

CC:PUB-116325-99  
MWilliams

### **ACTION ON DECISION**

**SUBJECT:** John D. Shea v. Commissioner  
112 T.C. 183 (1999)  
T.C. Dkt. Nos. 10841-95, 23549-96

#### **Issues:**

Whether the burden of proof should be placed on the Commissioner with respect to the application of section 66(b) because the notice of deficiency failed to specifically describe section 66(b) as a basis for the determined deficiency.

#### **Discussion:**

During the years at issue, the taxpayer was married and a resident of California, a community property state. The taxpayer filed joint returns for his 1990, 1991, and 1992 tax years. The notices of deficiency contained determinations that the taxpayer had unreported business receipts, unsubstantiated Schedule C deductions, and that the taxpayer's proper filing status for 1992 was married filing separately. The notice of deficiency did not reduce the taxpayer's income for 1992 by half to account for an allocation of community income to the taxpayer's wife pursuant to California community property law. Section 66(b) would allow the entire amount of income to be allocated to the taxpayer notwithstanding community property laws, if certain conditions were met. The notice of deficiency did not refer to section 66(b).

At trial, the taxpayer claimed that the Commissioner's reliance on section 66(b) was a new matter within the meaning of Tax Court Rule 142(a), and that the Commissioner should bear the burden of proof with respect to the issue. The Commissioner argued that: 1) under Abatti v. Commissioner, 644 F.2d 1385 (9<sup>th</sup> Cir. 1981), rev'g T.C. Memo. 1978-392, a theory is a new matter if the basis for the deficiency asserted at trial is inconsistent with the language of the notice of deficiency; and 2) the theory advanced was not inconsistent with the notice and, accordingly, was not a new matter.

In a reviewed opinion, the Tax Court held that the burden of proof should be placed on the Commissioner with respect to the section 66(b) issue. Rather than relying on established case law for its determination as to whether the section 66(b) issue was

new matter, the court incorporated section 7522 into its analysis. Section 7522 requires the Commissioner to issue a notice of deficiency which contains a description of the basis for the Commissioner's tax determination. The Tax Court held that, where a notice of deficiency fails to describe the basis on which the Commissioner relies to support the deficiency determination and that determination requires the presentation of evidence that is different than that which would be necessary to resolve the determinations that were described in the notice of deficiency, the Commissioner will bear the burden of proof as to the new matter. The Tax Court then determined that the Commissioner's failure to specifically describe the basis for its deficiency determination warranted placing the burden of proof on the Commissioner as a sanction for the violation of section 7522.

Contrary to the position adopted by the majority in this case, the Service does not agree that the enactment of section 7522 affects the burden of proof in Tax Court litigation or that section 7522 provides any authority for the Tax Court to incorporate a violation of section 7522 into the definition of new matter. Section 7522 does not articulate specific standards for determining whether the description of the Commissioner's basis is adequate, it does not provide any statutory remedy or sanction if the Commissioner violates the section, and it does not incorporate the legislative mandate of section 7522 into the definition of the new matter test. Instead, the legislative history reveals that the purpose of the statute was to make the Commissioner's notices easily understandable to the public. H.R. Conf. Rep. No. 100-1104, 100<sup>th</sup> Cong., 2d Sess. 219 (1988), 1988-3 C.B. 473, 708-09. Further, under the plain meaning rule of statutory construction, since the statute does not provide for a shifting of the burden of proof upon the failure to comply with the provision of section 7522, such a requirement should not be incorporated into the statute. See Caminetti v. United States, 242 U.S. 470, 485 (1917).

Based on the foregoing, we do not acquiesce in the Tax Court's determination in Shea that the Commissioner bears the burden of proof in the Tax Court if the notice of deficiency fails to meet the standards set forth in section 7522. We will continue to argue that compliance with section 7522 should have no effect on the burden of proof. We will consider appealing cases where the Tax Court places the burden of proof on the Commissioner, in reliance on Shea, where the Commissioner would not otherwise bear the burden of proof. We acknowledge, however, that on the facts of this case, the Tax Court could have found that the section 66(b) issue was new matter under existing precedent and that, based on the evidence presented, section 66(b) was not applicable.

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**Recommendation:**

Nonacquiescence.

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Melinda Williams  
Attorney

**Reviewers:**

Approved: STUART L. BROWN  
Chief Counsel

By: 

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Deborah A. Butler  
Associate Chief Counsel  
(Procedure & Administration)