

September 2015

Schoppe v. Commissioner: The Federal Circuit Split Regarding the Application of the Automatic Stay Provision of 11 U.S.C. § 362(a)(1) to Appeals from the United States Tax Court

Nathaniel Tucker

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***SCHOPPE V. COMMISSIONER: THE FEDERAL CIRCUIT
SPLIT REGARDING THE APPLICATION OF THE
AUTOMATIC STAY PROVISION OF 11 U.S.C. § 362(A)(1)
TO APPEALS FROM THE UNITED STATES TAX COURT***

*Nathaniel Tucker**

I.	Introduction.....	665
II.	History of the Automatic Stay and Tax Court Deficiencies.....	667
	A. Adoption of 11 U.S.C. § 362 and the Scope of the Automatic Stay.....	667
	1. Who is Stayed?	668
	2. Actions Arising Prior to Commencement of Bankruptcy	668
	3. Exceptions to the Automatic Stay.....	668
	B. Purpose of Automatic Stay.....	669
	C. Tax Deficiencies and Tax Court.....	669
	D. The Circuit Split: Whether Appeals from Tax Court Are Subject to the Automatic Stay.....	672
	1. The Fifth Circuit Declines to Enforce the Automatic Stay.....	672
	2. The Ninth Circuit Imposes the Automatic Stay....	673
	3. The Eleventh Circuit Does Not Enforce the Stay.	674
	4. The Third Circuit Joins the Majority – No Automatic Stay.....	674
	5. The First Circuit Also Rejects the Automatic Stay Requirement.....	675
III.	The Tenth Circuit Incorrectly Sides with the Majority of Courts to Reach the Issue and Declines to Impose the Automatic Stay.....	676
	A. The Tenth Circuit Decision	676
	B. The Critical Issues in the Automatic Stay Debate.....	677
IV.	Why The Automatic Stay Should Be Applicable To Appeals of Tax Court Decisions	678

A. A Tax Court Proceeding, and a Subsequent Appeal from it, is a Continuation of the Proceeding Against the Debtor.....	678
1. The Exception of § 362(b)(9) Indicates that IRS Administrative Proceedings Are “Against the Debtor” as Defined by § 362(a)(1).	678
2. The Automatic Stay Provision Operates as a Stay to Proceedings Subject to § 362(a)(8).....	680
3. Proceedings Should Be Considered as a Whole When Determining Whether the Action Is “Against the Debtor.”.....	681
4. Not Staying Appeals from Tax Court Would Lead to Anomalous Results.	681
B. The Nature of Tax Court Proceedings Supports the Conclusion that the Automatic Stay Should Apply. . .	682
1. Tax Court Proceedings Indicate That They Are “Against the Debtor” within the Meaning of § 362(a)(1).	683
2. The Level of Review of the Appeal Does Not Impact Whether the Proceedings Are “Against the Debtor” within the Meaning of 11 U.S.C. § 362(a)(1).	683
3. IRS Proceedings Are Not Subject to the Automatic Stay of § 362(a) Only Because § 362(b)(9) Provides a Specific Exception.	684
4. The Two Paths a Taxpayer Can Pursue When the IRS Determines a Deficiency Do Not Mean That Tax Court Proceedings and Subsequent Appeals Are Not “Against the Debtor” within the Meaning of § 362(a)(1).	684
5. The Creation and History of Tax Court Suggest It Is an Appeals Process and Not a Method for Initiating a Controversy.	686
C. A Proceeding before Tax Court, and a Subsequent Appeal from It, Operates as a Commencement or Continuation to Recover a Claim Against the Debtor.....	686
1. Legislative History and Statutory Language Suggest That § 362(a)(1)’s Language, “to Recover a Claim,” Includes Proceedings before Tax Court.	687

2015]	AUTOMATIC STAY PROVISIONS OF 11 U.S.C. § 362(a)(1)	665
	2. The Policy Behind § 362(a)(1) Suggests that Tax Court and Subsequent Appeals Are Proceedings “to Recover a Claim” against the Debtor.	688
	3. Efficiency Also Suggests That Tax Court Proceedings Should Be Stayed Under § 362(a)(1).	689
	D. 11 U.S.C. § 362(a)(6) Independently Supports the Imposition of the Automatic Stay.	689
	1. Tax Court Proceedings and Subsequent Appeals Would Be Considered “an Act” for the Purposes of § 362(a)(6).	690
	2. Tax Court Proceedings and Subsequent Appeals Would Be Considered Acts to “Assess” a Claim Against the Debtor.	691
	E. The Purpose and Legislative Intent of the Automatic Stay Confirms Appeals from Tax Court Should Be Stayed.	692
	1. Applying the Automatic Stay Provision of the Bankruptcy Code Will Protect the Debtor.	692
	2. Applying the Automatic Stay Provision of the Bankruptcy Code Will Promote the Goal of Applying Equal Treatment to Creditors.	694
	V. Conclusion	694

I. INTRODUCTION

Under 11 U.S.C. § 362(a)(1), a petition for bankruptcy stays the commencement or continuation of actions or proceedings against the debtor that were brought or could have been brought prior to the petition. Likewise, a petition stays the commencement or continuation of a proceeding to recover a claim against the debtor that arose prior to the petition.¹ The federal circuits that have addressed the issue are split on whether an appeal of a Tax Court decision is stayed by the automatic

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1. 11 U.S.C. § 362(a)(1) (2012).

stay in bankruptcy. The First, Third, Fifth, and Eleventh Circuits hold that the stay is ineffective, and only one circuit, the Ninth, concludes that the automatic stay should apply.² This Note sides with the Ninth Circuit and against the majority of circuits to reach the issue and concludes that 11 U.S.C. § 362(a)(1) – the automatic stay provision set forth in the bankruptcy code – should operate as a stay of appeals from Tax Court proceedings. This is so because Tax Court proceedings are a continuation of proceedings brought against the debtor by the Commissioner of the Internal Revenue Service (IRS). The Note also concludes that a Tax Court decision, and a subsequent appeal from it, is a proceeding to recover a claim against the debtor under 11 U.S.C. § 362(a)(1). In addition, this Note concludes that the automatic stay provision of 11 U.S.C. § 362(a)(6) should resolve the circuit split because the language “assess” is broad enough to include appeals from Tax Court. Lastly, the Note explains that applying the automatic stay is proper because of the legislative intent and purpose of the automatic stay in the bankruptcy statute.

Part II of this Note establishes the background of the automatic stay which exists in bankruptcy law under 11 U.S.C. § 362(a)(1). It examines the purpose of the automatic stay and how its scope is very broad and applicable to many different proceedings. Further, this part discusses how the automatic stay applies to tax deficiencies, and it examines the federal circuit court split regarding the applicability of the automatic stay to appeals from Tax Court.

Part III presents a factual and procedural history of the most recent circuit court decision regarding this matter, *Schoppe v. Commissioner*,³ which the Tenth Circuit decided. It also presents the issues that the circuits need to resolve to determine whether the automatic stay provision applies to appeals from Tax Court decisions.

Part IV analyzes how the Tenth Circuit incorrectly decided *Schoppe*⁴ because it failed to understand what is meant by “against the debtor.” It also demonstrates why 11 U.S.C. § 362(a)(1) should be applied to stay appeals from Tax Court because Tax Court is merely a continuation of IRS administrative proceedings that are brought against the debtor. This part also argues that the broad language of 11 U.S.C. § 362(a)(6) of the automatic stay provision could be applicable to stay appeals from Tax Court. It also contends that the automatic stay

2. See *infra* Part II.D.

3. *Schoppe v. Comm’r*, 711 F.3d 1190 (10th Cir. 2013).

4. *Id.*

provision should be applied to appeals from Tax Court because it gives the debtor a “breathing spell,” satisfying the legislative intent and the purpose of the statute. Lastly, Part V provides a conclusion to this Note.

II. HISTORY OF THE AUTOMATIC STAY AND TAX COURT DEFICIENCIES

Section A discusses the adoption of the automatic stay provision of the Bankruptcy Code and defines its scope. Next, Section B explains the policy for adopting the automatic stay. Then Section C explains what a tax deficiency is and explains the procedures the IRS follows to determine whether a tax deficiency exists. In addition, it explains how a taxpayer ends up in Tax Court and defines the jurisdiction of Tax Court. Lastly, Section D explains the federal circuit court split regarding the application of the automatic stay to appeals from Tax Court.

A. *Adoption of 11 U.S.C. § 362 and the Scope of the Automatic Stay*

The automatic stay protection under 11 U.S.C. § 362 became effective on October 1, 1979.⁵ Section 362(a)(1) states:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.⁶

Section 362(a)(1) lists all the actions that are stayed by declaring bankruptcy, thus creating the scope of the automatic stay, which is intended to be broad.⁷ It will stay a wide variety of proceedings against the debtor⁸ including arbitration,⁹ license revocation,¹⁰ administrative

5. Pub. L. No. 95-598, § 402(a), 92 Stat. 2549 (1979).

6. 11 U.S.C. § 362.

7. H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297.

8. The Bankruptcy Code defines a debtor as a “person or municipality concerning which a case under this title has been commenced.” 11 U.S.C. § 101(13) (2012).

9. *Id.*

10. *See In re Nejberger*, 120 B.R. 21 (Bankr. E.D. Pa. 1990), *aff’d*, 934 F.2d 1300 (3d Cir. 1991) (liquor license); *In re Duke*, 167 B.R. 324 (Bankr. D. R.I. 1994) (driver’s license). However, section 362(b)(2)(D) permits revocation of certain licenses for failure to pay a domestic support obligation. 11 U.S.C. § 362(b).

proceedings,¹¹ and judicial proceedings.¹²

1. Who is Stayed?

The automatic stay provision applies “to all entities.”¹³ The term “entity” is meant to have a broad scope.¹⁴ Entity is defined in 11 U.S.C. § 101(15) of the Bankruptcy Code.¹⁵ It includes persons, estates, trusts, governmental units, and the United States government.¹⁶ It also includes companies and corporations bringing actions against a debtor.¹⁷ Essentially, the term “entity” is meant to cover virtually anyone or anything that could bring a suit against a debtor.

2. Actions Arising Prior to Commencement of Bankruptcy

The automatic stay provision is limited to actions brought against the debtor that arose prior to filing for bankruptcy or actions that could have been brought prior to filing for bankruptcy.¹⁸ However, if the cause of action arose subsequent to the debtor filing for bankruptcy, then the automatic stay is not applicable.¹⁹ The cause of action must arise prior to the petition for bankruptcy because the petition cannot discharge debts that arise after filing a petition for bankruptcy.²⁰

3. Exceptions to the Automatic Stay

Congress created exceptions to the automatic stay in 11 U.S.C. § 362(b) of the Bankruptcy Code.²¹ These are specific actions which normally would have been stayed under 11 U.S.C. § 362(a), but due to different policy reasons, these particular actions are not stayed.²²

11. See *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1032 (3d Cir. 1991) (citing *Ass’n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (3d Cir. 1991)).

12. *Id.*

13. 11 U.S.C. § 362(a).

14. ALAN N. RESNICK & HENRY J. SOMMER, 3 COLLIER ON BANKRUPTCY ¶ 362.03 (16th ed. 2008).

15. 11 U.S.C. § 101(15) (2012).

16. *Id.*

17. See, e.g., *In re Clinton Centrifuge*, 81 B.R. 844, 845-46 (Bankr. E.D. Pa. 1988).

18. 11 U.S.C. § 362(a) (2012).

19. *Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.)*, 744 F.2d 332, 337-38 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (cause of action did not arise until after commencement of chapter 7 case).

20. *Shenberg v. Vill. of Carpentersville (In re Shenberg)*, 433 F. Supp. 677, 680 (N.D. Ill. 1977).

21. 11 U.S.C. § 362(b).

22. See RESNICK & SOMMER, *supra* note 14, ¶ 362.05. The exceptions include criminal

However, because of the inclusive nature of 11 U.S.C. § 362(a), the exceptions in 11 U.S.C. § 362(b) should be read very narrowly.²³

B. Purpose of Automatic Stay

The automatic stay is a fundamental protection given to a debtor by bankruptcy laws.²⁴ The purpose of the automatic stay is to give the debtor a “breathing spell” by halting the collections process.²⁵ In addition, it serves the purpose of freezing the debtor’s financial relationships on the day he petitions for bankruptcy.²⁶ Lastly, the automatic stay gives the debtor an opportunity to create plans for repayment and reorganization without having to litigate against creditors in different courts.²⁷

In addition to protecting debtors, the automatic stay also serves the purpose of protecting creditors.²⁸ Without the automatic stay, creditors would be able to pursue their own remedy against the debtor.²⁹ This would result in first-in-time creditors obtaining payments of their claims in preference of other creditors whose security interests were actually superior.³⁰

C. Tax Deficiencies and Tax Court

A tax deficiency is an understatement on a tax return of the taxes a taxpayer owes to the IRS.³¹ In order for Tax Court to have jurisdiction, the IRS must first determine that a tax deficiency exists.³² Whether a

proceedings against the debtor and civil proceedings against the debtor regarding domestic support obligation, paternity tests, child custody or visitation, dissolution of marriage, or domestic violence. 11 U.S.C. § 362(b).

23. See RESNICK & SOMMER, *supra* note 14, ¶ 362.05 (citing *Hillis Motors, Inc. v. Hawaii Auto Dealers’ Ass’n*, 997 F.2d 581 (9th Cir. 1993)).

24. H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296.

25. *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994).

26. *First Sav. & Loan Ass’n v. Bennett (In re Bennett)*, 29 B.R. 380, 381 (Bankr. W.D. Mich. 1981).

27. *Accredited Associates, Inc. v. Shottenfeld*, 292 S.E.2d 417, 420 (Ga. Ct. App. 1982).

28. *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992).

29. *Id.*

30. *Id.*

31. LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* 301 (Mathew Bender & Co., Inc. ed., 3d ed. 2009). See also 26 U.S.C. § 6211(a) (2012), which provides that “the amount by which the tax imposed . . . exceeds the excess of the sum of the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus the amounts previously assessed (or collected without assessment) as a deficiency, over the amount of rebates. . . .”

32. *Bocock v. Comm’r*, 127 T.C. 178, 182 (2006).

deficiency exists is first determined at the administrative level of the IRS.³³ Only after the IRS determines a taxpayer deficiency exists can the issue be taken to Tax Court and a subsequent appeal.³⁴

The IRS established a process for determining whether a taxpayer has a tax deficiency.³⁵ This process begins with an examination of tax returns.³⁶ Generally, the IRS uses a computer program to select tax returns for examination.³⁷ However, tax returns are also selected when third-party documentation³⁸ does not match the return. In addition, the IRS selects tax returns to examine because of information received from other sources about a taxpayer's non-compliance with the tax laws.³⁹ The IRS will then notify the taxpayer and begin the examination.⁴⁰ During the examination, an IRS examiner determines whether any changes need to be made to the taxpayer's tax return.⁴¹ If the examiner determines that additional taxes are owed, the taxpayer can either agree and pay the additional taxes or disagree and discuss the issue with the examiner's supervisor.⁴² If the supervisor agrees with the taxpayer's position, then the issue is resolved; but if the parties fail to agree, then the IRS issues the taxpayer a "30-day letter"—a preliminary notice that a deficiency exists.⁴³

After the 30-day letter is issued, the taxpayer has the option to appeal within the IRS.⁴⁴ This step begins the Collection Due Process Procedures (CDP).⁴⁵ The appeal within the IRS is taken by a local Appeals Office.⁴⁶ If an agreement is not reached at the Appeals Office, or if the taxpayer does not appeal within the IRS, the taxpayer receives a

33. LEDERMAN & MAZZA, *supra* note 31, at 91.

34. *Id.*

35. I.R.S. Pub. 556 (Sep. 26, 2013), 2013 WL 5471049.

36. *Id.* at *2.

37. *Id.*

38. For example, see Form 1099 and W-2.

39. I.R.S. Pub. 556 at *2.

40. *Id.* at *3.

41. *Id.* at *4-5.

42. *Id.* at *5.

43. *Id.* at *5-6. *See also* LEDERMAN & MAZZA, *supra* note 31, at 175-76 (A 30-day letter, also called a preliminary notice of deficiency is a form letter sent to the taxpayer by the IRS. It gives the taxpayer the proposed adjustment of the taxpayer's tax liability along with the IRS's findings of facts and interpretation of the applicable law. The letter also contains an explanation of the taxpayer's appeal rights and an explanation of the collection process. Unlike the notice of deficiency, the IRS is not required by statute to send the 30-day letter.).

44. I.R.S. Pub. 556 at *12.

45. LEDERMAN & MAZZA, *supra* note 31, at 627.

46. I.R.S. Pub. 556 at *12. The Appeals Office is separate and independent from the IRS. It is the only level of appeal within the IRS.

“90-day letter,” also known as the notice of deficiency.⁴⁷ After receiving the notice of deficiency, the taxpayer may pay the deficiency or file a petition at Tax Court within 90 days.⁴⁸ A petition for bankruptcy does not stay the administrative process.⁴⁹

Tax Court is a court of very limited jurisdiction.⁵⁰ In the case of deficiency, Tax Court can only redetermine the correct amount of the deficiency.⁵¹ Tax Court conducts a de novo⁵² review and has the power to increase or decrease the deficiency and to determine whether a deficiency even exists.⁵³ Tax Court follows its own rules of practice for determining whether there is a deficiency.⁵⁴ However, Tax Court does not have general equitable power.⁵⁵ Thus, even if Tax Court determines there is a tax deficiency, it lacks the power to force the taxpayer to pay.⁵⁶ Provisions in the Bankruptcy Code operate to stay redeterminations of deficiency proceedings at Tax Court.⁵⁷

After Tax Court has made a redetermination of the deficiency, its decision may be appealed.⁵⁸ The United States Circuit Courts of Appeals have exclusive jurisdiction over appeals from Tax Court.⁵⁹ The circuit

47. *Id.* at *6.

48. 26 U.S.C. § 6213(a) (2012). The taxpayer also has the option to file a petition in a U.S. District Court or the Federal Court of Claims after paying the deficiency. However, filing in either of these courts would not be an issue with the automatic stay provision of the bankruptcy code because the claim is not against the taxpayer or a claim to recover money against the taxpayer. Instead, the taxpayer is asserting a claim to recover money from the IRS.

49. 11 U.S.C. § 362(b)(9) (2012).

50. *Comm’r v. McCoy*, 484 U.S. 3, 7 (1987). *See also* LEDERMAN & MAZZA, *supra* note 31, at 318 (“The boundaries of Tax Court’s jurisdiction are strictly determined by statute.”).

51. 26 U.S.C. § 6214(a) (2012).

52. *Gatlin v. Comm’r*, 754 F.2d 921, 923 (11th Cir. 1985).

53. 26 U.S.C. § 6214(a).

54. *See* 26 U.S.C. § 7453 (2012).

55. *McCoy*, 484 U.S. at 7. Section 6214(b) does give Tax Court power to apply the doctrine of equitable recoupment. However, this would only allow Tax Court to offset taxes owed by the taxpayer with previously overpaid taxes by the taxpayer. Tax Court still could not enforce the collection.

56. *Roberts v. Comm’r*, 175 F.3d 889 (11th Cir. 1999) (citing 26 U.S.C. § 7402(a) (2012); 28 U.S.C. § 1340 (2012); *Taylor v. United States*, 88 N.E.2d 121, 124-25 (Mass. 1949) (collection in state court)) (“the Government must bring a suit for collection of tax in federal district court (or perhaps state court) if it wants judicial assistance in collecting a deficiency”). *See also* MERTENS LAW OF FEDERAL INCOME TAXATION § 49E:46, at 145 n.58 (2007 rev.) (“A proceeding in Tax Court is, of course, not a suit for the collection of taxes, but a proceeding for the review of the Commissioner’s action in determining a deficiency.”).

57. 11 U.S.C. § 362(a)(8) (2012); The issue of whether 11 U.S.C. § 362(a)(1) also operates as a stay of redeterminations of deficiencies by Tax Court will be addressed later in the analysis section. *See supra* Part IV.B.1.

58. 26 U.S.C. § 7482(a)(3) (2012).

59. *Id.* § 7482(a)(1).

courts have the power to affirm, modify, or reverse the decision of Tax Court.⁶⁰ The circuit court's decision is final, except, of course, it is subject to review by the Supreme Court of the United States.⁶¹

D. The Circuit Split: Whether Appeals from Tax Court Are Subject to the Automatic Stay

Appeals from deficiency redeterminations from Tax Court have raised issues that have caused a split within in the federal circuit courts. The First, Third, Fifth, and Eleventh Circuits have all held that appeals from Tax Court are not subject to the automatic stay provision in 11 U.S.C. § 362(a)(1).⁶² However, the Ninth Circuit has held that appeals from Tax Court are subject to the automatic stay.⁶³ In the most recent ruling on the issue, the Tenth Circuit joined the majority of circuits in holding that Tax Court appeals are not subject to the automatic stay.⁶⁴ This Note concludes that the decisions of the First, Third, Fifth, Eleventh, and Tenth Circuits are in error because, among other things, they failed to understand that the controversy begins when the IRS assesses a tax deficiency at the administrative level prior to Tax Court proceedings.

1. The Fifth Circuit Declines to Enforce the Automatic Stay

The first court that dealt with the issue of whether appeals from Tax Court were subject to the automatic stay was the Fifth Circuit in *Freeman v. Commissioner*.⁶⁵ In this case, the appellants (taxpayers) had filed a petition in Tax Court for a redetermination of their 1981 federal tax liability.⁶⁶ However, the petition was not timely filed, and Tax Court dismissed the petition.⁶⁷ The appellants appealed. After filing for appeal, the appellants filed a petition for Chapter 11 bankruptcy. The appellants alleged that the bankruptcy petition operated as a stay of the appeal from

60. *Id.* § 7482(c)(1).

61. *Id.* § 7482(a)(1). Because the effects of an automatic stay of bankruptcy has never been addressed in a writ of certiorari to the Supreme Court for a tax deficiency, it will not be addressed in this article. However, it is likely that it would be treated the same as an appeal to the circuit court from Tax Court.

62. *See infra* Parts II.D.1, 3-5, and III.

63. *See infra* Part II.D.2.

64. *Schoppe v. Comm'r*, 711 F.3d 1190, 1192 (10th Cir. 2013).

65. *Freeman v. Comm'r*, 799 F.2d 1091 (5th Cir. 1986).

66. *Id.* at 1092.

67. *Id.*

Tax Court pursuant to 11 U.S.C. § 362(a)(1).⁶⁸

The Fifth Circuit ultimately rejected the appellants' argument.⁶⁹ The Fifth Circuit agreed that a Tax Court proceeding is a continuation of a judicial proceeding within the meaning of the statute.⁷⁰ However, it determined that the proceeding in Tax Court was not "against the debtor" within the meaning of the statute.⁷¹ The Fifth Circuit reasoned that whether the proceeding is against the debtor is determined by examining the state of the case at the beginning of the controversy.⁷² The Fifth Circuit then determined that because the taxpayer filed the petition at Tax Court, the proceeding was initiated by the debtor and, thus, was not against the debtor.⁷³ Therefore, the automatic stay provision of 11 U.S.C. § 362(a)(1) did not operate as a stay of the taxpayers' appeal from Tax Court.

2. The Ninth Circuit Imposes the Automatic Stay

The next court that dealt with the issue of whether appeals from Tax Court are subject to the automatic stay was the Ninth Circuit in *Delpit v. Commissioner*.⁷⁴ In this case, the Delpits disputed a notice of deficiency by filing a petition in Tax Court.⁷⁵ Tax Court ruled in favor of the Commissioner, and the Delpits appealed.⁷⁶ Shortly after filing for appeal, the Delpits filed a petition for bankruptcy. The Delpits argued that the appeal from Tax Court was stayed under 11 U.S.C. § 362(a)(1).⁷⁷

The Ninth Circuit agreed with the Delpits, and the appeal was stayed.⁷⁸ The Ninth Circuit reasoned that a Tax Court petition, although filed by the debtor, is merely a "continuation" of the IRS proceedings brought against the debtor.⁷⁹ Thus, the appeal was subject to the automatic stay. The Ninth Circuit also held that the appeal was a

68. *Id.*

69. *Id.* at 1093.

70. *Id.* at 1092.

71. *Id.* at 1093.

72. *Id.* at 1093 (citing *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 61-62 (6th Cir. 1983); *Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982)).

73. *Id.*

74. *Delpit v. Comm'r*, 18 F.3d 768 (9th Cir. 1994).

75. *Id.* at 769.

76. *Id.*

77. *Id.*

78. *Id.* at 7-71.

79. *Id.*

continuation of the proceedings to recover a claim against the debtor because the proceedings initiated by the IRS were to recover a sum of money the debtor owed for a tax deficiency.⁸⁰

3. The Eleventh Circuit Does Not Enforce the Stay

The Eleventh Circuit was the next court to decide whether appeals from Tax Court are subject to the automatic stay of 11 U.S.C. § 362(a)(1). In *Roberts v. Commissioner*, Tax Court determined that the appellants owed a tax deficiency.⁸¹ The taxpayers filed a petition for Chapter 11 bankruptcy and then filed an appeal from the Tax Court decision.⁸² The Commissioner moved to dismiss the appeal on the grounds that it was untimely.⁸³ However, the appellants argued that the notice of appeal was ineffective because of the automatic stay of 11 U.S.C. § 362(a)(1).⁸⁴

The Eleventh Circuit disagreed with the appellants regarding the automatic stay and granted the Commissioner's motion to dismiss the appeal.⁸⁵ It examined the reasoning of the Fifth Circuit in *Freeman*⁸⁶ and the Ninth Circuit in *Delpit*.⁸⁷ Ultimately, the court rejected the Ninth Circuit's reasoning that Tax Court was a continuation of the IRS proceedings brought against the debtor.⁸⁸ The Eleventh Circuit agreed with the Fifth Circuit that the proceedings started at Tax Court and were not initiated against the debtor, but instead by the debtor.⁸⁹

4. The Third Circuit Joins the Majority – No Automatic Stay

In 2001, the Third Circuit also addressed whether the automatic stay contained in the Bankruptcy Code applied to appeals from Tax Court. In *Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*, the taxpayer filed a petition in Tax Court for a readjustment of partnership items.⁹⁰ The taxpayer moved for summary

80. *Id.*

81. *Roberts v. Comm'r*, 175 F.3d 889, 891 (11th Cir. 1999).

82. *Id.* at 891.

83. *Id.* at 892.

84. *Id.* at 896-97.

85. *Id.* at 893.

86. *Freeman v. Comm'r*, 799 F.2d 1091 (5th Cir. 1986).

87. *Delpit v. Comm'r*, 18 F.3d 768 (9th Cir. 1994).

88. *Roberts*, 175 F.3d at 894.

89. *Id.* at 895.

90. *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r*, 249 F.3d 175, 177 (3d Cir. 2001).

judgment, and the motion was denied.⁹¹ The taxpayer then moved for an interlocutory appeal, which was granted.⁹² After filing the appeal, the taxpayer petitioned for Chapter 11 bankruptcy.⁹³

The Third Circuit briefly addressed the issue of the automatic stay. The court adopted the reasoning of the Fifth and Eleventh Circuits.⁹⁴ The court determined that the proceeding in Tax Court was not against the debtor and rejected the reasoning of the Ninth Circuit.⁹⁵

5. The First Circuit Also Rejects the Automatic Stay Requirement

The next court that dealt with the automatic stay of the Bankruptcy Code and appeals from Tax Court was the First Circuit in *Haag v. United States*.⁹⁶ Initially, the United States filed in the district court to collect against the taxpayers.⁹⁷ The taxpayers then brought suit against the United States in the district court alleging that the IRS failed to notify them of their right to a collection due process hearing.⁹⁸ The district court ruled in favor of the United States regarding the taxpayers' suit and the taxpayers appealed.⁹⁹ While the appeal was pending, one of the taxpayers petitioned for bankruptcy.¹⁰⁰

The First Circuit briefly looked to the previous circuit court decisions that addressed the issue of appeals from Tax Court to determine whether the automatic stay of the Bankruptcy Code should be applied in this case.¹⁰¹ It rejected the Ninth Circuit's approach and joined the majority of circuits in concluding that Tax Court proceedings were brought by, not against, the taxpayer, and hence, the appeal was not subject to the automatic stay.¹⁰²

91. *Id.*

92. *Id.*

93. *Id.* at 179.

94. *Id.* at 180.

95. *Id.*

96. *Haag v. United States*, 485 F.3d 1 (1st Cir. 2007). This case was not an appeal from Tax Court, but the court still addressed the issue regarding its applicability in the case.

97. *Id.* at 2.

98. *Id.* at 2.

99. *Id.* at 3.

100. *Id.* at 4.

101. *Id.*

102. *Id.*

III. THE TENTH CIRCUIT INCORRECTLY SIDES WITH THE MAJORITY OF COURTS TO REACH THE ISSUE AND DECLINES TO IMPOSE THE AUTOMATIC STAY

The most recent court to face the issue of whether the automatic stay provision in 11 U.S.C. § 362(a)(1) applies to appeals from Tax Court was the Tenth Circuit in *Schoppe v. Commissioner*.¹⁰³ It agreed with the majority of circuits that the automatic stay provision does not apply to appeals from Tax Court.¹⁰⁴ This Note will conclude that the Tenth Circuit erred in so holding because Tax Court proceedings are a claim brought against the debtor within the meaning of 11 U.S.C. § 362(a)(1).

A. *The Tenth Circuit Decision*

In *Schoppe*, the appellant, John H. Schoppe, petitioned for review of a Tax Court redetermination that had found him liable for tax deficiencies for the years 2002 through 2007.¹⁰⁵ While the case was proceeding at the appellate level, Schoppe filed a petition for voluntary bankruptcy.¹⁰⁶ This forced the appellate court to face the issue of whether the automatic stay provision of 11 U.S.C. § 362(a)(1) applied to appeals from Tax Court.

After going through the IRS process,¹⁰⁷ the Commissioner determined that Schoppe had a tax deficiency and issued the notice of deficiency.¹⁰⁸ Schoppe then filed a petition in Tax Court seeking a redetermination of the deficiencies. Tax Court ruled in favor of the Commissioner and found Schoppe liable.¹⁰⁹ Schoppe then appealed the case to the United States Court of Appeals for the Tenth Circuit.¹¹⁰

The Tenth Circuit held that a petition filed in Tax Court is an independent judicial process initiated by the debtor, not against the debtor.¹¹¹ Thus, the Tenth Circuit concluded that appeals from Tax Court are not subject to the automatic stay.¹¹² The court examined the opinions

103. *Schoppe v. Comm’r*, 711 F.3d 1190 (10th Cir. 2013).

104. *Id.* at 1192.

105. *Id.* at 1191.

106. *Id.*

107. *See supra* Part II.C.

108. *Schoppe*, 711 F.3d at 1191.

109. *Id.*

110. *Id.*

111. *Id.* at 1192.

112. *Id.*

of the other circuits that faced this issue.¹¹³ The court ultimately rejected the reasoning of the Ninth Circuit that the automatic stay applies because Tax Court is a continuation of administrative proceedings the IRS brought against the taxpayer.¹¹⁴

The Tenth Circuit went on to determine whether Schoppe was liable for tax deficiencies.¹¹⁵ The Court ultimately determined that he was liable and affirmed the ruling of Tax Court.¹¹⁶

B. The Critical Issues in the Automatic Stay Debate

Although they are split, the federal circuits have identified two main issues which must be resolved to determine whether the automatic stay provision, 11 U.S.C. § 362(a)(1), is applicable to appeals from Tax Court. The two issues are:

- 1.) Whether a proceeding before Tax Court and a subsequent appeal are initiated by the debtor, or, conversely, whether it is a continuation of the proceeding initiated against the debtor when the Commissioner begins the administrative process of determining whether there is a deficiency?
- 2.) Whether a proceeding before Tax Court or a subsequent appeal operates as a commencement or continuation of the action to recover a claim against the debtor?

An answer in the affirmative to either of these issues would support the proposition that the automatic stay provision of 11 U.S.C. § 362(a)(1) does apply to Tax Court proceedings and subsequent appeals from them.

Thus far, courts have only looked to 11 U.S.C. § 362(a)(1) to determine whether the automatic stay is applicable to appeals from Tax Court.¹¹⁷ However, by looking at the language of 11 U.S.C. § 362(a)(6) of the automatic stay provision, Tax Court decisions and subsequent appeals from its decisions may be stayed because the phrase “assess . . . a claim against the debtor” is broad enough to cover Tax Court proceedings. If 11 U.S.C. § 362 (a)(6) is applicable, then it would resolve the problem without having to answer the two issues identified by the circuit courts.

113. *Id.* at 1191-92.

114. *Id.* at 1191.

115. *Id.* at 1192-94.

116. *Id.* at 1194.

117. *See supra* Parts II–III.

IV. WHY THE AUTOMATIC STAY SHOULD BE APPLICABLE TO APPEALS OF TAX COURT DECISIONS

The Tenth Circuit incorrectly decided *Schoppe*¹¹⁸ because the language of the automatic stay provisions and legislative intent support the application of the automatic stay to appeals from Tax Court. Section A demonstrates why 11 U.S.C. § 362(a)(1) should be applied to stay appeals from Tax Court because Tax Court is merely a continuation of IRS administrative proceedings that are brought against the debtor. Section B explains how the nature of Tax Court itself justifies the application of the automatic stay. Section C shows that Tax Court proceedings are acts “to recover a claim” within the scope of 11 U.S.C. § 362(a)(6). Section D argues that 11 U.S.C. § 362(a)(6) could independently stay appeals from Tax Court. Finally, Section E contends that the automatic stay provision should be applied to appeals from Tax Court because it gives the debtor a “breathing spell,” satisfying the legislative intent and the purpose of the statute.

A. *A Tax Court Proceeding, and a Subsequent Appeal from it, is a Continuation of the Proceeding Against the Debtor*

Subsection 1 argues that when drafting the statute, Congress considered IRS administrative proceedings to be brought against the debtor. Next, subsection 2 explains why adding 11 U.S.C. § 362(a)(8), addressing Tax Court proceedings, does not mean that proceedings at Tax Court are not also applicable under 11 U.S.C. § 362(a)(1). Then, subsection 3 argues that when Tax Court proceedings are viewed as a whole, it is clear that they are against the debtor. Lastly, subsection 4 explains that not staying appeals from Tax Court would lead to unusual results.

1. The Exception of § 362(b)(9) Indicates that IRS Administrative Proceedings Are “Against the Debtor” as Defined by § 362(a)(1)

Section 362(b) carves out specific exceptions to the automatic stay under 11 U.S.C. § 362(a).¹¹⁹ Section 362(b)(9) creates an exception to

118. See *supra* Parts II-III.

119. 11 U.S.C. § 362(a) (2012), which provides, “Except as provided in subsection (b) of this section”; *id.* § 362(b), which provides, “The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78(a)(3)], does not operate as a stay under subsection (a).” See also RESNICK & SOMMER, *supra* note 14, ¶ 362.05 (“Section 362(b) contains a list of exceptions to the stay. These

the automatic stay that allows the IRS to determine tax deficiencies and audit taxpayers who have filed for bankruptcy.¹²⁰ This allows for the administrative proceedings of the IRS's Collection Due Process to continue, even though the taxpayer has initiated the automatic stay by filing for bankruptcy.¹²¹ This exception under 11 U.S.C. § 362(b)(9) does not state specifically what it is an exception to. Therefore, it could have been Congress's intent that § 362(b)(9) is an exception to every subsection of § 362(a), including the automatic stay provision of 11 U.S.C. § 362(a)(1).¹²² Specifically, it would be an exception to "the commencement or continuation . . . of a[n] . . . administrative . . . proceeding against the debtor."¹²³ By carving out this exception for an IRS deficiency process, the statute indicates that Congress considered the IRS administrative procedures for determining a deficiency to be "against the debtor" within the meaning of 11 U.S.C. § 362(a)(1).¹²⁴ If Congress did not consider it to be "against the debtor," then it would have been unnecessary to write 11 U.S.C. § 362(b)(9).¹²⁵ The IRS administrative proceedings would not have been subject to the stay if they were not "against the debtor."¹²⁶ Therefore, the exception Congress created for IRS tax deficiency proceedings indicates that they are "against the debtor," and subsequent appeals from such a proceeding, including filing in Tax Court and appeals from Tax Court, should also be considered "against the debtor."¹²⁷

Even if 11 U.S.C. § 362(b)(9) does not apply as an exception to all subsections of 11 U.S.C. § 362(a), it would still be an exception to

are particular types of actions that would be stayed under the language of section 362(a) but that, for different policy reasons, are expressly excepted from the stay.").

120. 11 U.S.C. § 362(b)(9):

The filing of a [bankruptcy] petition does not operate as a stay under subsection (a), of an audit by a governmental unit to determine tax liability, the issuance to the debtor by a governmental unit of a notice of a tax deficiency, a demand for tax returns, or the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

121. *See id.*

122. *See id.* The actual text classifies it as an exception to subsection (a). Because it does not state which subsection of (a), it is reasonable to assume that it is an exception to any part of (a) that would be applicable.

123. *Id.* § 362(a)(1).

124. *See* RESNICK & SOMMER, *supra* note 14, ¶ 362.03(10).

125. *See id.*

126. *See id.*

127. *See id.*

subsection (a)(1). As stated above, 11 U.S.C. § 362(b)(9) creates an exception to the automatic stay for administrative proceedings conducted by the IRS in determining a tax deficiency.¹²⁸ The only part of 11 U.S.C. § 362(a) that references administrative proceedings is 11 U.S.C. § 362(a)(1).¹²⁹ Therefore, at a minimum, 11 U.S.C. § 362(b)(9) must be an exception to 11 U.S.C. § 362(a)(1), even if it does not apply to all of 11 U.S.C. § 362(a).

2. The Automatic Stay Provision Operates as a Stay to Proceedings Subject to § 362(a)(8)

The automatic stay should be applied to proceedings in Tax Court regarding a tax deficiency of a debtor.¹³⁰ Staying proceedings in Tax Court satisfies the policy of the automatic stay.¹³¹ Staying proceedings in Tax Court further provides a “breathing spell” for the debtor.¹³² Unlike 11 U.S.C. § 362(a)(1),¹³³ 11 U.S.C. § 362(a)(8) is very specific.¹³⁴ The express language states that § 362(a)(8) only applies to proceedings in Tax Court and not to appeals from Tax Court.¹³⁵

In *Delpit*, the Ninth Circuit properly rejected the Commissioner’s argument that applying 11 U.S.C. § 362(a)(1) to Tax Court proceedings would render § 362(a)(8) superfluous.¹³⁶ The Commissioner was mistaken because there are proceedings in Tax Court that would be stayed under 11 U.S.C. § 362(a)(8), but not under 11 U.S.C. § 362(a)(1) because they are not “against the debtor.”¹³⁷ Therefore, 11 U.S.C. §

128. 11 U.S.C. § 362(b)(9).

129. *Id.* § 362(a)(1) (“the commencement or continuation . . . of a[n] . . . administrative . . . proceeding against the debtor.”).

130. *Id.* § 362(a)(8).

131. H.R. REP. NO. 95-595, at 340-44 (1977) (“The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws.”).

132. *See id.* (providing, “It gives the debtor a breathing spell from his creditors.”).

133. *Id.* (stating, “the scope of [(a)(1)] is broad.”).

134. *See Cheng v. Comm’r*, 938 F.2d 141, 143 (9th Cir. 1991); *Delpit v. Comm’r*, 18 F.3d 768, 771 (9th Cir. 1994).

135. *See Delpit*, 18 F.3d at 771 (emphasis in original) (“We had no difficulty concluding from the express language of Section 362(a)(8) that it applies only to proceedings *before Tax Court*, and not to proceedings *before the Court of Appeals*.”).

136. *Id.* at 772.

137. *See id.* (emphasis in original):

Tax Court is authorized to rule on certain kinds of declaratory judgments pertaining to pension plans and governmental obligations, *see* 26 U.S.C. 7476, 7478, and certain questions pertaining to the confidentiality of written determinations, *see* 26 U.S.C. 6110. Although Section 362(a)(8) clearly applies to such actions (because they are “before” Tax Court), Section 362(a)(1) does *not* apply simultaneously because such actions do not necessarily arise from proceedings ‘against the debtor’

362(a)(1) does not render 11 U.S.C. § 362(a)(8) unnecessary.¹³⁸ Instead, Tax Court hears cases where the stay under both subsections is applicable.¹³⁹

3. Proceedings Should Be Considered as a Whole When Determining Whether the Action Is “Against the Debtor”

Proceedings must be looked at as a whole to determine whether they are initiated “against the debtor” within the meaning of 11 U.S.C. § 362(a)(1).¹⁴⁰ The purpose of IRS administrative proceedings is to collect tax deficiencies from taxpayers who owe them.¹⁴¹ After exhausting every appeal available,¹⁴² if the taxpayer still has a deficiency, then the taxpayer must pay the deficiency to the IRS.¹⁴³ Thus, even though the taxpayer technically files the petition in Tax Court, the nature and result of all of the proceedings indicate that it is in fact “against the taxpayer.”¹⁴⁴

4. Not Staying Appeals from Tax Court Would Lead to Anomalous Results

If an appeal from Tax Court was not stayed under 11 U.S.C. § 362(a)(1), then it would lead to very unusual results.¹⁴⁵ Assuming the appeal is not stayed and the appellate court rules in favor of the Commissioner, the appellate court will only remand the case back to Tax Court.¹⁴⁶ Unlike a federal district court, which could enforce the judgment, the controversy before Tax Court would undoubtedly be stayed under 11 U.S.C. § 362(a)(8) of the bankruptcy code.¹⁴⁷ To do this would be inefficient and serve no benefit to either the IRS or the

138. *See id.* at 772.

139. *Id.*

140. *Id.* at 773 (citing *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 226 (9th Cir. 1989) (holding that a motion by a creditor to strike a pre-bankruptcy action violates the automatic stay even though the debtor initiated the proceedings and was the plaintiff)).

141. *See LEDERMAN & MAZZA, supra* note 31, at 91 (“[T]he IRS audits returns . . . to generate additional revenue. Therefore, those returns selected for audit are generally ones that the IRS expects will reflect a tax understatement.”).

142. A process that could end in the U.S. Supreme Court.

143. If the IRS did need judicial assistance in recovery, then it would have to file a suit in federal district court or state court. *See Roberts v. Comm’r*, 175 F.3d 889, 896 (11th Cir. 1999) (citing 26 U.S.C. § 7402(a) (2012); 28 U.S.C. § 1340 (2012); *Taylor v. United States*, 88 N.E.2d 121, 124-25 (Mass. 1949)).

144. *See supra* notes 135-37, 141-43.

145. *Delpit*, 18 F.3d at 773.

146. *Id.*

147. *Id.*

debtor.¹⁴⁸

Further, the Commissioner would never be able to enforce a favorable judgment to collect the tax deficiency.¹⁴⁹ Under 11 U.S.C. § 362(a)(6), which stays any “act to collect . . . a claim against a debtor,” the Commissioner would again be stayed from collecting.¹⁵⁰ Essentially, a victory on appeal for the Commissioner would not allow the IRS to recover any tax deficiency from the debtor and would only be a waste of time for the appellate court, the IRS, and the debtor.¹⁵¹

B. The Nature of Tax Court Proceedings Supports the Conclusion that the Automatic Stay Should Apply

The recent decision of the Tenth Circuit in *Schoppe v. Commissioner*¹⁵² has increased the number of circuits that hold the majority opinion that the automatic stay provision of 11 U.S.C. § 362(a)(1) does not operate as a stay to appeals from Tax Court. However, many of the circuits in the majority rely upon the faulty reasoning of the Eleventh Circuit in *Roberts v. Commissioner*.¹⁵³ If the authority upon which the Eleventh Circuit relied is properly understood, then it becomes clear that 11 U.S.C. § 362(a)(1) is applicable to appeals from Tax Court.

The Ninth Circuit in *Delpit v. Commissioner* properly understood that 11 U.S.C. § 362(a)(1) should be applied to stay appeals from Tax Court because they are brought “against the debtor” and are brought to “recover a claim” against the debtor.¹⁵⁴ The specific exception to IRS administrative proceedings in 11 U.S.C. § 362(b)(9) makes it clear that the legislature considered these proceedings to be “against the debtor.” Because proceedings in Tax Court and subsequent appeals are merely a continuation of the proceedings brought against the debtor, they should be stayed. Further, proceedings in Tax Court and subsequent appeals are proceedings to “recover a claim” against the debtor.¹⁵⁵ Although Tax Court lacks the power to assist the IRS in collecting a deficiency, Tax Court is a necessary step the IRS must take to “recover” its claim against

148. *See id.* at 773 n.6.

149. *See id.*

150. *See id.* *See also* 11 U.S.C. § 362(a)(6) (2012), which stays any “act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.”

151. *Delpit*, 18 F.3d at 773.

152. *Schoppe v. Comm’r*, 711 F.3d 1190 (10th Cir. 2013).

153. *Roberts v. Comm’r*, 175 F.3d 889 (11th Cir. 1999).

154. *Delpit*, 18 F.3d at 770-71.

155. *Id.*

the debtor.¹⁵⁶

1. Tax Court Proceedings Indicate That They Are “Against the Debtor” within the Meaning of § 362(a)(1)

In *Roberts v. Commissioner*,¹⁵⁷ the Eleventh Circuit held that whether a proceeding is brought “against the debtor” within the meaning of 11 U.S.C. § 362(a)(1) is determined at the inception or initial proceedings against the debtor.¹⁵⁸ As shown above, the initial proceeding occurs at the administrative level with the IRS audit and notice of deficiency.¹⁵⁹ These administrative proceedings are not optional for the taxpayer.¹⁶⁰ The taxpayer cannot file a petition in Tax Court until these administrative proceedings are completed by the IRS.¹⁶¹ This supports the proposition that a petition to Tax Court is simply a continuation of the proceedings “against the debtor.”

2. The Level of Review of the Appeal Does Not Impact Whether the Proceedings Are “Against the Debtor” within the Meaning of 11 U.S.C. § 362(a)(1)

Appeals are generally considered against the taxpayer so long as the initial controversy is brought “against the debtor.”¹⁶² This does not take into account the scope of review the appellate court uses.¹⁶³ Therefore, even though Tax Courts review the tax deficiency de novo,¹⁶⁴ the level of review does not suggest that Tax Court proceedings are not

156. See *supra* Part II.B.

157. *Roberts*, 175 F.3d at 889. Although the most recent case is *Schoppe v. Commissioner*, the Eleventh Circuit provides more analysis of the issue for the majority circuits. Thus, it makes more sense to critique its reasoning rather than any of the other circuits.

158. See also *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 61-62 (6th Cir. 1983); *Ass’n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982); *Berry Estates, Inc. v. New York (In re Berry Estates)*, 812 F.2d 67, 71.

159. See *supra* Part II.B.

160. See LEDERMAN & MAZZA, *supra* note 31, at 119 (“When the IRS seeks access to the taxpayer’s books and records, it will typically ask the taxpayer to provide them on a voluntary basis. If those efforts fail, the IRS may issue an administrative summons compelling the taxpayer to turn over the records.”). See also 26 U.S.C. § 7602(a)(2) (2012).

161. *Delpit v. Comm’r*, 18 F.3d 768, 770 (9th Cir. 1994).

162. *Ass’n of St. Croix Condo. Owners*, 682 F.2d at 449 (“In our view, section 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee.”)

163. See *id.*

164. *Gatlin v. Comm’r*, 754 F.2d 921, 923 (11th Cir. 1985) (“[A] trial before Tax Court is a proceeding de novo.”).

continuations of proceedings brought “against the debtor.”¹⁶⁵

3. IRS Proceedings Are Not Subject to the Automatic Stay of § 362(a) Only Because § 362(b)(9) Provides a Specific Exception

In *Roberts*, the Eleventh Circuit accurately acknowledged that the audit and determining of a deficiency at the administrative level of the IRS are not stayed by 11 U.S.C. § 362(a).¹⁶⁶ From this, the Eleventh Circuit concluded that the Ninth Circuit was wrong to consider the IRS administrative acts as an “administrative proceeding” within the meaning of 11 U.S.C. § 362(a)(1).¹⁶⁷ However, the Eleventh Circuit did not accurately apply the authority upon which it relied. In *H & H Beverage v. Department of Revenue*, the Third Circuit did not apply the automatic stay of 11 U.S.C. § 362(a).¹⁶⁸ Instead, the Third Circuit applied the exception to the automatic stay under 11 U.S.C. § 362(b)(9) and determined that the audit and notice of deficiency at the administrative level were not stayed.¹⁶⁹ The audit and notice of deficiency were allowed to go forward, not because 11 U.S.C. § 362(a)(1) did not apply, but because the exception under 11 U.S.C. § 362(b)(9) applied.¹⁷⁰ The bankruptcy courts’ decisions in *In re Moore* and *In re Ungar* that administrative proceedings were not stayed also relied upon 11 U.S.C. § 362(b)(9), not subsection 11 U.S.C. § 362(a)(1).¹⁷¹ Essentially, IRS administrative proceedings are an exception that Congress allowed to go forward despite the automatic stay.¹⁷²

4. The Two Paths a Taxpayer Can Pursue When the IRS Determines a Deficiency Do Not Mean That Tax Court.

165. See *Ass’n of St. Croix Condo. Owners*, 682 F.2d at 449.

166. *Roberts v. Comm’r*, 175 F.3d 889, 898 n.5 (11th Cir. 1999) (citing *H & H Beverage Distribs. v. Dep’t of Revenue*, 850 F.2d 165 (3d Cir. 1988); *In re Moore*, 131 B.R. 893 (Bankr. S.D. Fla. 1991); *In re Ungar*, 104 B.R. 517 (Bankr. N.D. Ga. 1989)).

167. *Roberts*, 175 F.3d at 894.

168. *H & H Beverage Distribs.*, 850 F.2d at 168 (“§ 362(b)(9) of the Code provides that the automatic stay does not bar a governmental entity from issuing a ‘notice of tax deficiency.’”).

169. *Id.*

170. *Id.*

171. *Ungar*, 104 B.R. at 520 (“§ 362(b)(9), specifically exempts from the stay the issuance of notices of tax deficiencies to the debtor by a governmental unit”); *Moore*, 131 B.R. at 894 (although this case does not specifically rely on either § 362(b)(9) or § 362(a), the judge did rely on *In re Ungar* to make his decision; thus, it can be inferred that the judge relied on § 362(b)(9) and not § 362(a)).

172. See 11 U.S.C. § 362(b)(9) (2012).

Proceedings and Subsequent Appeals Are Not “Against the Debtor” within the Meaning of § 362(a)(1)

The Eleventh Circuit, in *Roberts v. Commissioner*, was also concerned about creating unwarranted inconsistency in the way that the automatic stay is provided to tax-related judicial proceedings.¹⁷³ When issued a notice of deficiency, taxpayers can choose to file a petition in Tax Court or pay the deficiency and file suit for a refund in a United States District Court or the United States Court of Federal Claims.¹⁷⁴ If the taxpayer chooses to pay the deficiency and files for a refund, and subsequently files for bankruptcy, then the automatic stay would not apply. The suit would not be “against the debtor”; instead, the suit would be the debtor against the Commissioner of the IRS.¹⁷⁵ The Eleventh Circuit admitted, “we see no logical reason why a taxpayer’s election to proceed in Tax Court rather than district court should affect a court’s determination of whether the proceeding is ‘against the debtor’ under the first clause of section 362(a)(1).”¹⁷⁶

The Eleventh Circuit failed to realize the substantially different position taxpayers in district courts are in as opposed to taxpayers in Tax Court.¹⁷⁷ The creation of Tax Court was designed to alleviate financial hardship caused by having to pay a deficiency before being able to go to court.¹⁷⁸ Congress was concerned that being forced to pay before the appeal may even force taxpayers into bankruptcy.¹⁷⁹ Congress did not believe that this could be remedied simply by filing for a refund.¹⁸⁰ That is why Congress believed it necessary to provide the taxpayer a method to “appeal” the determination of his tax liability.¹⁸¹ However, a taxpayer in a district court has already paid the tax and is simply trying to recover the money; he is not getting a redetermination to avoid paying like a taxpayer in Tax Court.¹⁸²

173. *Roberts v. Comm’r*, 175 F.3d 889, 895 (11th Cir. 1999).

174. *See* 26 U.S.C. § 6213 (2012) and 28 U.S.C. § 1346 (2012).

175. *See* 11 U.S.C. § 362(a)(1). *See also Roberts*, 175 F.3d at 895.

176. *Roberts*, 175 F.3d at 895.

177. *See Flora v. United States*, 362 U.S. 145, 158-59 (1960).

178. S. REP. NO. 68-179, at 8 (1924) (This section discusses the Board of Tax Appeals. However, the Board of Tax Appeals is what Tax Court was originally called, and the purpose of the Board of Tax Appeals is essentially the same as Tax Court. It served the same function as Tax Court.). *See also Flora*, 362 U.S. at 158-59.

179. S. REP. NO. 68-179, at 8.

180. *Id.*

181. *Id.* (“[The taxpayer] is entitled to an appeal and to a determination of his liability for the tax prior to its payment.”).

182. *See id.*

5. The Creation and History of Tax Court Suggest It Is an Appeals Process and Not a Method for Initiating a Controversy

Before it was called “Tax Court,” Tax Court was called the “Board of Tax Appeals.”¹⁸³ It was created under the Revenue Act of 1924, and it was an independent agency in the executive branch of the government.¹⁸⁴ As its name suggests, the Board of Tax Appeals was an appeals process for taxpayers to have a redetermination of a deficiency that had been brought against the taxpayer by the IRS.¹⁸⁵ Prior to the Board of Tax Appeals, a taxpayer had no choice but to pay the deficiency before he could recover the money from the IRS in a district court.¹⁸⁶ The Board of Tax Appeals was an appeals process, never an initiation of a suit by the taxpayer.¹⁸⁷

The Board of Tax Appeals underwent some changes when it became Tax Court, but none of these changes affected the purpose of Tax Court as an appeals process. The name was officially changed to Tax Court in the Revenue Act of 1942.¹⁸⁸ Although the Act changed the name, it did nothing to change the operations of Tax Court.¹⁸⁹ It was officially established as a court under Article I of the Constitution in 1969.¹⁹⁰ The reason for this change was to give Tax Court the authority to compel the attendance of witnesses, to punish for contempt, and to enforce its orders.¹⁹¹ However, none of the changes made to Tax Court have affected its function. As its legislative history shows, Tax Court was created and functions as an appeals process for taxpayers and not as a method for a taxpayer to initiate a suit against the IRS.

C. A Proceeding before Tax Court, and a Subsequent Appeal from It, Operates as a Commencement or Continuation to Recover a Claim Against the Debtor.

The Ninth Circuit’s position is further supported by the legislative intent of the bankruptcy statute and the policy underlying the automatic

183. Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 253, 336.

184. *Id.* at 338.

185. S. REP. NO. 68-179, at 8-9.

186. *Id.*

187. *See* Revenue Act of 1924, 43 Stat. at 337.

188. Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957 (1942).

189. *See id.*; MARTIN J. MCMAHON JR. & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 51.03[1] (2d ed. 2013).

190. MCMAHON & ZELENAK, *supra* note 189, ¶ 51.03(1); *see also* U.S. CONST. art. I, § 8, cl. 9.

191. MCMAHON & ZELENAK, *supra* note 189, ¶ 51.03(1).

stay. The legislature adopted the automatic stay to provide the debtor a “breathing spell” against creditors and to prevent preferential treatment of one creditor at the detriment of the other creditors. By allowing appeals from Tax Court to go forward notwithstanding the filing of bankruptcy and the automatic stay, the debtor is further burdened and the IRS is given preferential treatment over the other creditors. In addition, the results of continuing an appeal from Tax Court are unusual and inefficient. Even if the IRS ultimately gets a favorable ruling, it will be unable to collect the debt under 11 U.S.C. § 362(a)(6) of the automatic stay provision. Therefore, it is highly inefficient to continue the proceedings. Subsection 1 argues that the legislative history and statutory language of 11 U.S.C. § 362(a)(1) “to recover a claim” includes Tax Court proceedings. Next, subsection 2 explains that the policy of the automatic stay also supports the conclusion that it applies to Tax Court proceedings. Lastly, subsection 3 shows why not applying the automatic stay to appeals from Tax Court is highly inefficient.

1. Legislative History and Statutory Language Suggest That § 362(a)(1)’s Language, “to Recover a Claim,” Includes Proceedings before Tax Court

The legislature included the language “to recover a claim” in 11 U.S.C. § 362(a)(1) to make this section interact with 11 U.S.C. § 362(a)(6).¹⁹² Section 362(a)(6) provides, “a petition filed . . . operates as a stay, applicable to all entities, of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.”¹⁹³ The primary difference between 11 U.S.C. § 362(a)(1) and 11 U.S.C. § 362(a)(6) is that 11 U.S.C. § 362(a)(6) is broader: it covers “any act,” whereas 11 U.S.C. § 362(a)(1) is applicable to judicial or administrative proceedings.¹⁹⁴ To fall within 11 U.S.C. § 362(a)(1)’s “to recover a claim,” the action must be (1) a judicial or administrative proceeding (2) “to recover a claim against the debtor.”¹⁹⁵

The first part of the 11 U.S.C. § 362(a)(1) language is easily

192. 124 CONG. REC. H11,092-93 (daily ed. Sept. 28, 1978):

Section 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case. The provision is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent harassment of the debtor with respect to pre-petition claims.

193. 11 U.S.C. § 362(a)(6) (2012).

194. See RESNICK & SOMMER, *supra* note 14, ¶ 362.03(3). Tax Court clearly falls under the category of a judicial proceeding within the meaning of section 362(a)(1).

195. 11 U.S.C. § 362(a)(1).

satisfied. Proceedings in Tax Court, as well as federal appellate courts, are unquestionably judicial proceedings.¹⁹⁶ Therefore, the issue turns on how “to recover a claim” is defined.

The Eleventh Circuit, in *Roberts*,¹⁹⁷ misunderstood the meaning of “to recover a claim against a debtor.” Although the court accurately understood that Tax Court is only a process for determining whether a deficiency exists,¹⁹⁸ and Tax Court lacks equitable power to enforce a judgment,¹⁹⁹ the proceedings in Tax Court should still be properly characterized as a proceeding to recover a claim. Tax Court and subsequent appeals are necessary steps to recover a claim against a taxpayer. Although Tax Court lacks equitable power to collect the debt,²⁰⁰ the IRS is unable to collect the debt without going through Tax Court proceedings.²⁰¹ Essentially, Tax Court proceedings and subsequent appeals are part of the ongoing process by which the IRS recovers a claim against the debtor.²⁰²

2. The Policy Behind § 362(a)(1) Suggests that Tax Court and Subsequent Appeals Are Proceedings “to Recover a Claim” against the Debtor

Looking to 11 U.S.C. § 362(a)(6) helps to better understand what is meant by the words, “to recover a claim.” Both 11 U.S.C. § 362(a)(6) and 11 U.S.C. § 362(a)(1) have one common purpose: to prevent harassment of a debtor with respect to pre-petition claims.²⁰³ Tax Court

196. See *Freeman v. Comm’r*, 799 F.2d 1091, 1092 (5th Cir. 1986); *Delpit v. Comm’r*, 18 F.3d 768, 771 (9th Cir. 1994); *Roberts v. Comm’r*, 175 F.3d 889, 895 (11th Cir. 1999); *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm’r*, 249 F.3d 175, 179-80 (3d Cir. 2001); *Haag v. United States*, 485 F.3d 1, 4 (1st Cir. 2007); *Schoppe v. Comm’r*, 711 F.3d 1190, 1191-92 (10th Cir. 2013).

197. *Roberts*, 175 F.3d at 889.

198. *Id.* at 896 (citation omitted).

199. *Id.* at 895-96 (citing *Comm’r v. McCoy*, 484 U.S. 3, 7 (1987)).

200. *Id.* at 895-96 (citation omitted) (“A proceeding in Tax Court is, of course, not a suit for the collection of taxes . . .”).

201. See LEDERMAN & MAZZA, *supra* note 31, at 325 (“Most tax litigation will not begin until after the IRS sends the taxpayer a letter known as a ‘notice of deficiency.’”).

202. See *Delpit v. Comm’r*, 18 F.3d 768, 770-71 (9th Cir. 1994).

203. *In re Smith*, 185 B.R. 871, 872-73 (Bankr. M.D. Fla. 1994); H.R. REP. NO. 95-595, at 174-75 (1977); 24 CONG. REC. H11092 (daily ed. Sept. 28, 1978). See also RESNICK & SOMMER, *supra* note 14, ¶ 362.03(8)(a) (“362(a)(6) is intended to prevent creditor harassment of the debtor in attempting to collect prepetition debts. The conduct prohibited ranges from that of an informal nature, such as by telephone contact or by dunning letters, to more formal judicial and administrative proceedings that are also stayed under subsection (a)(1).”). This suggests, perhaps, that even if a proceeding before Tax Court was not stayed under section (a)(1)’s “to recover a claim” language, it may still be stayed under section (a)(6) because of its broader reach.

proceedings and appeals are a method which “harasses” the debtor. The entire audit through Tax Court and the subsequent appeals causes great strain on a taxpayer. The IRS administrative level assessment of a tax deficiency is not optional for taxpayers.²⁰⁴ Although technically optional, the taxpayer must go to Tax Court unless the taxpayer accepts the IRS deficiency order without challenge. The proceedings also require the taxpayer to spend time and money trying to resolve the issue with the IRS. As a result, until the issue is resolved with the IRS, the taxpayer’s financial situation will be uncertain. In the aggregate, the effects of litigating through Tax Court and subsequent appeals are “harassment” of the debtor.

3. Efficiency Also Suggests That Tax Court Proceedings Should Be Stayed Under § 362(a)(1)

It is highly inefficient for Tax Court proceedings and subsequent appeals not to be stayed by a bankruptcy petition. Even if the IRS received a favorable result, it would be unable to enforce the judgment. Any attempt to collect a deficiency would certainly be a violation of 11 U.S.C. § 362(a)(6).²⁰⁵ Allowing an appeal from Tax Court to continue wastes more time and money of the debtor, the IRS, and the courts. Overall, continuing is not beneficial to any party. If a Tax Court proceeding and a subsequent appeal are not considered proceedings to recover a claim against the debtor, the proceedings should still be stayed because they are proceedings “against the debtor.”²⁰⁶

D. 11 U.S.C. § 362(a)(6) Independently Supports the Imposition of the Automatic Stay

Although the circuits are split on whether the automatic stay under 11 U.S.C. § 362(a)(1) applies, no court has considered whether the

204. See 26 U.S.C. § 7602(a)(2) (2012). See also LEDERMAN & MAZZA, *supra* note 31, at 119 (“When the IRS seeks access to the taxpayer’s books and records, it will typically ask the taxpayer to provide them on a voluntary basis. If those efforts fail, the IRS may issue an administrative summons compelling the taxpayer to turn over the records.”).

205. See *Delpit*, 18 F.3d at 774 n.6:

In any event, it appears that the Commissioner would be unable to enforce a favorable judgment by this court. A victory would leave the Commissioner in the same position she would be in if the stay remained in effect. Accordingly, there seems to be no practical reason to proceed with the merits of the case from the Commissioner’s standpoint.

206. See *supra* Part IV.A.

automatic stay is applicable under 11 U.S.C. § 362(a)(6).²⁰⁷ The courts should apply 11 U.S.C. § 362(a)(6) and conclude that it too supports imposition of the automatic stay to prevent appeals of decisions of Tax Court. 11 U.S.C. § 362(a)(6) states:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.²⁰⁸

The main purpose of this provision is to interact with 11 U.S.C. § 362(a)(1)'s language, "to recover a claim," to prevent the harassment of a debtor.²⁰⁹ However, the very language of 11 U.S.C. § 362(a)(6) is much broader than 11 U.S.C. § 362(a)(1). Section 362(a)(1) only covers judicial or administrative proceedings, but 11 U.S.C. § 362(a)(6) is more expansive and covers "any act."²¹⁰ In addition, 11 U.S.C. § 362(a)(1) only stays proceedings to "recover a claim" against the debtor,²¹¹ but 11 U.S.C. § 362(a)(6) stays "any act" to "collect, assess, or recover" a claim against the debtor.²¹² Thus, if proceedings in Tax Court and a subsequent appeal can be viewed as "an act" and it is to "collect" or "assess" a claim against the debtor, then 11 U.S.C. § 362(a)(6) would be applicable to stay the proceedings.

1. Tax Court Proceedings and Subsequent Appeals Would Be Considered "an Act" for the Purposes of § 362(a)(6)

In 11 U.S.C. § 362(a)(6), the term "act" is to be broadly construed.²¹³ It can cover very small creditor acts such as telephone calls or letters to the debtor.²¹⁴ In addition, it covers acts that also fall under 11 U.S.C. § 362(a)(1), such as administrative or judicial proceedings.²¹⁵

207. See *supra* Part III.B.

208. 11 U.S.C. § 362(a)(6) (2012).

209. 124 CONG. REC. H11,092-93 (daily ed. Sept. 28, 1978) ("[Section 362(a)(1)] is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent the harassment of the debtor with respect to pre-petition claims.").

210. 11 U.S.C. § 362(a)(1), (a)(6).

211. Of course, it also covers claims brought "against the debtor," but for the purposes of this section that language is unnecessary because it does not have any impact on section 362(a)(6).

212. 11 U.S.C. § 362(a)(1), (a)(6).

213. See RESNICK & SOMMER, *supra* note 14, ¶ 362.03(8)(a).

214. *Id.*; *In re Smith*, 185 B.R. 871, 872-73 (Bankr. M.D. Fla. 1994).

215. RESNICK & SOMMER, *supra* note 14, ¶ 362.03(3).

Therefore, proceedings in Tax Court and subsequent appeals would be considered an “act” for the purposes of 11 U.S.C. § 362(a)(6).²¹⁶

2. Tax Court Proceedings and Subsequent Appeals Would Be Considered Acts to “Assess” a Claim Against the Debtor

In order for proceedings in Tax Court and subsequent appeals to be stayed by 11 U.S.C. § 362(a)(6), the proceedings must be considered an act to “collect, assess, or recover” a claim against the debtor.²¹⁷ If it were an act to “recover” a claim, then 11 U.S.C. § 362(a)(1) and § 362(a)(6) would both be applicable.²¹⁸ Proceedings in Tax Court and subsequent appeals are probably not considered acts to “collect” a claim against the debtor, as Tax Court lacks equitable power to enforce a judgment to collect a deficiency from the taxpayer.²¹⁹ Therefore, in order for 11 U.S.C. § 362(a)(6) to be applicable, proceedings in Tax Court and subsequent appeals must be considered an act to “assess” a claim against the debtor.²²⁰

“Assess” is defined as, “to officially say what the amount, value, or rate of (something) is.”²²¹ This language means that any act to officially declare what amount is owed by a debtor would be stayed under 11 U.S.C. § 362(a)(6). Proceedings in Tax Court serve the purpose of redetermining a deficiency.²²² If determining a deficiency is an assessment of a claim, or an official declaration of an amount owed, then 11 U.S.C. § 362(a)(6) is applicable to stay proceedings at Tax Court. Subsequent appeals, which serve the purpose of determining a deficiency owed by the debtor, are likewise stayed.²²³ Deficiency is defined as an understatement of the taxes owed by a taxpayer to the IRS.²²⁴ It is an amount owed by the taxpayer and would be considered a claim.²²⁵ Before going to Tax Court, the deficiency is first determined by the IRS.²²⁶ The power to determine a deficiency is given to the IRS

216. *See id.*

217. *See* 11 U.S.C. § 362(a)(6).

218. *See supra* Part IV.C.

219. *Roberts v. Comm’r*, 175 F.3d 889, 895-96 (11th Cir. 1999) (citing *Comm’r v. McCoy*, 484 U.S. 3, 7 (1987)).

220. *See* 11 U.S.C. § 362(a)(6).

221. Definition, *Assess*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/assess> (last visited Nov. 21, 2013).

222. *See* 26 U.S.C. § 6213 (2012).

223. *See* 11 U.S.C. § 362(a)(6).

224. *See* 26 U.S.C. § 6211(a) (2012). *See also* LEDERMAN & MAZZA, *supra* note 31, at 301.

225. *See* 11 U.S.C. § 362(a)(1).

226. I.R.S. Pub. 556 (Sep. 26, 2013), 2013 WL 5471049.

under I.R.C. § 6201. The relevant portion states, “The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes imposed by this title.”²²⁷ As this statute makes clear, determining a deficiency is an “assessment” of taxes owed by the taxpayer. Therefore, a determination of a deficiency would be an act to “assess” a claim under 11 U.S.C. § 362(a)(6).²²⁸ Because proceedings before Tax Court and subsequent appeals are a redetermination of the deficiency, they would also be considered an “assessment” of a claim and would be stayed under 11 U.S.C. § 362(a)(6).²²⁹

E. The Purpose and Legislative Intent of the Automatic Stay Confirms Appeals from Tax Court Should Be Stayed

The automatic stay provision of the bankruptcy code has two essential purposes: (1) to give the debtor a “breathing spell” to formulate plans for repayment²³⁰ and (2) to “protect creditors and thereby promote the bankruptcy goal of equal treatment.”²³¹ If the automatic stay is applied to appeals from Tax Court, it furthers both of these legislative policy goals.²³²

1. Applying the Automatic Stay Provision of the Bankruptcy Code Will Protect the Debtor

The automatic stay provision protects debtors by giving them a “breathing spell.”²³³ Debtors are then able to formulate plans for repayment of their debts.²³⁴ In addition, the automatic stay protects debtors from harassment and collection efforts by their creditors.²³⁵ Legislative history shows Congress intended the automatic stay to be

227. The title of this statute is “Assessment Authority,” which further suggests that it is considered to “assess” a claim against the taxpayer and would fall under section 362(a)(6).

228. See 11 U.S.C. § 362(a)(6). Of course, assessments by the IRS would not be stayed because § 362(b)(9) makes a specific exception for them.

229. *Id.*

230. H.R. REP. NO. 95-595, at 340 (1977). See also RESNICK & SOMMER, *supra* note 14, ¶ 362.03; Ahlers v. Norwest Bank Worthington (*In re Ahlers*), 794 F.2d 388, 393-94 (8th Cir. 1986).

231. H & H Beverage Distribs. v. Dep’t of Revenue, 850 F.2d 165, 166 (3d Cir. 1988) (providing that the automatic stay “is one of the fundamental debtor protections provided by bankruptcy laws” and its essential purpose is twofold: (1) to protect creditors and thereby promote the bankruptcy goal of equal treatment; and (2) to give debtors a breathing spell).

232. *Delpit v. Comm’r*, 18 F.3d 768, 768 (9th Cir. 1994).

233. H.R. REP. NO. 95-595, at 340. See also RESNICK & SOMMER, *supra* note 14, ¶ 362.03; *In re Ahlers*, 794 F.2d at 393-94.

234. H.R. REP. NO. 95-595, at 340.

235. *Id.*

applied broadly to preserve the status quo for the debtor,²³⁶ thereby freezing the financial relationship between the debtor and the creditors.²³⁷

If a debtor is required to go forward with an appeal from Tax Court, then the debtor will not be given a “breathing spell.”²³⁸ The appeal will require more time and money on the debtor’s part to determine whether a deficiency is owed to the IRS. Being forced to spend more time and money dealing with the appeal from Tax Court hinders the debtor’s ability to plan for repayment of the debt. In addition, even if the debtor is able to formulate a plan for repayment while the appeal from Tax Court goes forward, the outcome of the appeal may force the debtor to further restructure and change plans for repayment of the debt.

The debtor is also subject to harassment if the debtor is required to go forward with a Tax Court appeal.²³⁹ The appeal allows the IRS to continue to attack the debtor regarding a debt. This appeal is burdensome to the debtor and brings further hardships because it requires the debtor to spend more time and money in defending the debtor’s financial position from the IRS.

When the appeal from Tax Court goes forward, it does not maintain the status quo for the debtor.²⁴⁰ Maintaining the status quo serves the purpose of freezing the financial relationship between the debtor and the creditors.²⁴¹ However, allowing the appeal from Tax Court to go forward is completely contrary to this policy. Instead of freezing the financial relationship between the debtor and the IRS, the appeal further strains the financial relationship.²⁴²

Under bankruptcy law, a trustee evaluates a debtor’s financial position before proceeding with the case.²⁴³ This is necessary to help the debtor formulate a strategy for repayment of debts.²⁴⁴ However, if the stay is not applied to appeals from Tax Court, then the trustee will be

236. Pension Benefit Guar. Corp. v. LTV Corp. (*In re Chateaugay Corp.*), 87 B.R. 779, 793 (Bankr. S.D.N.Y. 1988), *aff’d*, 875 F.2d 1008 (2d Cir. 1989), *rev’d on other grounds & remanded*, 496 U.S. 633 (1990), *abrogated*, Cohen v. JP Morgan Chase & Co., 498 F.3d 111 (2d Cir. 2007).

237. First Sav. & Loan Ass’n v. Bennett (*In re Bennett*), 29 B.R. 380, 381 (Bankr. W.D. Mich. 1981).

238. See *Delpit v. Comm’r*, 18 F.3d 768, 772 (9th Cir. 1994).

239. *Id.*

240. *Id.*

241. See *Bennett*, 29 B.R. at 381.

242. *Id.*

243. See S. REP. NO. 95-989, at 50 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5836. See also *United States v. Hammett (In re Hammett)*, 28 B.R. 1012, 1019 (Bankr. E.D. Pa. 1983).

244. See S. REP. NO. 95-989, at 50.

unable to properly evaluate the debtor's position.²⁴⁵ As a result, it will be more difficult for the debtor to formulate a proper plan for repayment of debt.²⁴⁶

2. Applying the Automatic Stay Provision of the Bankruptcy Code Will Promote the Goal of Applying Equal Treatment to Creditors

When a court holds that the automatic stay is inapplicable, it gives the creditor at issue preferential treatment over other creditors.²⁴⁷ By not applying the automatic stay to appeals from Tax Court, the IRS is given preferential treatment over other creditors.²⁴⁸ All other creditors would be stayed, but the IRS would still be allowed to put pressure on the debtor. This pressure will affect the debtor, and, in some cases, the debtor may simply pay the deficiency in order to escape this pressure.²⁴⁹ The IRS's preferential treatment is exactly what the automatic stay tries to prevent.²⁵⁰ Only by staying the appeals from Tax Court can the bankruptcy policy of equal treatment of creditors be satisfied.

V. CONCLUSION

In *Schoppe v. Commissioner*,²⁵¹ the Tenth Circuit recently joined the majority of circuits in holding that the automatic stay provision of 11 U.S.C. § 362(a)(1) does not operate to stay appeals from Tax Court. However, the majority of circuits relied upon incorrect reasoning of the Eleventh Circuit in *Roberts v. Commissioner*.²⁵² When the authority upon which the Eleventh Circuit relied is interpreted correctly, it becomes clear that the Ninth Circuit was correct in *Delpit v. Commissioner* when it held that the automatic stay provision of 11 U.S.C. § 362(a)(1) does operate to stay appeals from Tax Court.²⁵³ In order to resolve the circuit split, the issue could be looked at under 11

245. See *Hammett*, 28 B.R. at 1018.

246. *Id.*

247. H.R. REP. NO. 95-595, at 340 (1977). For example, 11 U.S.C. § 362(b)(2)(A)(ii) allows civil actions for establishing domestic support obligations, such as alimony, to go forward without being subject to the automatic stay. Because the debtor's spouse is not subject to the automatic stay in an alimony action, the debtor's spouse can recover from the debtor without regard to the status of the debtor's other creditors. Thus, the spouse receives preferential treatment.

248. See *id.*

249. See *id.*

250. See *id.*

251. *Schoppe v. Comm'r*, 711 F.3d 1190 (10th Cir. 2013).

252. *Roberts v. Comm'r*, 175 F.3d 889 (11th Cir. 1999).

253. See *Delpit v. Comm'r*, 18 F.3d 768, 771 (9th Cir. 1994).

U.S.C. § 362(a)(6) of the automatic stay provision. This subsection is more expansive than 11 U.S.C. § 362(a)(1) and stays “any act” to “assess” a claim against the debtor. A redetermination of a deficiency in Tax Court, or subsequent appeal from it, can only be considered an act to assess a claim against the debtor. Thus, appeals from Tax Court should be stayed under 11 U.S.C. § 362(a)(6). The only court that can resolve the circuit split is the United States Supreme Court. At this time, it does not seem likely that it will face the issue and resolve the split. However, should the issue ever be brought before the Supreme Court, it is my hope that this Note will identify the faulty reasoning upon which the majority of circuits have relied and provide a new approach under 11 U.S.C. § 362(a)(6) to resolve the circuit split.