Further Criticism of the Procedure in *Liberty Global*

To the Editor:

We are writing with respect to the excellent article published in *Tax Notes* on June 26, 2023, by Jenny A. Austin, Anthony D. Pastore, and Jeremy D. Himmelstein.[1] We have a couple of additional comments as to why the district court's June 1 order in *Liberty Global*[2] is erroneous and should be reversed on appeal.

The Internal Revenue Code specifically contemplates what should happen when an additional deficiency is determined by the IRS while a refund action for the same tax and tax year is already pending.[3] Section 7422(e) provides that in that event, the IRS may mail a deficiency notice to the taxpayer, and proceedings in the refund action shall be *stayed* for the period of time in which the taxpayer may file a Tax Court petition (ordinarily 90 days), plus 60 days thereafter. If the taxpayer does file in Tax Court, then the court in which the refund action is pending loses jurisdiction over issues related to the liability. Conversely, if the taxpayer does not timely file in Tax Court, then the United States may counterclaim for the full amount of the deficiency in the refund action, even if the ordinary time for filing such a counterclaim has expired.[4] Liberty Global cited section 7422(e) in its motion to dismiss and explained that it provided Congress's contemplated approach to this situation, but the court never even mentioned it.

Several facts show that this remedial provision (section 7422(e)) could — and should — have been applied in this case. First, the IRS had plenty of time after Liberty Global's initial refund suit was filed to issue a statutory notice of deficiency for the additional amounts it alleges were due — almost two full years, without even asking for any extensions.[5] Indeed, the new collection suit was itself filed by the United States on October 7, 2022, four days before the expiration of the applicable limitations period. That simple point undercuts the government's peevish claim[6] that this situation arose because "tax litigators have been developing strategies to bypass the administrative process for taxpayers that, like LGI [Liberty Global], can afford to pay the tax, and litigate in what is usually a post-payment forum, the district court." Contrary to the government's position, the new action it filed was not "a situation of LGI's own making." Rather, it results from the *IRS's* failure to issue a statutory notice of deficiency for nearly two years when it could and should have, and the government's deliberate choice to seek a judicial remedy in a separate proceeding filed within the same time frame instead of following ordinary procedures. Even if the IRS had issued a statutory notice of deficiency, the taxpayer would effectively be litigating the issues related to the deficiency before payment of that amount, whether in the Tax Court or in the district court in which the refund action was already pending.

But in electing to file a new, separate civil action, the government exacerbated the very

[1] Austin, Pastore, and Himmelstein, "*Liberty Global* Turns the Deficiency Procedures Upside Down," *Tax Notes Federal*, June 26, 2023, p. 2181.

[2] *United States v. Liberty Global Inc.*, No. 1:22-cv-02622 (D. Colo. June 1, 2023).

[3] There can be little doubt that the amount sought by the United States in its civil action constitutes a "deficiency" within the meaning of section 6211: The government's complaint alleges that Liberty Global's "correct federal income tax liability for 2018 is estimated to be $473,384,256," over $235 million more than was previously stated to be its total tax. *See* Complaint, *Liberty Global*, No. 1:22-cv-02622 (D. Colo. Oct. 7, 2022).

[4] This contrasts with the long-established "setoff" procedure in refund actions: When the government identifies a new issue *after* the deficiency limitations period has expired, the United States may "setoff" the amount of the additional tax attributable to the new issue against the amount of a refund otherwise due. *E.g.*, *Lewis v. Reynolds*, 284 U.S. 281 (1932). But because of the bar of the limitations period, it may not seek an amount in excess of the initially claimed refund.

[5] The taxpayer's 2018 return was filed October 11, 2019, so the standard three-year period of limitations for assessment under section 6501 did not expire until October 11, 2022. *See* Order on Motion to Dismiss, *Liberty Global*, No. 1:22-cv-02622, at 2. Liberty Global filed its refund action November 27, 2020, when nearly two years still remained on the limitations period. For this reason, the government's argument that it was compelled to skip administrative proceedings and the statutory notice of deficiency, and instead to pursue the "common law" remedy in an original action to protect against the running of the statute is wrong. The government had all the time allowed by Congress to address the issue through the ordinary procedures.

[6] See its letter to the court, *Liberty Global*, No. 1:22-cv-02622 (Jan. 11, 2023).

problem that section 7422(e) was intended to manage: Its new suit "split a cause of action" into two separate proceedings. Remarkably, this problem also was never discussed by the court or the parties.[7] At least since *Sunnen*,[8] it has been clear that because income taxes are levied annually, "each year is the origin of a new liability and of *a separate cause of action*." (Emphasis added.) This was also one of the principles underlying the setoff procedure discussed in *Lewis v. Reynolds*. However, because of the government's second suit here, Liberty Global's 2018 income tax liability — which is a single cause of action — will necessarily be litigated in two different proceedings.

This result cannot be attributed to the common error of confusing a "cause of action" with an "issue" relevant to that cause of action, which has spawned generations of litigation over the differences between res judicata and collateral estoppel, compulsory vs. permissive counterclaims, etc. For in this case, not only will the same cause of action be litigated in two forums, so will the *exact same issues* — the tax consequences under section 245A of "Project Soy," including specifically the application of temporary regulations to those tax effects. This process is worse than "cause of action splitting," it is *issue splitting*.[9]

We understand why the parties may not have wished to focus on this point in their briefing. The government is trying out a largely untested theory that it can bring a civil action regardless of whether an income tax liability has been assessed, and Liberty Global would obviously have preferred that the new case seeking hundreds of millions of dollars be dismissed rather than somehow consolidated with the pending refund action. But we are flabbergasted that it did not occur to Senior Judge R. Brooke Jackson, to whom both cases have been assigned, to at least ask why there were two separate proceedings going on over the same issues.

Our colleagues' article does an excellent job of parsing whether section 6213(a) either (1) permits the government to proceed as it did in this case by filing a suit to collect an unassessed income tax liability; or (2) requires a statutory notice of deficiency before assessment and collection of such an income tax liability. Put us down as being in the second camp. For example, the second sentence of section 6213(a) — providing that "no assessment of a deficiency in respect of any tax imposed by subtitle A . . . 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" (emphasis added) — would effectively be rendered meaningless by the court's ruling that the IRS can bypass it in every instance simply by choosing to proceed directly to a suit for collection. Indeed, the entire deficiency regime would become optional for the IRS, rather than mandatory. As the article properly notes, the government's position and the court's holding turn the deficiency rules "upside down."

Very truly yours,

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[7] Liberty Global's motion to dismiss did note that under section 7422(e) "two courts — Tax Court and federal district court — would have concurrent jurisdiction over the same tax year." Motion to Dismiss, *Liberty Global*, No. 1:22-cv-02622, at 5-6. But that is precisely what Congress was aware of, and intended to manage, when section 7422(e) was enacted.

[8] *Commissioner v. Sunnen*, 333 U.S. 591 (1948).

[9] For this reason, even if the section 7422(e) procedure is somehow determined not to be both applicable and mandatory, the government's asserted "common law" suit clearly arises out of the "same transaction" (Project Soy) as LGI's refund claim and thus should be a compulsory counterclaim under F.R. Civ. P. 13(a)(1).