No. 16-1197

In the Supreme Court of the United States

QINETIQ U.S. HOLDINGS, INC. AND SUBSIDIARIES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, requires the Internal Revenue Service to provide a "reasoned explanation" when it issues a notice of deficiency under 26 U.S.C. 6212.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 845 F.3d 555. The opinion of the Tax Court (Pet. App. 25a-50a) is available at T.C. Memo. 2015-123, 2015 WL 4036150. The Tax Court's order denying petitioner's motion to dismiss its petition (Pet. App. 19a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2017. A petition for rehearing was denied on March 7, 2017 (Pet. App. 51a). The petition for a writ of certiorari was filed on April 4, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 6212 of Title 26 of the United States Code provides that, "[i]f the Secretary [of the Treasury] determines that there is a deficiency in respect of any tax imposed by [certain provisions of the Internal Revenue Code (Code),] he is authorized to send notice of such deficiency to the taxpayer." 26 U.S.C. 6212(a). The notice "shall describe the basis for, and identify the amounts (if any) of, the tax due, interest, additional amounts, additions to tax, and assessable penalties included in such notice." 26 U.S.C. 7522(a). The statute further provides that "[a]n inadequate description under the preceding sentence shall not invalidate such notice." *Ibid.*

The taxpayer may then, within a prescribed period of time, "file a petition with the Tax Court for a redetermination of the deficiency." 26 U.S.C. 6213(a). The Tax Court has jurisdiction to "redetermine the correct amount of the deficiency." 26 U.S.C. 6214(a). If no petition is filed, the deficiency "shall be assessed, and shall be paid upon notice and demand from the Secretary." 26 U.S.C. 6213(c).

2. Petitioner brought this suit in the Tax Court to contest an income-tax deficiency of $13,902,087 for the taxable year that ended on March 31, 2009. Pet. App. 25a. As relevant here, the deficiency arose from the disallowance of a business-expense deduction for $117,777,501 in compensation paid. *Id.* at 6a-7a; C.A. App. 448. Under 26 U.S.C. 83(a), an employee who receives property, including stock, in connection with the performance of services is taxed on the value of the property, but not until the property is no longer subject to a substantial risk of forfeiture. *Ibid.* The employer is entitled to a corresponding deduction when the income is recognized by the employee. 26 U.S.C. 83(h).

In 2008, petitioner acquired Dominion Technology Resources, Inc. (DTRI) by merger. Pet. App. 6a. Petitioner asserted, as DTRI's successor, that it was entitled to a Section 83(h) deduction on the theory that stock issued by DTRI in 2002 to its major shareholders, Thomas Hume and Julian Chin, had not become fully vested until just before the merger. *Ibid.* Chin and Hume had paid par value for the stock, and in corporate actions and federal tax filings they and DTRI had long treated it as fully vested upon its issuance in 2002. *Id.* at 28a-30a, 35a, 49a. Petitioner asserted, however, that the stock had been granted to Hume and Chin in connection with their performance of services and that, under a shareholders agreement executed a few days after the stock was issued, the stock had remained subject to a substantial risk of forfeiture until 2008. *Id.* at 28a-30a, 46a.

After an extensive back-and-forth exchange between petitioner and the Internal Revenue Service (IRS) during an audit, Pet. 7; see C.A. App. 42-234, the IRS issued a notice of deficiency to petitioner pursuant to 26 U.S.C. 6212. See C.A. App. 443-448. The notice informed petitioner that "the deduction you claimed for Salaries and Wages in the amount of $117,777,501 under the provisions of [26 U.S.C. 83] is disallowed in full as you have not established that you are entitled to such a deduction." C.A. App. 448.

3. Petitioner filed a petition in the Tax Court challenging both the sufficiency of the notice of deficiency and the IRS's substantive determination with respect to Chin's shares. Pet. App. 7a.

a. Petitioner moved to dismiss its own petition, arguing that the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, requires a notice of deficiency to

contain a "reasoned explanation" of the agency's determination. Petitioner alleged that the notice of deficiency issued by the IRS in this case lacked a reasoned explanation for the deficiency, and that the notice therefore should be set aside under 5 U.S.C. 706(2)(A) as arbitrary and capricious agency action. Pet. App. 7a, 19a-20a.

The Tax Court denied petitioner's motion to dismiss. Pet. App. 19a-24a. The court held that the notice was not arbitrary and capricious because the notice had "served its purpose by notifying the petitioner that a deficiency had been determined and giving the petitioner the opportunity to petition th[e] [Tax] Court for redetermination of the proposed deficiency." *Id.* at 21a. The court further held that, in any event, petitioner's "arbitrary and capricious argument is irrelevant because the APA judicial review procedures do not supplant th[e] [Tax] Court's longstanding de novo review procedures." *Ibid.*

Petitioner relied in part on this Court's statement in *Mayo Foundation for Medical Education & Research* v. *United States*, 562 U.S. 44 (2011) (*Mayo*), that the Court was "not inclined to carve out an approach to administrative review good for tax law only," *id.* at 55. The Tax Court explained that *Mayo* was inapposite because the decision "dealt with agency rulemaking only." Pet. App. 21a. The court concluded that *Mayo* "d[id] [not] overrule more than 85 years of jurisprudence and practice reviewing deficiency determinations de novo." *Ibid.* "It is well settled," the court explained, "that the APA does not apply to deficiency cases in th[e] [Tax] Court; that is, cases arising under [S]ections 6213 or 6214 in which [the Tax Court] may redetermine the taxpayer's tax liability." *Id.* at 22a.

b. On the merits, petitioner conceded that no deduction was allowable for Hume's stock, Pet. App. 7a n.2, 25a-26a, but a $58.8 million deduction for Chin's stock remained in dispute, *id.* at 26a, 39a; C.A. App. 1948. The Tax Court found, on a stipulated record, that no deduction was allowable under 26 U.S.C. 83(h) for Chin's stock. Pet. App. 26a-27a, 39a-50a. The court concluded that the stock had been purchased by Chin as a capital investment, rather than transferred to him in connection with the performance of services, *id.* at 41a-45a, and that the stock had not been subject to a substantial risk of forfeiture between 2002 and 2008, *id.* at 45a-50a.

4. The court of appeals affirmed. Pet. App. 1a-18a.

a. The court of appeals rejected petitioner's argument that a notice of deficiency must contain a reasoned explanation for the agency's decision. Pet. App. 7a-11a. The court explained that petitioner's argument, which was based on the judicial-review provisions of the APA, "fail[ed] to consider the unique system of judicial review provided by the Internal Revenue Code for adjudication of the merits of a [n]otice of [d]eficiency." *Id.* at 8a.

The court of appeals explained that, in general, a "reasoned explanation" requirement applies to final agency decisions for which judicial review is based on an administrative record under a standard of review prescribed by the APA. Pet. App. 7a-8a. The court noted that "[t]he reviewing court in such a case generally is not authorized to conduct a de novo evaluation of the record or to 'reach its own conclusions' regarding the subject matter before the agency." *Id.* at 8a (quoting *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)). The court further explained, however, that "[s]ome agency-specific statutes * * * provide materi-

ally different procedures for judicial review that predate the APA's enactment," and that "[o]ne such example is the Internal Revenue Code," which authorizes the Tax Court to conduct *de novo* review of a notice of deficiency. *Ibid.* (citing 26 U.S.C. 2614). Relying on its decision in *O'Dwyer* v. *Commissioner*, 266 F.2d 575, 580 (4th Cir.), cert. denied, 361 U.S. 862 (1959), the court of appeals reasoned that the Code's provisions for *de novo* review in the Tax Court "are incompatible with the limited judicial review of final agency actions allowed under the APA" because the Code's provisions "permit consideration of new evidence and new issues not presented at the agency level." Pet. App. 9a.[1]

The court of appeals further held that a notice of deficiency is not final agency action subject to a reasoned-explanation requirement for the additional reason that the requisite "legal consequences," such as the agency's preclusion from taking contrary litigation positions on appeal, do not flow from a notice of deficiency. Pet. App. 9a-10a (citation omitted). The court contrasted the "fluid procedures" in the Tax Court under 26 U.S.C. 6214, under which both parties may assert new legal theories and the IRS may assert increased deficiencies, with judicial review under the APA's "'arbitrary' and 'capricious'" standard, which requires the agency action under review "[to] be final in all respects" and confines review "to the static administrative record with deference accorded to the agency's decision." Pet. App. 10a.

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[1] The court of appeals acknowledged that, to the extent it had held in *O'Dwyer* that the APA applies only to formal agency adjudications, and not to informal adjudications, *O'Dwyer* had been overruled by *Lorion*, 470 U.S. at 744. The court concluded, however, that *O'Dwyer*'s "central holding," discussed above, "remains valid." Pet. App. 9a n.3.

The court concluded that, "[g]iven these significant variations in the scope of judicial review under the two statutory schemes, * * * the APA's general procedures for judicial review, including the requirement of a 'reasoned explanation' in a final agency decision, were not intended by Congress to be superimposed on the Internal Revenue Code's specific procedures for de novo judicial review of the merits of a [n]otice of [d]eficiency." *Ibid.*

The court of appeals concluded that the notice of deficiency in this case satisfied the requirements of 26 U.S.C. 7522. See Pet. App. 11a-13a. Section 7522 requires only that the notice describe the basis for the deficiency and identify the amounts of tax, interest, and penalties due; and it specifically provides that "[a]n inadequate description * * * shall not invalidate such notice." 26 U.S.C. 7522.

b. The court of appeals upheld the Tax Court's decision on the merits. Pet. App. 13a-18a. The court of appeals found it unnecessary to consider whether Chin's stock was transferred in connection with the performance of services because the record supported the Tax Court's finding that the stock was not subject to a substantial risk of forfeiture. *Id.* at 15a; see *id.* at 15a-18a.

ARGUMENT

Petitioner contends (Pet. 10-19) that the APA requires the IRS to provide a reasoned explanation when it issues a notice of deficiency under 26 U.S.C. 6212, and that the IRS failed to provide such an explanation in the notice it issued to petitioner. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," to judicial review of the agency action. 5 U.S.C. 702. The APA requires a reviewing court to set aside agency action that is arbitrary and capricious. 5 U.S.C. 706(2)(A). In order for the court to apply that standard, an agency generally must provide a reasoned explanation for its actions. See *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513-514 (2009).

The APA's judicial-review provisions, however, do not govern review of all agency action. The APA subchapter pertaining to judicial review "does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute." 5 U.S.C. 556(b). And the APA's judicial-review subchapter "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. 559; see 5 U.S.C. 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute."); 5 U.S.C. 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review" under the APA.).

When the APA was enacted, a number of statutes already "defined the specific procedures to be followed in reviewing a particular agency's action," including procedures for specific courts to conduct review. *Bowen* v. *Massachusetts*, 487 U.S. 879, 903 (1988). "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts" under 5 U.S.C. 704, "it did not intend that general grant

of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Bowen*, 487 U.S. at 903. The APA "grandfathered" existing statutory schemes providing specific procedures for judicial review, as well as common-law standards of review that were clearly "recognized by law." *Dickinson* v. *Zurko*, 527 U.S. 150, 155 (1999); see *Wilson* v. *Commissioner*, 705 F.3d 980, 990 (9th Cir. 2013) ("Where Congress has enacted a special statutory review process for administrative action, that process applies to the exclusion of the APA."); *Porter* v. *Commissioner*, 130 T.C. 115, 118 (2008) ("[T]he APA does not supersede specific statutory provisions for judicial review.").

b. The court of appeals correctly held that the Internal Revenue Code is an "agency-specific statute[]" that "provide[s] materially different procedures for judicial review that predate the APA's enactment," and that judicial review of an IRS notice of deficiency is governed by those procedures rather than by the APA. Pet. App. 8a. Petitioner suggests (Pet. 16) that the *Bowen* Court construed the APA's provisions preserving special review schemes to address only the *forum* for challenging an agency action. The APA, however, preserves the existing "form of proceeding for judicial review." 5 U.S.C. 703. The Court recognized in *Bowen* that Congress did not intend for the APA to duplicate "previously established special statutory *procedures* relating to specific agencies." 487 U.S. at 903 (emphasis added).

When the APA was enacted in 1946, the law governing review of tax deficiencies was already "well established." *Porter*, 130 T.C. at 121. Under that longstanding statutory scheme, the Commissioner may send a no-

tice of deficiency if he determines that there is a deficiency in tax (26 U.S.C. 6212)—*i.e.*, that the tax due exceeds the amount reported by the taxpayer (26 U.S.C. 6211(a)). The role of the notice of deficiency is "to give the taxpayer notice that the Commissioner means to assess a deficiency tax against him and to give him an opportunity to have such [a] ruling reviewed by the Tax Court before it becomes effective." *Commissioner* v. *Stewart*, 186 F.2d 239, 241 (6th Cir. 1951); see *Benzvi* v. *Commissioner*, 787 F.2d 1541, 1542 (11th Cir.), cert. denied, 479 U.S. 883 (1986); *Abrams* v. *Commissioner*, 787 F.2d 939, 941 (4th Cir.), cert. denied, 479 U.S. 882 (1986); *Commissioner* v. *Forest Glen Creamery Co.*, 98 F.2d 968, 971 (7th Cir. 1938), cert. denied, 306 U.S. 639 (1939).

As Judge Learned Hand explained in *Olsen* v. *Helvering*, 88 F.2d 650, 651 (2d Cir. 1937), "the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough." In light of the statutory purpose of giving such notice, other courts of appeals have confirmed, consistent with the decision below, that a notice of deficiency need not contain a detailed explanation in order to be valid. See, *e.g.*, *Estate of Abraham* v. *Commissioner*, 408 F.3d 26, 37, amended by, 429 F.3d 294 (1st Cir. 2005), cert. denied, 547 U.S. 1178 (2006); *Pasternak* v. *Commissioner*, 990 F.2d 893, 897-898 (6th Cir. 1993); *Geiselman* v. *United States*, 961 F.2d 1, 5 (1st Cir.) (per curiam), cert. denied, 506 U.S. 891 (1992).

In 1988, Congress enacted 26 U.S.C. 7522,[2] which prescribes very limited requirements for the content of a notice of deficiency. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, Tit. VI, Subtit. J, Pt. I, § 6233(a), 102 Stat. 3735. Under Section 7522, the notice must "describe the basis" for the deficiency and provide the taxpayer with specific amounts, but "[a]n inadequate description * * * shall not invalidate such notice." 26 U.S.C. 7522. That provision forecloses petitioner's argument that a notice of deficiency must be set aside if it does not contain the "reasoned explanation" that is generally contemplated by the APA.

c. The judicial-review provisions in the Internal Revenue Code reinforce the conclusion that the IRS need not provide a reasoned explanation for a determination that a deficiency in tax exists. Rather than seeking APA review in a federal district court on a closed administrative record, with deference given to the agency's decision, a taxpayer that receives a notice of deficiency may petition the Tax Court, which has jurisdiction to "redetermin[e]" the deficiency. 26 U.S.C. 6213(a), 6214(a); *Abrams*, 787 F.2d at 942 (describing deficiency procedures and Tax Court review).

Courts have long construed those provisions to authorize *de novo* review in the Tax Court. The facts and law are determined anew based on the evidence and arguments presented to the court, rather than on "any previous record developed at the administrative level." *Gatlin* v. *Commissioner*, 754 F.2d 921, 923 (11th Cir. 1985) (citations omitted); see *Phillips* v. *Commissioner*,

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[2] This provision was initially codified at 26 U.S.C. 7521 (1988). It was moved to Section 7522 in 1990. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Tit. XI, Subtit. G, § 11704(30), 104 Stat. 1388-519.

283 U.S. 589, 598 (1931); *Clapp* v. *Commissioner*, 875 F.2d 1396, 1403 (9th Cir. 1989). The Commissioner can even assert an increased deficiency, al-though he bears the burden of proving such new matter in order to avoid unfair surprise. See 26 U.S.C. 6214; T.C. R. 142(b). In judicial review under the APA, courts "will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion." *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 544 (2008) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943)). By contrast, when a taxpayer challenges an IRS notice of deficiency in the Tax Court, the Commissioner's reasoning in issuing the notice has long been treated as irrelevant. See *Gatlin*, 754 F.2d at 923; *Greenberg's Express, Inc.* v. *Commissioner*, 62 T.C. 324, 327-328 (1974).

The procedure for *de novo* review in the Tax Court is inconsistent with the default approach for judicial review under the APA, which contemplates review of agency action limited to a "static" administrative record and the rationale articulated by the agency. Pet. App. 10a. That inconsistency confirms that Congress intended the separate judicial-review procedure in the Internal Revenue Code to govern in the deficiency context. *Ibid.* Petitioner contends (Pet. 18) that the APA's judicial-review provisions contemplate that an agency action will be set aside if it fails to satisfy either arbitrary-and-capricious or *de novo* review. See 5 U.S.C. 706(2)(A) and (F). Congress clearly did not intend for notices of deficiency to be set aside for lack of a reasoned explanation, however, because the deficiency procedures in the Internal Revenue Code explicitly provide that a notice of deficiency will not be invalidated based

on an inadequate description of the basis for the deficiency. 26 U.S.C. 7522.

2. Petitioner contends (Pet. 11-15) that the court of appeals' decision conflicts with decisions of this Court and other courts of appeals that have rejected so-called "tax exceptionalism," *i.e.*, a specialized approach to administrative law in the tax context. Pet. 11 (capitalization altered). The decisions on which petitioner relies did not involve notices of deficiency, and none of them conflicts with the decision below.

a. Petitioner repeatedly cites (Pet. 2-3, 10, 13, 15) this Court's statement in *Mayo Foundation for Medical Education & Research* v. *United States*, 562 U.S. 44 (2011), that the Court would not "carve out an approach to administrative review good for tax law only." *Id.* at 55. Petitioner suggests that the Court in *Mayo* broadly rejected the application of any specialized approach to administrative law in the tax context. That is incorrect.

In *Mayo*, this Court held that regulations promulgated by the United States Department of the Treasury (Treasury) in its administration of the tax laws are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the same basis as regulations issued by other agencies. 562 U.S. at 55. That holding has no bearing on the question presented here. The Court in *Mayo* simply recognized that, in the absence of any Internal Revenue Code provision that specifically addresses the level of deference owed to Treasury regulations implementing the tax laws, background principles of administrative law apply. Congress has, however, enacted special provisions governing the review of notices of deficiency issued by the IRS. As the Tax Court correctly concluded, *Mayo*'s holding that Treasury regulations

warrant *Chevron* deference has "no relevance" to deficiency cases, where separate and specific statutory procedures have long governed. Pet. App. 21a.

b. None of the court of appeals decisions cited by petitioner (Pet. 13-15) conflicts with the decision below.

i. The Tenth Circuit's decision in *Fisher* v. *Commissioner*, 45 F.3d 396 (1995), is the only appellate ruling that even suggests that the APA's "reasoned explanation" requirement applies to IRS notices of deficiency. But *Fisher* is also factually distinguishable. At issue in *Fisher* was a supplemental notice of deficiency that included not only a deficiency determination, but also a penalty under former 26 U.S.C. 6661(a) (1988), thereby implicitly informing the taxpayers that the IRS had denied their request for a discretionary waiver of the penalty under former 26 U.S.C. 6661(c) (1988). The taxpayers complained that the denial of the waiver without explanation was improper.

In the course of its *de novo* review, see 26 U.S.C. 6214, the Tax Court fully addressed the circumstances of the denial of the waiver and concluded that it was not arbitrary or capricious. See *Fisher* v. *Commissioner*, 64 T.C.M. (CCH) 1670 (1992). The Tenth Circuit reversed. *Fisher*, 45 F.3d 396. Relying upon formal-adjudication cases under the APA, where review is confined to the administrative record, the court held that the notice of deficiency should have contained a reasoned explanation for the denial of the waiver. *Id.* at 397. The Tenth Circuit determined that it could not evaluate whether there had been an abuse of discretion in denying the waiver without a written explanation of the IRS's reasons for that decision.

The court below correctly viewed *Fisher* as limited to IRS actions that are reviewable for abuse of discretion. See Pet. App. 12a n.6. It was in that context that the Tenth Circuit required the agency to explain its denial of a discretionary waiver, in order to permit the court to evaluate the sufficiency of the rationale and to confirm that the request was considered and the discretion exercised. See *ibid.* That reasoning does not logically apply to a notice of deficiency, which the Tax Court reviews *de novo* and without regard to the Commissioner's reasoning at the administrative level. See *Gatlin*, 754 F.2d at 921-923. The IRS penalty-waiver decision at issue in *Fisher* also did not implicate Section 7522, which makes clear that the lack of an adequate description of the basis for a notice of deficiency does not invalidate the notice. *Fisher*'s continuing vitality is limited, moreover, because the penalty provision there at issue, 26 U.S.C. 6661 (1988), which granted the Commissioner discretion to waive the penalty in certain circumstances, has since been repealed. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Tit. VII, Subtit. G, Pt. II, § 7721(c)(2), 103 Stat. 2399.

ii. *Cohen* v. *United States*, 650 F.3d 717 (D.C. Cir. 2011), is also inapposite. Indeed, the D.C. Circuit itself described that case as "*sui generis*." *Id.* at 733. There, taxpayers filed suit under the APA to challenge the IRS's adoption, without notice and comment, of a special tax-refund procedure that the court viewed as a substantive rule. *Id.* at 732. The court's holding simply reflects the principle that agencies must utilize notice-and-comment procedures before promulgating substantive rules. It has no bearing on the issuance of a notice of deficiency or its required contents, for which specific

procedures are established by the Internal Revenue Code.

iii. Petitioner's reliance (Pet. 15, 17 n.8) on Judge Bybee's dissent in *Wilson*, 705 F.3d at 997, is likewise misplaced. A dissenting opinion does not create a circuit conflict. And in any event, the situation in which Judge Bybee would have applied the APA involved Internal Revenue Code provisions that were enacted after the APA to create, and provide for judicial review of, determinations involving a new "equitable" type of innocent-spouse relief. See 26 U.S.C. 6015(e) and (f). Over dissenting opinions in each court, two courts of appeals and the Tax Court held that such denials are reviewable *de novo* rather than for abuse of discretion. *Wilson*, 705 F.3d at 988; *Commissioner* v. *Neal*, 557 F.3d 1262, 1265 (11th Cir. 2009); *Porter*, 130 T.C. at 118. The courts relied on the similarity between the language of the jurisdictional grant, 26 U.S.C. 6015(e), and the language authorizing Tax Court review of deficiency determinations, 26 U.S.C. 6213(a), where review is *de novo*. This case, however, does not present any question concerning the standard of review for IRS innocent-spouse determinations. And petitioner has identified no decision holding that the IRS must include a reasoned explanation each time it issues a notice of deficiency to a taxpayer. See 26 U.S.C. 6211-6216, 7522.

3. In any event, this case would be a poor vehicle in which to review the question presented because any error in failing to provide a reasoned explanation in the notice of deficiency was harmless. See 5 U.S.C. 706 (providing that "due account shall be taken of the rule of prejudicial error"); *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659-660 (2007) (holding that harmless-error principles apply to judicial

review of agency action). As the IRS has explained throughout this litigation, the adjustments in the notice of deficiency had already been thoroughly explained in detailed reports, presentations, and rebuttals made throughout the audit process. C.A. App. 42-234; see Pet. 7 (acknowledging that the notice of deficiency "follow[ed] a back-and-forth between the taxpayer and the agency in which various arguments and facts were raised and debated by petitioner and the IRS"). Petitioner therefore was adequately informed of the IRS's rationale for issuing the notice of deficiency, even if the agency's explanation was not set forth in the notice itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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