taxpayers did not allege that there were any issues that they were unable to litigate in the context of a refund suit that they would have been able to litigate in a Tax Court suit if they had been issued a notice of deficiency, [22] and there were alternative routes to the Tax Court.

The taxpayers argued that the deficiency notice is a jurisdictional prerequisite for a taxpayer to challenge an assessment in Tax Court, and because a notice was never sent they were deprived of their opportunity to contest the tax due, and thus were entitled to a refund. [23] The majority pointed out that there was an alternative route to the Tax Court once the Service began collection proceedings without first providing the required deficiency notice. A taxpayer can contest the appropriateness of a collection action taken by the IRS by requesting a collection due process hearing. [24] In such a hearing, the taxpayer may raise challenges to the existence or amount of the underlying tax liability if the taxpayer did not receive any statutory notice of deficiency for such tax liability prior to the commencement of the collection proceedings. [25] The determination of that hearing can then be appealed to the Tax Court.

Thus, the majority concluded that the Service's failure to issue deficiency notices was harmless error, as the taxpayers could have waited for collection proceedings to begin and could have requested a collection due process hearing at that time. By voluntarily paying before they even received a notice and demand, the taxpayers waived their right to go to the Tax Court and thus could not later claim that they were deprived of a substantial right that in effect, they denied to themselves. Therefore, the majority held that the assessments were valid even in the absence of a statutory notice.

The Concurrence: Computational Adjustment

Judge Prost, while agreeing in the ultimate result of the majority that the assessments should be upheld, believed that the Court of Federal Claims's construction of "computational adjustment" was correct, in that a computational adjustment includes any (1) change in a partner's tax liability (2) which correctly applies Sections 6221-6234 (3) to a partnership item. [26] He concluded that the changes in the tax liability of the Bushes were computational adjustments because the changes simply reflected how the Bushes had to report certain partnership losses (a partnership item) on their returns, based on the closing agreements they entered into with the Service. As no additional fact finding was required to compute the tax liability, the judge agreed with the Court of Federal Claims that a notice of deficiency was not required, and thus the tax assessments were valid and the taxpayers were not entitled to a refund.

The judge rationalized his position with a fascinating grammatical discussion, citing the rule that subordinate clauses "should be placed near the words they modify." [27] He also noted the principle of statutory construction that "[r]eferential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent." [28] Judge Prost also is clearly one of the more colorful members of the court. He emphasized his grammatical point with the following example: "That is why we say, 'Flying over Washington, I saw the Lincoln Memorial,' not 'I saw the Lincoln Memorial flying over Washington.'"

Judge Prost rose to the challenge of applying these rules to the definition of computational adjustment in Section 6231(a)(6), and found that "change" refers to "the tax liability of a partner," not to a "partnership item," noting that the phrase "partnership item" appears nowhere near the word "change," but rather is simply part of a phrase qualifying "treatment." Thus, he concluded that requiring the proper "treatment" of a partnership item is not the same thing as requiring a "change" in the value of a partnership item, as the majority held.

For the Bushes, their amounts at risk affected how much of the partnership losses they could claim. The amount of the partnership losses (i.e., the partnership item) remained the same; the change was to how those losses were "treated" on the taxpayers' individual returns, which ultimately resulted in a change to their individual tax liability. If Congress intended a different result, Judge Prost noted that it would have used the word "change" instead of the word "treatment." [29]

Judge Prost then addressed the *Olson* case that had been raised by the government in support of its position, and agreed that following the approach laid out clearly in that case, the proper result is exactly the opposite of what the majority reached: Bush had entered into settlement agreements with the Service; these agreements provided that Bush could not claim losses from certain investments; the Service subsequently recomputed the taxes owed by Bush based on those agreements, which involved nothing more than reviewing the taxpayers' returns for the years in question, reducing the losses that had been improperly claimed, and recalculating the remaining figures. This is a typical computational adjustment under the *Olson* line of reasoning, and thus the adjustments should have been exempt from the notice of deficiency requirement. [30]

Judge Prost feared that the majority's holding that a statutory notice is required in such a situation would not only undermine the intent of TEFRA to streamline the process but also give the taxpayer an unnecessary second chance to attack assessments based on a settlement the taxpayer signed, fully understanding that such agreement could, and most likely would, result in future tax liabilities. If the issuance of a notice of deficiency is required, the taxpayer can go to

Tax Court and relitigate the amount of tax owed, and the reason he owes it prior to payment, even when he had already signed a settlement agreement that fully resolved the matter, on which the Service had relied to its detriment, without having to show fraud or malfeasance, or misrepresentation of a material fact as required under Section 7121.

The Concurrence: Harmless Error

As he believed that no notice was required, Judge Prost did not have to resort to the "harmless error" theory relied on by the majority. In fact, he went on to attack the majority's use of such standard. He feared that the exception formulated by the majority was broad enough to apply whenever the IRS fails to give a taxpayer notice that he owes more taxes, thus allowing the Service to bypass a taxpayer's statutorily guaranteed right to notice. He emphasized his belief that the notice requirement is nonnegotiable, and that the failure to satisfy it can never be harmless.

This newly created exception by the majority has no textual basis in the tax law, but rather is available as a defense only in the appellate courts. As such, the general harmless error standard cannot trump the Code sections granting the taxpayer an unqualified right to a notice of deficiency before the Service can assess or collect a deficiency. [31] Judge Prost noted that tax laws are technical laws, not subject to the general principles of equity as the majority held, but rather requiring strict adherence to the explicit procedures they establish. [32]

Unlike the Federal Circuit majority, which incorrectly focused on the outcome of whether the proper amount was assessed, and ignored the right to receive the notice itself, Judge Prost held that the procedural rights are themselves "substantial rights" and the failure of the Service to follow the required procedures can itself lead to harm. [33] Respect has to be given to the degree of formality required by the statute when the Service must issue a notice of deficiency; it is not enough that the ultimate assessment turns out to be right. [34]

Judge Prost then attacked the majority's conclusion that a taxpayer's right to a refund suit or a collection due process hearing is equivalent to a taxpayer's prepayment, pre-assessment right to challenge the alleged deficiency in Tax Court. As the judge correctly points out, at least one significant difference between the two is the timing and the existence of an assessment. A taxpayer can only request a collection due process hearing after taxes have been assessed, at which time the taxpayer's credit score has been affected and his property may have been subject to liens. [35] The legislative history behind the allowance of collection due process hearings suggests Congress wanted to provide "greater due process to taxpayers who are trying to comply with our complex tax laws." It was never intended as a substitute for the issuance of a notice of deficiency. [36]

CONCLUSION

By getting caught up in its own grammatical analysis of the statute, the Federal Circuit majority in *Bush* had to justify its conclusion by resorting to the appellate statutory rule of "harmless error." As the harmless error interpretation is not binding precedent for the Tax Court or for any U.S. district court, it seems unclear how the holding in this case can be applied in the future when the IRS fails to follow procedure.

Taxpayers might be quick to sue on the grounds they did not receive a notice, even if one might not have been technically required if not for the majority's interpretation of the statute. After losing in the trial court on the grounds that it did not issue a required notice, the Service will then be forced to appeal to a court that can enforce the harmless error standard. This is a burdensome result that benefits no one except the litigators.

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1 Although admittedly this requirement became less absolute when the assessment arises from a partnership proceeding after the 1982 enactment of TEFRA, which added Section 6221 *et seq.* Also, see generally Section 6213(b). Additionally, a taxpayer may waive the right to a notice of deficiency and voluntarily permit an assessment in the absence of a notice; see Section 6213(d).

2 The Service did not assert in this case that it had obtained a waiver from the taxpayer.

3 The case was among 30 tax refund suits brought by partners of various Greenberg Brothers Partnerships.

4 Bush, *Bush v. U.S.*, 100 AFTR 2d 2007-5655, 78 Fed Cl 76 (Fed. Cl. Ct., 2007).

5 The facts in Shelton, *Shelton v. U.S.*, 100 AFTR 2d 2007-5706 (Fed. Cl. Ct., 2007), are almost identical to the facts in Bush. Shelton was a limited partner in Cinema 84, and he claimed deductions from the partnership in his income tax returns for 1981, 1985-1987, 1989, 1992, and 1995. In 1991, the Service issued an FPAA disallowing deductions reported on tax returns from 1984-1989. While the partnership-level suit was pending in the Tax Court, Shelton and the IRS executed a Form 906 closing agreement virtually identical to the Bushes' closing agreement. Based on the closing agreement, the Service issued notices of adjustment and assessed additional amounts due. After paying these assessments and being denied a refund by the IRS, Shelton filed suit in the Court of Federal Claims, alleging that the assessments made in tax years 1981, 1985-1987, 1989, 1992, and 1995 were invalid due to the Service's failure to issue notices of deficiency for the tax years before making the assessments. The Court of Federal Claims granted the government's motion for summary judgment. The Federal Circuit decision addressed both Bush and Shelton.

6 See 28 U.S.C. section 1346(a)(1).

7 Section 6213(a).

8 See Sections 6223(a) and (d)(2).

9 Sections 6226(a)(1) through (3).

10 For those partners who participate in the judicial proceedings, the Service assesses each partner the tax attributable to his distributive share of the adjusted partnership items at the conclusion of the case. See Sections 6225(a), 6230(a)(1), and 6231(a)(6).

11 See Section 6231(a)(6).

12 Section 6230(a)(1).

13 Sections 6230(a)(1) and (a)(2)(A).

14 Section 6231(a)(5).

15 See Section 6230(a)(2)(A)(i). See, e.g., Roberts, *Roberts v. C. I. R.*, 94 TC 853 (1990) (holding that a partner's at-risk amount under Section 465 required partner-level factual determinations where third-party side agreements materially affected the petitioner's amount at risk in each partnership).

16 See Reg. 301.6231(a)(3)-1(a)(1)(vi)(C).

17 See Section 6221 ("the tax treatment of any partnership item (and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item) shall be determined at the partnership level").

18 Citing for this proposition Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 81 L Ed 2d 694 (1984), which held that where the language of a statute is clear, it was improper to rely on the agency's interpretation to override it.

19 See 28 U.S.C. section 2111.

[20] See, e.g., Elings, *Elings v. C.I.R.*, 91 AFTR 2d 2003-1648, 324 F3d 1110 (CA-9, 2003) (Service' failure to include date to file Tax Court petition does not invalidate deficiency notice where taxpayer filed a timely petition); Smith, *Smith v. C.I.R.*, 88 AFTR 2d 2001-7315, 275 F3d 912 (CA-10, 2001) (same).

[21] In fact, Section 7522(a) expressly provides that errors in a notice of deficiency (such as an inadequate description of the basis for the deficiency, the amount owing, or the applicable penalties) generally will not invalidate that notice.

[22] The only issue that the taxpayers sought to litigate was their claim that the government had failed to properly apply the provisions of the closing agreements in later years, which resulted in an overpayment of tax that led to a partial offset to the tax liability for the years in question. This claim was rejected by the Court of Federal Claims and was not appealed to the Federal Circuit; only the jurisdictional issue was appealed. See Bush, *Bush v. U.S.*, 102 AFTR 2d 2008-6300, 84 Fed Cl 90 (Fed. Cl. Ct., 2008); Shelton, *Shelton v. U.S.*, 102 AFTR 2d 2008-6287 (Fed. Cl. Ct., 2008). In fact, the taxpayers did not even raise the claim that litigating this issue in the Tax Court could have led to a different result.

[23] Taxpayers relied on Singleton, *Singleton v. U.S.*, 80 AFTR 2d 97-7360, 128 F3d 833 (CA-4, 1997).

[24] See Section 6330(d)(1). Alternatively, taxpayers can seek an injunction in district court to contest an impermissible assessment.

[25] Section 6330(c).

[26] Section 6231(a)(6); see also Temp. Reg. 301.6231(a)(6)-1T.

[27] Shertzer, *The Elements of Grammar* (1986), page 47.

[28] Singer and Singer, *Sutherland Statutes and Statutory Construction,* Vol. 2A, §47.33 (Thomson Reuters/West, 7th ed., 2009).

[29] Judge Prost then went on to chastise the majority for failing to give proper weight to the words Congress chose, or to the distinction Congress drew by using different words in Section 6231(a)(6), and cited Badaracco, *Badaracco v. C.I.R.*, 53 AFTR 2d 84-446, 464 US 386, 78 L Ed 2d 549, 1984-1 CB 254 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effect susceptible of improvement"); Kirkendall v. Dept. of the Army, *Kirkendall v. Department of Army*, 479 F3d 830 (CA-F.C., 2007); and Sosa v. Alvarez-Machain, *Sosa v. Alvarez-Machain*, 542 US 692, 159 L Ed 2d 718 (2004), fn. 9 ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended"). He stated that "[h]ad Congress intended to limit 'computational adjustments' to tax liability changes arising from changes in a partnership item, it could have used 'change' again, rather than 'treatment.' The majority errs by rewriting the definition of 'computational adjustment' to include this new limitation."

[30] In further support of his conclusion, the concurring judge cited to other court of appeals decisions that reach the same result. See, e.g., Desmet, *Desmet v. C.I.R.*, 104 AFTR 2d 2009-6456, 581 F3d 297 (CA-6, 2009); Callaway, *Callaway v. C.I.R.*, 86 AFTR 2d 2000-6148, 231 F3d 106 (CA-2, 2000) (holding that "where no further factual determinations are necessary at the partner level, an assessment attributable to an 'affected item' may also be made by computational adjustment" because determining the change in tax liability "is a mathematical calculation and requires no further factfinding"); see also Bob Hamric Chevrolet, Inc., *Bob Hamric Chevrolet, Inc. v. U.S. I.R.S.*, 73 AFTR 2d 94-1905, 849 F Supp 500 (DC Tex., 1994) (holding that "a settlement is usually applied to a partner by means of a computational adjustment and not under the ordinary deficiency and refund procedures"); Harris, *Harris v. C. I. R.*, 99 TC 121 (1992); Powell, *Powell v. C. I. R.*, 96 TC 707 (1991); and N.C.F. Energy Partners, *N.C.F. Energy Partners, Bingham Petroleum, Inc., Tax Matters Partner v. Commissioner of Internal Revenue*, 89 TC 741 (1987) (superseded on other grounds by TRA '97, section 1238(a)).

[31] Section 6213(a).

[32] See Dalm, *U.S. v. Dalm*, 65 AFTR 2d 90-1210, 494 US 596, 108 L Ed 2d 548 (1990); Lewyt Corp., *Lewyt Corp. v. C.I.R.*, 47 AFTR 665, 349 US 237, 99 L Ed 1029, 1955-1 CB 378 (1955); Oropallo, *Oropallo v. U.S.*, 71 AFTR 2d 93-1969, 994 F2d 25 (CA-1, 1993), fn. 3; In re Graham, *In re Graham*, 71 AFTR 2d 93-364, 981 F2d 1135 (CA-10, 1992); Ewing, *Ewing v. U.S.*, 66 AFTR 2d 90-5615, 914 F2d 499 (CA-4, 1990); Richardson v. Smith, *Richardson v. Smith*, 9 AFTR 2d 1921, 301 F2d 305 (CA-3, 1962) (noting that "taxation is a game which must be played strictly in accordance with the rules").

[33] See Sections 6212 and 6213; Hughes v. Rowe, *Hughes v. Rowe*, 449 US 5, 66 L Ed 2d 163 (1980); Carey v. Piphus, *Carey v. Piphus*, 435 US 247, 55 L Ed 2d 252 (1978) (holding that deprivation of a party's procedural due process rights is actionable, even without injury).

[34] Botany Worsted Mills, *Botany Worsted Mills v. U.S.*, 7 AFTR 8847, 278 US 282, 73 L Ed 379 (1929); Raleigh & Gaston R.R. Co. v. Reid, *Raleigh & G.R. Co. v. Reid*, 80 US 269, 20 L Ed 570 (1871) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode").

[35] Section 6322.

[36] 144 Cong. Rec. S4147, 4182 (1998).