SECTION 6851 TERMINATION OF A TAXABLE YEAR: THE SEARCH FOR A TAXPAYER REMEDY

I. INTRODUCTION

The power of the Internal Revenue Service to protect its revenue through the collection vehicle of summary administrative proceedings has been well established since the enactment of the Revenue Act of 1918.[1] The collection vehicles most heavily relied upon have been sections 6851 and 6861 of the *Internal Revenue Code of 1954 (Code).* Not until recently, however, when the Internal Revenue Service moved to blend the divergent policies of revenue protection and social reform, has the application of these provisions achieved notoriety. The most recent entanglement of the revenue laws with social reform has been in the Narcotics Traffickers Program. The noted aim of the program is to: "[D]isrupt the distribution of narcotics through the enforcement of all available tax statutes. . . . [M]aximum use [is to be] . . . made of jeopardy, quick, and transferee assessments, and termination of taxable periods."[2] Despite the revenue collection success of the program,[3] the courts have not unanimously accepted the application of the termination provision.[4]

The heart of the conflict between the taxpayer and the Internal Revenue Service is whether or not a deficiency notice should issue under *Code* section

1. Graham v. du Pont, 262 U.S. 234, 255 (1923); Dodge v. Osborn, 240 U.S. 118, 120 (1916); Springer v. United States, 102 U.S. 586, 593 (1880); State Railroad Tax Cases, 92 U.S. 575, 615 (1875); Cheatham v. United States, 92 U.S. 85, 88-89 (1875).

2. Silver, *Terminating the Taxpayer's Taxable Year: How IRS Uses It Against Narcotics Suspects*, 40 J. TAXATION 110 (1974), *citing* Internal Revenue Service Manual Supplement, Nov. 10, 1971.

3. The *Wall Street Journal*, April 10, 1974, at 1, col. 1, notes that the program has produced about $27 million in seized assets and $101 million in assessments against approximately 3,475 drug suspects through December 31, 1973.

4. The following cases have held in favor of the taxpayer by deciding that an assessment made under *Code* section 6851 is a deficiency within the ambit of *Code* sections 6861 and 6211: Clark v. Campbell, 501 F.2d 108 (5th Cir. 1974), *aff'g*, 341 F. Supp. 171 (N.D. Tex. 1972); Hall v. United States, 493 F.2d 1211 (6th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3115 (U.S. July 10, 1974) (No. 73-2005); Rogers v. O'Donnell, — F. Supp. — (N.D. Fla. 1974), *appeal docketed*, No. 74-1731, 5th Cir., April 18, 1974; Shaw v. McKeever, 74-1 U.S. Tax Cas. ¶ 9348 (D. Ariz. 1974); Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973); Williams v. United States, 74-1 U.S. Tax Cas. ¶ 9139 (D. Nev. 1973); Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969). The following cases held in favor of the government by deciding that an assessment made pursuant to *Code* section 6851 is made by the authority of *Code* section 6201 and is not a deficiency within the ambit of *Code* section 6211: Laing v. United States, 496 F.2d 853 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3208 (U.S. October 15, 1974); Chapman v. Commissioner, 487 F.2d 1393 (2d Cir. 1973); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973), *aff'g* 344 F. Supp. 567 (S.D.N.Y. 1972); Williamson v. United States, 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1971); Parenti v. Whinston, 347 F. Supp. 471 (E.D. Pa. 1972); Parrish v. Daly, 350 F. Supp. 735 (S.D. Ind. 1972); Johnson v. Coppinger, 320 F. Supp. 716 (N.D. Ala. 1971); William Jones, 62 T.C. —, No. 1 (1974); Puritan Church of America v. Commissioner, 10 C.C.H. Tax Ct. Mem. 485 (1951), *aff'd per curiam on other grounds*, 209 F.2d 306 (D.C. Cir.), *cert. denied*, 347 U.S. 975 (1953); Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840 (1938).

6212(a) in a termination of a taxable year pursuant to *Code* section 6851(a). In the past the Internal Revenue Service has followed the administrative policy of not issuing such a deficiency notice. However, since the Tax Court is the only prepayment forum available to a taxpayer contesting a tax liability, and since such a notice of deficiency is a prerequisite to that court's jurisdiction,[5] taxpayers have been adamantly arguing that such a notice should issue by virtue of *Code* section 6861(a) which treats jeopardy assessments.[6] Moreover, even though the conflict can be succinctly stated, the resolution of the issue must embody the inconsistent positions adopted by the Service, the constitutional question of due process, and the necessity of such a provision for the protection of the revenue. Therefore, due to the divergent circuit court decisions pitting the Fifth and Sixth Circuits which require a notice of deficiency against the Second and Seventh Circuits which do not require a deficiency notice, the stage has been set for Supreme Court review.[7]

It is the purpose of this Note to present the statutory, historical, and theoretical framework that encompasses a *Code* section 6851 termination of a taxable year. This analysis, coupled with a review of the case law treatment, should provide the reader with the necessary tools to artfully select the most effective vehicles to attack an erroneous termination of a taxable year. As it will be shown, most aggrieved terminated taxpayers, in frustration, level their attack at the technical position of the Internal Revenue Service. However, even though the Service's position appears to be technically unsound, the taxpayer will have difficulty in formulating a more cogent position to meet his burden.[8] Therefore, other avenues must be explored to provide additional safeguards for the taxpayer. Finally, although the major portion of the litigation in this area is concentrated in the southern and eastern circuits, readers residing in other circuits should not be lulled into a false sense of security as the Narcotics Traffickers Program is of national scope.

II. Function of the Statutes

Subject to certain exceptions, the federal income tax is an annual tax imposed on income derived during a calendar year which is deemed to be a taxable year.[9] For individuals reporting their income on such a basis, returns are

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5. Mason v. Commissioner, 210 F.2d 388, 389 (5th Cir. 1954).

6. Assessments made pursuant to *Code* section 6861(a) will be referred to as jeopardy assessments and assessments made pursuant to *Code* section 6851(a) will be referred to as termination assessments.

7. Hall v. United States, 493 F.2d 1211 (6th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3208 (U.S. October 15, 1974); Laing v. United States, 496 F.2d 853 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3208 (U.S. October 15, 1974); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3115 (U.S. July 10, 1974) (No. 73-2005). The *Hall* and *Laing* oral arguments are to be heard in tandem, 43 U.S.L.W. 3208 (U.S. October 15, 1974).

8. Helvering v. Taylor, 293 U.S. 507 (1935). In litigated cases it is presumed that a decision of the Commissioner is correct.

9. Int. Rev. Code of 1954, § 7701(a)(23).

not required to be filed until the 15th of April following the close of the calendar year.[10]

A. *Termination Assessments Pursuant to Section 6851*

One of the noted exceptions to this method of reporting income is *Code* section 6851(a),[11] which allows the Internal Revenue Service, upon the occurence of certain conditions, to terminate a tax year and make a demand for immediate payment of taxes due and payable.[12] *Code* section 6851(a) contemplates that for its provisions to apply, the Internal Revenue Service must make a threshold "finding" of jeopardy. As noted in the statute, such a finding encompasses three subject areas: (1) a taxpayer who designs to depart from the United States or to remove his property therefrom, (2) a taxpayer who designs to conceal himself or property within the United States, and (3) a taxpayer who designs to do any other act which may hinder or impede the collection of tax. Although such a finding by the Internal Revenue Service is presumptive evidence of jeopardy,[13] the basis upon which the Internal Revenue Service acts would appear to be subject to judicial review for arbitrariness.[14] Once such a threshold finding has been made, the Internal Revenue Service adheres to the following procedural steps in terminating a taxpayer's taxable year:[15] (1) the District Director declares the taxable period terminated; (2) the Internal Revenue Service prepares a return for the taxpayer for the terminated period under

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10. INT. REV. CODE OF 1954, § 6072(a).
11. Section 6851 of the *Internal Revenue Code of 1954* provides:
(a) Income Tax in Jeopardy.
(1) In general.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing [a] return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.
12. *See* Note, *Termination of Taxable Year: Procedure In Jeopardy*, 26 TAX L. REV. 829, 833 (1971) where the author suggests a distinction between taxes owing and taxes due and payable. Pursuant to such a distinction the precise moment of assessment could provide a basis for testing its legality. Thus, where an assessment is made prior to the time when the tax is due and payable, it is faulty.
13. INT. REV. CODE OF 1954, § 6851(a)(1).
14. Rogan v. Mertens, 153 F.2d 937, 939 (9th Cir. 1946); United States v. Bonaguro, 294 F. Supp. 750, 753 (E.D.N.Y. 1968); Rinieri v. Scanlon, 254 F. Supp. 469, 474 (S.D.N.Y. 1966). *Contra*, Parenti v. Whinston, 347 F. Supp. 471, 472 (E.D. Pa. 1972); Clark v. Campbell, 341 F. Supp. 171, 173 (N.D. Tex. 1972). Note that the *Clark* and *Parenti* decisions perhaps have confused the principles of a finding under *Code* section 6851(a) and a belief of jeopardy under *Code* section 6861(a).
15. Note, *Termination of Taxable Year: Procedures in Jeopardy*, 26 TAX L. REV. 829, 831 (1971).

Code section 6020(b)(1);[16] (3) an assessment of the tax estimated to be owed by the taxpayer for the terminated period and the tax still owing for the preceeding year is made; (4) a letter of notice and demand for immediate payment of the tax is mailed to the taxpayer; and, (5) the Internal Revenue Service commences immediate collection of the demanded payment from the available assets of the taxpayer. Thus, within the above framework, *Code* section 6851 (a) operates to give the Internal Revenue Service the authority to utilize summary administrative proceedings for the collection of income taxes deemed to be in jeopardy.[17]

1. *Procedural Safeguards Inherent In Section 6851*

Code section 6851 provides two remedies to a taxpayer whose tax year has been terminated. The first is the reopening provision[18] and the second is the bond provision.[19] Pursuant to the reopening provision, the taxpayer is permitted to file a return at the end of the calendar year reflecting income and deductions for the entire twelve month period, including the terminated period. Although *Code* section 6851(b) states the terminated period "may" be so reopened, the Regulations provide that the taxpayer "shall"[20] file a return in accordance with *Code* section 6012 and such a filing "shall" reopen the taxable period.[21] Although there may be some question as to whether the "reopening" return refers to the terminated period or to the full calendar year taxable period,[22] this author subscribes to the theory that *Code* section 6851(b) refers only to an annual return. Therefore, once the taxpayer files his "reopening" return, he may bring a suit for refund in a federal district court[23] following the expiration of a six-month period.[24]

Alternatively, the taxpayer may file a bond pursuant to *Code* section 6851 (e) to stay collection proceedings on the amount of tax declared due and payable by virtue of such a termination. The bond is in lieu of making immediate payment and must be in an amount equal to the amount of tax and interest sought to be stayed.[25]

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16. United States v. Bonaguro, 294 F. Supp. 750, 752 (E.D.N.Y. 1968); Rinieri v. Scanlon, 254 F. Supp. 469, 474 (S.D.N.Y. 1966). *But see Rambo v. United States*, 492 F.2d 1060, 1064 (6th Cir. 1974) which suggests that *Code* section 443(a)(3) requires the taxpayer to prepare a return for the shortened taxable year occurring as a result of a *Code* section 6851(a)(1) termination.
17. Rev. Proc. 60-4, § 4, 1960-1 Cum. Bull. 878.
18. Int. Rev. Code of 1954, § 6851(b).
19. Int. Rev. Code of 1954, § 6851(e).
20. Treas. Reg. § 1.6851-1(c) (1959).
21. Treas. Reg. § 1.6851-1(b)(2) (1959). Note that the Regulations promulgated pursuant to *Code* section 6851 deal with United States citizens and both departing and non-departing aliens. However, the scope of this Note focuses primarily upon United States citizens and non-departing aliens.
22. *See* Note, *Termination of Taxable Year: Procedures In Jeopardy*, 26 Tax L. Rev. 829, 834-38 (1971).
23. Int. Rev. Code of 1954, § 7422(a).
24. Int. Rev. Code of 1954, § 6532(a)(1).
25. Treas. Reg. § 1.6851-3 (1959).

Having reviewed the procedural remedies available to a terminated taxpayer, it is necessary to inquire into the meaningfulness of these remedies. The right to post bond may be an illusory remedy where the taxpayer's available assets have been seized.[26] Similarly, in view of the fact that taxpayers who have suffered jeopardy assessments under *Code* section 6861 may have their rights adjudicated in the Tax Court forum, the lack of immediacy of federal district court review for terminated taxpayers looms as unduly harsh. Consequently, termination taxpayers in effect are left without *any* meaningful remedy against unlawful seizure and sale.

B. *Jeopardy Assessments Pursuant to Section 6861*

Another noted exception to the normal method of reporting income[27] is found in *Code* section 6861(a).[28] This section contemplates that for its provisions to apply, the Internal Revenue Service must entertain a threshold "belief" of jeopardy. Such a "belief", pursuant to the statute, merely encompasses the thought that collection of taxes owing[29] may be delayed. Furthermore, such a "belief" on the part of the Internal Revenue Service is not subject to judicial scrutiny.[30] However, once the requisite threshold "belief" is entertained, the assessment procedures followed by the Internal Revenue Service are similar to those followed for *Code* section 6851 terminations.[31]

1. *Procedural Safeguards Inherent In Section 6861*

A taxpayer who suffers a jeopardy assessment pursuant to *Code* section 6861(a) is entitled to four specific statutory procedural remedies. First, the Internal Revenue Service is required to send the taxpayer a notice of deficiency within sixty days after the jeopardy assessment.[32] The notice of deficiency affords the taxpayer the option of paying the tax or filing a petition for Tax Court review[33] which he must exercise within ninety days after receipt of the notice.[34] Should the Internal Revenue Service neglect to issue the required deficiency no-

26. Shelton v. Gill, 202 F.2d 503, 507 (4th Cir. 1953); Schreck v. United States, 301 F. Supp. 1265, 1279 (D. Md. 1969); Kimmel v. Tomlinson, 151 F. Supp. 901, 902 (S.D. Fla. 1957).

27. *See* text accompanying notes 9 and 10 *supra*.

28. Section 6861 of the *Internal Revenue Code of 1954* provides:

(a) Authority for making [Jeopardy Assessments of Income, Estate and Gift Taxes].—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

29. *See* note 12 *supra*.

30. Lloyd v. Patterson, 242 F.2d 742, 744 (5th Cir. 1957); Veeder v. Commissioner, 36 F.2d 342, 344 (7th Cir. 1929).

31. Rev. Proc. 60-4, § 2.02, 1960-1 Cum. Bull. 878.

32. Int. Rev. Code of 1954, § 6861(b).

33. Mason v. Commissioner, 210 F.2d 388, 389 (5th Cir. 1954).

34. Int. Rev. Code of 1954, § 6213(a).

tice, the taxpayer may enjoin any collection proceedings by the Internal Revenue Service until such notice is issued.[35] Second, a taxpayer may stay collection proceedings pending Tax Court review if he is able to post an adequate bond.[36] Third, subject to three exceptions,[37] property seized pursuant to a jeopardy assessment may not be sold during the pendency of litigation in the Tax Court.[38] Fourth, the Internal Revenue Service may abate the jeopardy assessment if it finds the jeopardy no longer exists.[39]

Once again it should be noted that the right to post bond may be an entirely illusory remedy where the assets of a taxpayer have been seized.[40] Furthermore, the right of the Internal Revenue Service to abate its jeopardy assessment is a procedure designed to assist the Service,[41] not the taxpayer, and its use is not generally subject to judicial review.[42] Consequently, the availability of abatement as a successful remedial tool to the taxpayer depends upon a discretionary grant from the Service[43] which is not likely to issue. Therefore, the only meaningful procedural safeguards available to a jeopardy assessment taxpayer are Tax Court review and the sale proscriptions during pendency of litigation.

III. Case Law Treatment

The above treatment of *Code* sections 6851(a) and 6861(a), along with their respective procedural safeguards, highlights the extreme bipolarization of remedies available to the two types of taxpayers seeking to test erroneous seizures and sales. The courts have reviewed the divergency of the remedies, focusing primarily upon the immediacy of judicial review available in the Tax Court forum as compared with federal district court review in a refund suit.

The majority of termination cases, however, begin in a federal district court not as tax refund suits but rather as suits to enjoin the collection of taxes due and payable by virtue of the termination assessment. In these cases the Internal Revenue Service has been asserting the jurisdictional bar of *Code* sec-

35. Normally *Code* section 7421(a) proscribes any injunction against the collection of a tax. However, the failure to issue a notice of deficiency as required by *Code* section 6213(a) represents an expressed statutory exception to that rule. Subsection 7421(a) of the *Internal Revenue Code of 1954* provides: "Except as provided in sections 6212(a) and (c), 6213(a) and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

36. Int. Rev. Code of 1954, § 6863(a).

37. *Code* section 6863(b)(3)(B) notes that the three exceptions to the stay of sale of seized goods pending a Tax Court decision are: (1) the taxpayer consents to the sale; (2) the expense of conservation and maintenance will greatly reduce the net proceeds of the sale; and, (3) the goods are perishable in nature.

38. Int. Rev. Code of 1954, § 6863(b)(3)(A).

39. Int. Rev. Code of 1954, § 6861(g).

40. Shelton v. Gill, 202 F.2d 503, 507 (4th Cir. 1953); Schreck v. United States, 301 F. Supp. 1265, 1279 (D. Md. 1969); Kimmel v. Tomlinson, 151 F. Supp. 901, 902 (S.D. Fla. 1957).

41. Schreck v. United States, 301 F. Supp. 1265, 1280 (D. Md. 1969).

42. Lloyd v. Patterson, 242 F.2d 742, 747 (5th Cir. 1957).

43. Treas. Reg. § 301.6861-1(f)(1) (1957).

tion 7421(a) [Anti-Injunction Statute],[44] which specifically prohibits suits to enjoin the collection of "taxes". However, one of the express statutory exceptions to the jurisdictional bar of the Anti-Injunction Statute occurs when the Internal Revenue Service attempts to collect a tax without having sent a notice of deficiency where it is required to do so.[45] The Internal Revenue Service argues that, although a notice of deficiency is required in jeopardy assessments pursuant to *Code* section 6861(b), no such similar provision is found in *Code* section 6851(a). The Service argues that termination assessments do not result in a deficiency and that no notice of deficiency is required to be sent. Since no notice of deficiency is required to be sent, the statutory exception to the Anti-Injunction Statute is inapplicable and therefore the court is without jurisdiction to issue an injunction. On the other hand, the taxpayer argues that Code sections 6851(a) and 6861(a) are both jeopardy assessments and that *Code* section 6861(a) contains the assessment authority for both sections. Therefore, the procedural safeguards of *Code* section 6861(a) should be available on a *Code* section 6851(a) assessment. Such a theory would afford the terminated taxpayer a notice of deficiency and the option of Tax Court review.

Thus, the narrow issue before the courts is whether or not a notice of deficiency is required in a *Code* section 6851 termination. If it in fact is, federal courts would have jurisdiction to entertain injunction actions for failure to mail a notice of deficiency and the taxpayer would have an option for a Tax Court hearing following the mailing of such a notice. The resolution of the narrow issue is dependent upon where the assessment authority for a *Code* section 6851 termination may be found. The courts have reached contrary results over the "authority" issue primarily because of the inconsistency and harshness of the Service's position. Nevertheless, even though reaching different results, the courts have at least been in accord on the point that resolution of the authority issue may be found in the consideration of the following four areas:

1. The congressional intent with respect to the enactment of both *Code* section 6851 and *Code* section 6861 during the period from 1918 to 1926;

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44. Section 7421 of the *Internal Revenue Code of 1954* provides: "(a) Tax—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

45. Section 6213(a) of the *Internal Revenue Code of 1954* provides:

> Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper Court.

2. whether or not a tax assessment pursuant to *Code* section 6851 creates a "deficiency";
3. the *Code* sections the Internal Revenue Service has relied upon for assessment authority for a *Code* section 6851 termination since 1926; and,
4. the constitutionality of the Internal Revenue Service's position as applied.

A. *Congressional Intent 1918-1926*

Ordinarily, the resolution of a federal income tax problem is dependent upon a careful statutory analysis coupled with a reference to the applicable Treasury Regulations. However, when that analytical approach does not clearly lead to the resolution of the issue, congressional activity may be examined to determine the intent underlying the statute even though such intent may not be clearly expressed. Such a problem is presented by the source of authority issue on a *Code* section 6851 termination. *Code* section 6851 does not expressly contain its own independent assessment authority and does not refer to *Code* section 6861 for its assessment authority. Furthermore, even though *Code* section 6861 contains expressed assessment authority,[46] and both *Code* sections 6851 and 6861 are grouped under the same chapter of the *Code*, the two statutes may not be read *in para materia.*[47] Thus, with this apparent absence of statutory direction, the courts have looked to legislative history for the answer. The most noted analysis with this focus is to be found in *Schreck v. United States.*[48]

In *Schreck*, the taxpayer's taxable year had been terminated by the Internal Revenue Service pursuant to *Code* section 6851. The taxpayer asserted, *inter alia*, that the congressional intent to mitigate the "pay first-litigate later" rule is manifested in *Code* section 6861 which provides the taxpayer with an opportunity for prepayment judicial review in the Tax Court. Therefore, any attempt by the Service to terminate the taxable year without affording Tax Court review by sending a notice of deficiency violates the congressional intent underlying *Code* sections 6851 and 6861. The Internal Revenue Service argued, however, that the assessment authority for a termination has always been found in the general authorizing statute, which is now *Code* section 6201,[49] and never in the jeopardy assessment authority provisions of *Code* section 6861.

46. INT. REV. CODE OF 1954, § 6861(a).
47. Section 7806(b) of the *Internal Revenue Code of 1954* provides:
(b) Arrangement and Classification.—No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.
48. 301 F. Supp. 1265 (D. Md. 1969).
49. Section 6201(a) of the *Internal Revenue Code of 1954* provides:
(a) Authority of Secretary or Delegate.—The Secretary or his delegate is au-

The district court in *Schreck* adopted the taxpayer's position with regard to the legislative history even though admittedly not compelled to do so.[50] It would seem that the court's concern for the harshness of the Service's position was a significant factor in its acceptance of the taxpayer's position on legislative history. However, it appears that the *Schreck* decision omitted some legislative considerations. This, coupled with the fact that other courts have expressly refused to follow *Schreck*,[51] mandates further review of the legislative history.

The Internal Revenue Service first gained termination assessment power in section 250(g) of the Revenue Act of 1918,[52] the predecessor to *Code* section 6851. At that time no prepayment procedure existed by which a taxpayer could test any type of income tax assessment. Thus, the "pay first-litigate later" era was born since the only judicial forum to which a taxpayer had access was a federal district court in a post-payment refund suit. Further, the *only* assessment authority found in the Revenue Act of 1918 was section 3176.[53] As a consequence, assessments for both a normal and short tax year were authorized by the same statute. In 1918 no comparable counterpart to the jeopardy assessment provisions of *Code* section 6861 yet existed.

Congress, however, decided in 1924 that the requirement of "pay first-litigate later" was too harsh[54] and, therefore, established the Board of Tax Appeals[55] to provide a non-prepayment forum for the taxpayer. Even though the Board was initially afforded limited jurisdiction because of the remaining right of a tax refund suit, it was the genesis of the modern Tax Court. The jurisdiction of the Board was invoked by the deficiency notice requirement of then section 274.[56] Section 274 severely limited the Service's normal tax year assessment power by requiring it to send the taxpayer notice revealing that a deficiency was due and to announce an intention to assess and collect it. Subsequent to receipt of this notice, the assessment authority was suspended for a sixty day period during which the taxpayer could petition the Board of Tax Appeals for a redetermination of the deficiency. The "pay first-litigate later" rule was not

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thorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

50. Schreck v. United States, 301 F. Supp. 1265, 1271 (D. Md. 1969).

51. Laing v. United States, 496 F.2d 853, 854 (2d Cir. 1974); Irving v. Gray, 479 F.2d 20, 23-25 (2d Cir. 1973). Although these cases explicitly declined to follow *Schreck*, it was not upon a theory that the *Schreck* legislative history analysis was in error. *Irving* in particular disagreed that the Service's position was as harsh as *Schreck* had suggested and for this reason did not follow the case. Had the *Schreck* court been appraised of the factors available to *Irving*, the decision may have been different.

52. Revenue Act of February 24, 1919, ch. 18, § 250, 40 Stat. 1084 (now INT. REV. CODE OF 1954, § 6851).

53. Revenue Act of February 24, 1919, ch. 18, § 1317, 40 Stat. 1147. Note that § 3176 was incorporated into § 1317.

54. H.R. Rep. No. 179, 68th Cong., 1st Sess. 7 (1924); *see* I. SEIDMAN, LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS 1938-1861 at 759-70 (1938).

55. The Board of Tax Appeals is now known as the Tax Court of the United States.

56. Revenue Act of June 2, 1924, ch. 234, § 274, 43 Stat. 297 (now INT. REV. CODE OF 1954, §§ 6212(a) and 6213(a)).

mitigated with respect to the short tax year taxpayer, however, as section 274(d) represented an express exception to the section 274(a) deficiency notice requirement.

In 1926 the remedies of the normal tax year taxpayer were once again altered but, more importantly, the rights of a short year taxpayer were affected for the first time. The normal taxpayer retained the right of a deficiency notice under section 274(a)[57] of the 1926 Revenue Act. However, now appeals from decisions of the Board of Tax Appeals no longer flowed to federal district courts but rather to circuit courts of appeal.[58] Thus, the normal tax year taxpayer was given his choice of non-prepayment judicial review in the Board of Tax Appeals or post-payment judicial review in the federal district court in a suit for refund. As noted, the remedies of the short year taxpayer were also changed in that the 1924 Revenue Act section 274(d)'s express exception to the mailing of a deficiency notice under section 274(a) was deleted and section 279(a) of the 1926 Revenue Act was added thereby providing for the right to a Board of Tax Appeals redetermination of a "jeopardy" assessment.[59] Section 279(a) contained its own assessment authority and did not need to rely upon the general authorizing statute. However, it is important to note that the general authorizing statute remained,[60] as did the provisions for short year taxpayers[61] and normal tax year taxpayers.[62] Thus, the Revenue Act of 1926 seemed to have contemplated three types of assessments: (1) normal, (2) jeopardy, and (3) short year termination. However, even though section 279(a), dealing with jeopardy taxpayers, contained its own assessment authority, the assessments on a normal taxpayer and short year taxpayer still continued to draw their assessment authority from section 1103 of the general authorizing statute. This position is reinforced by the fact that section 250(g) of the Revenue Act of 1918 has been reenacted without change into present *Code* section 6851.[63]

It is apparent from this analysis that the *Schreck* presentation of the legislative history was incomplete. That court failed to discuss the co-existence of all three types of statutory assessments under the Revenue Act of 1926. Further, it would appear that Congress, in 1926, merely created a jeopardy assessment provision with *independent* assessment authority. However, the creation of the jeopardy assessment does not militate against the simultaneous statutory co-existence of a termination assessment nor does it necessarily follow that such a creation altered the assessment authority from which a termination assessment

57. Revenue Act of February 26, 1926, ch. 27, § 274(a), 44 Stat. 55 (now INT. REV. CODE OF 1954, §§ 6212(a) and 6213(a)).
58. Revenue Act of February 26, 1926, ch. 27, § 1001(a), 44 Stat. 109.
59. Revenue Act of February 26, 1926, ch. 27, § 279(a), 44 Stat. 59 (now INT. REV. CODE OF 1954, § 6861).
60. Revenue Act of February 26, 1926, ch. 27, § 1103, 44 Stat. 112.
61. Revenue Act of February 26, 1926, ch. 27, § 285, 44 Stat. 68 (now INT. REV. CODE OF 1954, § 6851).
62. Revenue Act of February 26, 1926, ch. 27, § 274, 44 Stat. 55 (now INT. REV. CODE OF 1954, §§ 6212(a) and 6213(a)).
63. Schreck v. United States, 301 F. Supp. 1265, 1268 n.3 (D. Md. 1969).

was always drawing, *i.e.*, the general authorizing statute. Quite the contrary, this theory merely emphasizes the inherent difference between a termination and a jeopardy assessment which the courts have recognized since 1929.[64] That distinction is that the jeopardy assessment provision contemplates jeopardy situations delaying the collection of taxes *after* the time prescribed for filing the tax return has elapsed, whereas a termination assessment contemplates a finding of jeopardy as defined in the statute *prior* to the required filing date of the return. Thus, the termination provision contemplates such extreme jeopardy as to require immediate collection after income is earned.[65] In such case, collection of the revenue would not be secure if the Internal Revenue Service awaited the normal close of the taxable year.

One final point that should be noted is whether or not a *Code* section 6851 termination assessment can be made by the authority of *Code* section 6201 (the general authorizing statute) as the Internal Revenue Service argues. The problem exists because *Code* section 6201(a) refers to assessment authority "extending to and including" four explicit areas, none of which encompasses terminations. However, *Code* section 7701(b)[66] would at least support the argument that the four subject areas of *Code* section 6201(a) are not exclusive. This argument is the concomitant of the argument that, pursuant to legislative history, terminations find their assessment authority in the general authorizing statute.[67]

From this analysis of congressional intent during the period from 1918 to 1926, it would appear, contrary to *Schreck*, that Congress had no explicitly determinable intent to mitigate the "pay first-litigate later" rule with respect to termination assessments. Had Congress entertained such an intent it could have been easily expressed. Furthermore, if such an intent is implicit, why do *Code* sections 6851 and 6861 contain separate bonding provisions?[68] All these factors support the theory that Congress, in fact, did recognize that in exceptional circumstances a special provision such as *Code* section 6851 would be vital to the protection and collection of the revenue.

B. *Does a Termination Create a Deficiency?*

The *Schreck* case also analyzed the source of authority issue for a *Code* section 6851 termination from the viewpoint of whether or not it created a deficiency. In so doing the *Schreck* opinion concluded that *Code* section 6861

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64. Veeder v. Commissioner, 36 F.2d 342, 344 (7th Cir. 1929); Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840, 842 (1938).

65. Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840, 842 (1938).

66. Section 7701(b) of the *Internal Revenue Code of 1954* provides: "(b) Includes and Including.—The terms "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."

67. Although *Code* section 6201 would not appear to be the historical derivative of section 3176 of the Revenue Act of 1918, the conclusion is inescapable that both statutes represent general authorizing statutes for law of their respective periods.

68. *See* notes 19 and 36 *supra*.

was the assessment authority source for a termination. The primary and requisite foundation for this conclusion is that a termination creates a deficiency since *Code* section 6861 explicitly refers only to deficiency assessments. However, as with the congressional intent issue, it is clear that a significant factor in the *Schreck* opinion that led to the conclusion that a deficiency existed was the court's noted concern for the harshness of the Service's position. With this in mind the *Schreck* case simply decided that the statutory definition of a deficiency was broad enough to prevent such inequitable results.[69]

Code section 6211[70] defines a deficiency and would appear to contemplate two elements: (1) the imposition of a tax, and (2) the filing of a return. Thus, the courts considering the deficiency issue, albeit reaching different conclusions, have seized upon these elements in deciding the issue.

1. *The Imposition of a Tax*

In 1938 the Board of Tax Appeals, in *Ludwig Littauer & Co. v. Commissioner*,[71] considered the issue of whether or not *Code* section 6851 requires a notice of deficiency as does *Code* section 6861. The *Ludwig* opinion concluded that it did not, noting that the notice of tax liability under the termination provision is nothing more than a provisional statement of the amount of tax that must be presently paid as protection against the impossibility of collection.[72] Subsequent to *Ludwig* the United States Court of Appeals for the Seventh Circuit noted in *Williamson v. United States*[73] that:

> [T]he deficiency notice requirement cannot be read into § 6851 because the assessment made under that section is not a deficiency as defined in § 6211. That section defines a deficiency as the amount by which the "tax imposed" exceeds the amount shown on the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year.[74]

This same theory of "no tax imposed" was followed also in *Irving v. Gray*.[75] Thus, although one recent decision expresses discontent with this theory,[76] the

69. Schreck v. United States, 301 F. Supp. 1265, 1275 (D. Md. 1969).
70. Section 6211(a) of the *Internal Revenue Code of 1954* provides:
(a) In General.—For the purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—
(1) the sum of
(A) 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
(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
(2) the amount of rebates, as defined in subsection (b)(2), made.
71. 37 B.T.A. 840 (1938).
72. Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840, 842 (1938).
73. 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1971).
74. *Id.*
75. 479 F.2d 20, 24 (2d Cir. 1973).
76. *See* William Jones, 62 T.C. —, No. 1 (1974).

Ludwig rule has been followed by the Second, Seventh and Ninth Circuits.[77] Furthermore, this theory was not treated by the *Schreck* opinion. However, it is respectfully suggested that neither the *Ludwig* nor the *Williamson* cases thoroughly treated the relevant statutes involved but rather summarily decided the "tax imposed" issue. The point is simply that this issue may not be authoratatively settled. Nevertheless, of the decisions that have considered the "tax imposed" issue, all have been in accord that no deficiency is created by a *Code* section 6851 termination.

2. *The Return Requirement*

Although the *Schreck* opinion did not consider the "tax imposed" issue, it did, however, conclude that where no return is made the amount assessed under a *Code* section 6851 termination does create a deficiency.[78] Nevertheless, the analysis utilized by the *Schreck* court was not as searching as it might have been.

The primary problem encountered with this issue is that the *Code* section 6211(a) definition of a deficiency is couched in terms of a return. Therefore, the argument that a deficiency may exist when no return has been filed or has been required to be filed mandates that a deficiency exists at all times in a tax year. Such a theory does not appear to be a reasonable one since a deficiency realistically should only be held to exist where a return is filed or is required to be filed. This analysis necessarily focuses on the type of return that is required to be filed, *id est*, will merely a full year normal return suffice or will a short year tax return satisfy the requirement?

Code section 443(a)(3)[79] requires a taxpayer to file a short period return when his taxable year is terminated. However, the Treasury Regulations under *Code* section 443 merely refer the taxpayer to *Code* section 6851 and the Regulations thereunder for guidance.[80] Furthermore, the Regulations under *Code* section 6851, relating to United States citizens, state only that a terminated taxpayer must file a tax return for his usual annual accounting period.[81] Thus, the Regulations do not conclusively resolve the issue of whether or not a return required to be filed pursuant to *Code* section 443(a)(3) would satisfy the return requirement of a *Code* section 6211(a) deficiency.

Since *Code* section 443(a)(3) is expressed in terms of terminating a "taxable year", it is useful to define that term. "Taxable year" is defined at both

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77. Irving v. Gray, 479 F.2d 20 (2d Cir. 1973); Williamson v. United States, 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1971); Da Boul v. Commissioner, 429 F.2d 38 (9th Cir. 1970).

78. Schreck v. United States, 301 F. Supp. 1265, 1274 (D. Md. 1969).

79. Section 443(a)(3) of the *Internal Revenue Code of 1954* provides: "(a) Returns for Short Period.—A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstnaces:

* * * *

(3) Termination of taxable year for jeopardy.—When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy)."

80. Treas. Reg. § 1.443-1(a)(3) (1957).

81. Treas. Reg. § 1.6851-1(c) (1959).

Code section 441(b)[82] and *Code* section 7701(23).[83] Pursuant to the definition contained in *Code* section 7701(23), it should be noted that when the period for which a return is required to be filed is less than twelve months that period is, by definition, a "taxable year". Thus, the common denominator of both a taxable year and a deficiency is the filing, or the required filing, of a tax return.[84] A deficiency cannot exist without a completed taxable year.

Therefore, for a deficiency to exist pursuant to a *Code* section 6851 termination, the taxes made due and payable[85] by virtue of the assessment must be based upon a taxable year. However, irrespective of the statutory language of *Code* section 443(a)(3), the Regulations of that section and *Code* section 6851 do not appear to contemplate that the short period is a taxable year. This conclusion is based upon three factors. First, the *Code* section 6851 Regulations reveal that, subsequent to a termination, the taxpayer is required to file a return for his current taxable year, meaning the taxpayer's usual annual accounting period determined without regard to the short period termination.[86] Furthermore, the same Regulation provides that any tax paid pursuant to the termination will be applied against the tax due on the current taxable year.[87] If the short period were intended to be a taxable year, the taxpayer should be required to file another return at the end of the year only for that portion of the year not encompassed in the termination. Second, the Regulations further provide that the taxpayer's exemption in a terminated short period need not be prorated.[88] If the short period were to be treated as a true and accurate taxable year, the exemption would be required to be prorated.[89] Third, *Code* section 6851(b) itself is couched in language of "reopening a termination". If a short period can be reopened and subsequently terminated once again,[90] with the additional requirement on the taxpayer of filing an annual return,[91] may the terminated period realistically be considered a taxable year in any technical sense?

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82. Section 441(b) of the *Internal Revenue Code of 1954* provides:
(b) Taxable Year.—For purposes of this subtitle, the term "taxable year" means—
(1) the taxpayer's annual accounting period, if it is a calendar year or fiscal year;
(2) the calendar year, if subsection (g) applies; or
(3) the period for which the return is made, if a return is made for a period of less than 12 months.
83. Section 7701(23) of the *Internal Revenue Code of 1954* provides:
(23) Taxable year.—The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary or his delegate, the period for which such return is made.
84. Estate of Levi T. Scofield, 25 T.C. 774, 783 (1956).
85. *See* note 12 *supra*.
86. Treas. Reg. § 1.6851-1(c) (1959).
87. *Id.*
88. Treas. Reg. § 1.6851-1(a)(1) (1959).
89. Treas. Reg. § 1.443-1(b)(1)(v) (1957).
90. Treas. Reg. § 1.6851-1(b)(1) (1959).
91. Treas. Reg. § 1.6851-1(c) (1959).

Thus, reading the statutes and regulations together as is required by the Regulations pertaining to *Code* section 443, it would appear that the termination of a taxable year need not create a deficiency.

C. *Post-1926 Termination Application*

Aside from the quagmire through which the above pursuit of a statutory solution has trailed, the Service's position on assessment authority emanating from *Code* section 6201 has been somewhat weakened in the eyes of the courts because of the inconsistent application of this theory. The *Code* section 6201 assessment authority argument seems to have been first advanced in *Clark v. Campbell*,[92] where it was rejected. Since the *Clark* case, the theory has been advanced in five other major cases; the Internal Revenue Service has been successful in only two.[93] Furthermore, the cases in which the courts declined to accept the Service position appeared to present a more searching analysis than the two cases which did accept the position. Prior to *Clark* in 1972, while it was not always clear, it appears that the Internal Revenue Service contended *Code* section 6851 contained independent assessment authority.[94]

Nevertheless, the mere inconsistent application of the assessment authority issue should, alone, not deter the courts in searching for the solution to the problem. As analyzed previously in the congressional intent section of this Note, it appears that the *Code* section 6201 assessment authority theory is, in fact, the most cogent.

D. *Constitutional Considerations*

As noted in the preceding analysis of the assessment authority, courts have been concerned with the constitutional due process element of the Internal Revenue Service's position that looks to *Code* section 6201 for assessment authority. Of the courts considering this aspect, the *Schreck v. United States*[95] and *Rambo v. United States*[96] decisions are the most notable. To avoid an unconstitutional reading of section 6851, the *Schreck* and *Rambo* decisions found that the termination assessment authority in *Code* section 6861 provided significant procedural safeguards for the taxpayer.

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92. 341 F. Supp. 171 (N.D. Tex. 1972).

93. The Service's argument was accepted in *Laing v. United States*, 496 F.2d 853 (2d Cir. 1974) and *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973).

The Service's position was rejected in *Hall v. United States*, 493 F.2d 1211 (6th Cir. 1974); *Rambo v. United States*, 492 F.2d 1060 (6th Cir. 1974); *Lisner v. McCanless*, 356 F. Supp. 398 (D. Ariz. 1973); *Clark v. Campbell*, 341 F. Supp. 171 (N.D. Tex. 1972).

94. Williamson v. United States, 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1971); United States v. Rochelle, 384 F.2d 748 (5th Cir. 1967); Rogan v. Mertens, 153 F.2d 937 (9th Cir. 1946); United States v. Johansson, 8 Am. Fed. Tax R.2d 6001 (S.D. Fla. 1961); William Jones, 62 TC —, No. 1 (1974); Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840 (1938); Puritan Church of America v. Commissioner, 10 P-H Tax Ct. Mem. 485 (1951). *But cf.* Carlo v. United States, 286 F.2d 841 (2d Cir. 1961); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966); Faucher v. United States, 10 Am. Fed. Tax R.2d 5922 (D.S.D. 1962).

95. 301 F. Supp. 1265, 1281 (D. Md. 1969).

96. 492 F.2d 1060, 1064 (6th Cir. 1974).

As noted earlier in the discussion,[97] the terminated taxpayer has essentially only two remedies: the reopening of a taxable year under *Code* section 6851 (b) and the posting of an adequate bond to stay collection proceedings. However, if all the taxpayer's assets have been seized, the latter remedy is illusory and the first remedy affords no access to a judicial forum until at least six months following the close of the taxable year in a tax refund suit.

Furthermore, *Schreck* questioned even the viability of the refund suit remedy in certain cases.[98] In this context the *Schreck* court was concerned with the situation that exists when the Service makes a large termination assessment and then proceeds to seize and sell assets that are inadequate to completely satisfy the amount of the assessment. In such a case, the court felt that unless the taxpayer was able to make full payment of the balance of the termination assessment, plus additional taxes incurred over the remaining part of the year, the taxpayer would be precluded from filing a claim for refund[99] pursuant to the full payment rule of *Flora v. United States*.[100] The *Flora* rule, succinctly stated, is that full payment of an assessment is a jurisdictional prerequisite to a refund suit in a federal district court.[101] Therefore, one cannot pay only a portion of an assessment and subsequently attempt to sue for a refund with respect to that part paid.[102] The subsequent decision of *Irving v. Gray*[103] involving a section 6851 termination, held *Flora* inapplicable because *Flora* dealt with a deficiency, and terminations do not create a deficiency.[104] However, the *Irving* treatment of the problem was not a searching one. One author suggests that the filing of a full period return automatically reopens the terminated period and suspends the termination assessment, whereupon, the Service assesses the amount shown on the return pursuant to *Code* section 6201. If the return shows the amount of tax due as less than the amount declared due by the termination and satisfied by levy, the return serves as a claim for refund. Furthermore, under this theory the *Flora* rule would be satisfied because the assessment upon which the suit is based is the amount shown on the return and not the termination assessment.[105] Nevertheless as the *Schreck* and *Irving* cases are not in accord on the procedure to be followed, the matter appears to be far from settled.

The issue still remains, however, that even if the taxpayer may file a refund suit six months following the close of the year, as *Irving* suggests, does this remedy alone satisfy the requirements of procedural due process? The question becomes even more difficult when one considers the fact that a jeopardy taxpayer

97. *See* text accompanying notes 18 and 19 *supra*.
98. Schreck v. United States, 301 F. Supp. 1265, 1281 (D. Md. 1969).
99. INT. REV. CODE OF 1954, § 7422.
100. 357 U.S. 63 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960).
101. Flora v. United States, 362 U.S. 145, 146 (1960).
102. *Id.* at 150.
103. 479 F.2d 20 (2d Cir. 1973).
104. Irving v. Gray, 479 F.2d 20, 24 n.6 (2d Cir. 1973).
105. Saltzman, *The Termination of a Taxable Year*, 28 TAX LAWYER 91, 108 (1974).

is afforded the procedural remedies of prepayment adjudication in Tax Court and sale proscriptions during the pendency of Tax Court review.[106]

In 1972 the Supreme Court announced, in *Fuentes v. Shevin*,[107] a minimum requirements test for satisfying the mandate of procedural due process. This test required that a preseizure notice and hearing be afforded the affected individual prior to deprivation of property in a replevin action.[108] *Fuentes* recognized, however, that there may exist "extraordinary circumstances" which justify postponing notice and hearing.[109] Thus, the Internal Revenue Service has been allowed to exercise the power of summary seizure to promptly secure its revenues.[110] However, the more recent case of *Mitchell v. W.T. Grant Co.*[111] considered the *Fuentes* rationale, and, rather than applying the minimum requirements and extraordinary circumstances tests, the Court opted for a more practicable "balancing of interests" test. *Mitchell* noted that the concept of procedural due process is not amenable to inflexible rules and that it rather considers the interests of both parties.[112] Thus, in *Mitchell* a creditor was allowed summary seizure of a debtor's property where the debtor was in payment default. The Court balanced the interests of the parties by reasoning that the initial hardship to the debtor is limited, the seller has a strong interest, the process proceeds under judicial supervision, and the prevailing party is protected against all loss.[113] The Court noted that the strength of these factors, coupled with the adequate opportunity for post-seizure judicial review, did not constitute a denial of procedural due process. The concept of adequate opportunity for post-seizure judicial review was borrowed from *Phillips v. Commissioner*[114] where the constitutionality of the predecessor termination provision to *Code* section 6851 was upheld. *Phillips* was, however, primarily concerned with the necessity of the Internal Revenue Service's action to insure the collection of revenue. The *Phillips* Court coupled this necessity with adequacy of *two* alternative post-seizure judicial hearing opportunities to sustain the constitutionality of the seizure.[115]

The taxpayer armed with the considerations of *Mitchell* and *Phillips*, coupled with the balancing analysis of *Mitchell*, can make a formidable attack on the sufficiency of the due process afforded under *Code* section 6851. First, even though the initial hardship on the debtor in *Mitchell* may have been limited, that factor is certainly not characteristic of the terminated taxpayer. Rather than the Service seizing one asset upon which the taxpayer has defaulted in payment, it seizes the *entire* asset pool of the taxpayer as no assets are ex-

106. *See* text accompanying notes 35 and 37 *supra*.
107. 407 U.S. 67 (1972).
108. Fuentes v. Shevin, 407 U.S. 67, 80 (1972).
109. *Id.* at 90.
110. *Id.* at 91-92; *accord*, Phillips v. Commissioner, 283 U.S. 589 (1931).
111. 94 S. Ct. 1895 (1974).
112. Mitchell v. W.T. Grant Co., 94 S. Ct. 1895, 1901 (1974).
113. *Id.* at 1906.
114. 283 U.S. 589 (1931).
115. Phillips v. Commissioner, 293 U.S. 589, 595-97 (1931).

empt. Second, in *Mitchell* the seller had a strong interest in the seized property because the debtor accepted the property from the seller subject to an existing lien in the amount of the purchase price yet due. However, the Service has no existing lien on the taxpayer's property when he takes possession. Rather the Service creates a lien by assessment on property the taxpayer already possesses. Third, whereas the seizure process in *Mitchell* was under judicial scrutiny, the courts are not in accord on the issue of whether or not the Service's basis for termination may be reviewed prior to seizure.[116] Finally, although *Phillips* accepted the proposition that the termination provision is a supplement to the jeopardy provision and is a vital process necessary for revenue protection, is this actually realistic? As noted in *Lisner v. McCanless*:[117] "What harm can exist to the collection of revenue by allowing a deficiency notice to issue *after* assessment? The taxpayer's assets are in the hands of the government. The IRS can continue to levy to enforce the assessment. In exchange, the right to sell is curtailed, and ultimately a formal deficiency must be noticed to the taxpayer."

It would therefore appear that factual circumstances differ substantially in a termination issue as compared with the situation in *Mitchell*. This factual difference, coupled with the fact that some courts have chipped away at the absolute necessity of not issuing a deficiency notice pursuant to a *Code* section 6851 termination, weakens the Service's constitutional footing. The constitutional attack, however, is not leveled at *Code* section 6851 but rather at the method in which it is applied. Thus, although the previous portions of this Note have been devoted to the technical correctness of the Service's position, one cannot avoid being concerned with the hardship that the Service's position works on terminated taxpayers. The search should be for an acceptable middle ground that does not violate the statutory scheme Congress has given *Code* section 6851 and yet serves to provide the taxpayer with some safeguard against a clearly erroneous termination.

IV. Search for an Answer

As previously noted, the technical position of the Internal Revenue Service, based upon statutory construction, is sound, albeit producing rather harsh results. Therefore, it would not appear that the most cogent attack would be upon the viability of a *Code* section 6851 termination being effected without issuing a notice of deficiency. In the final analysis what the terminated taxpayer desires, and perhaps is justified in seeking, is judicial review of clearly erroneous terminations. The particular judicial forum or form of review is not as important as ensuring that there remains a judicial check on the Service. If this check does not exist, the taxpayer may suffer severe consequences that should have and could have been averted.

116. *See* note 14 *supra*.
117. Lisner v. McCanless, 356 F. Supp. 398, 403 n.11 (D. Ariz. 1973).

Perhaps the classic illustration is that found in *United States v. Bonaguro*[118] where the taxpayer sought injunctive relief to force the Service to return his seized assets. The court granted the relief noting:

> The critical defect in the government's position in the instant case is that it has failed to show that it took the formal steps under the statute at all, that it made even internally the findings and declaration required under Section 6851(a), or entertained the belief required by Section 6861(a), or adverted to any data that could induce a reasonable belief that a tax of $1,617.50 was in jeopardy, or filed an involuntary return which was both consistent with the data it had and free of intrinsic repugnancy.[119]

In the *Bonaguro* case, had the court refused to consider the taxpayer's requested relief, an avoidable substantial harm would have occurred. Thus it would appear that the courts could provide adequate judicial review against clearly erroneous termination assessments in an injunction proceeding.

A. *The Jurisdictional Bar for Injunctions*

As noted earlier, the primary obstacle that a taxpayer will face in seeking review through the injunction is *Code* section 7421(a), which withdraws jurisdiction from federal district courts to hear suits for the purpose of restraining the assessment or collection of any tax. The plight of the taxpayer is made even more difficult by the two recent companion cases of *Bob Jones University v. Simon*[120] and *Alexander v. "Americans United", Inc.*[121] In these two cases the Court took a dim view of pre-enforcement injunctions and, as a result, narrowly construed the judicial exceptions to *Code* section 7421(a) enunciated in *Enochs v. Williams Packing & Navigation Co.*[122] In *Enochs* the Court held that for an injunction to issue one must show that (1) under no circumstances could the United States prevail, and that (2) equity jurisdiction exists.[123] Furthermore, the initial requirement is a threshold requirement focusing only upon whether *Code* section 7421(a) even applies. The second requirement focuses upon the equitable requirements of irreparable harm and a lack of an adequate remedy at law. However, the second requirement should not be analyzed until the threshold question is properly determined.

The hard line approach of the Court in *Bob Jones* and *"Americans United"* leaves one with the inescapable conclusion that a showing "under no circum-

118. 294 F. Supp. 750 (E.D.N.Y. 1968); *accord,* United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1964); Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966). *See also* Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974). The *Willits* case found a termination in the Narcotics Traffickers Program to be harassment in the guise of a tax. This followed to its logical extension would support the theory that an injunction should issue in such a case because it does not seek to enjoin a "tax" within the meaning of *Code* section 7421(a).

119. 294 F. Supp. 750, 753 (E.D.N.Y. 1968).

120. 416 U.S. 725 (1974).

121. 416 U.S. 752 (1974).

122. 370 U.S. 1 (1962).

123. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962).

stances could the United States prevail" will make this remedy a very narrow one. However, the Court noted that, if it can be shown that the Service's interpretation has no *legal basis*, the threshold requirement may be satisfied.[124]

Thus, even though the remedy is a narrow one, if courts will review the jurisdictional basis for the Service's claim, as *Bonaguro* did, protection will at least be afforded the termination taxpayer against clearly erroneous assessments. This theory contemplates that a finding of jeopardy by the Service without sufficient evidence is arbitrary and baseless[125] and, therefore, illegal.[126] Thus, if the Service's position is illegal, it may be enjoined under the *Bob Jones* standard. Furthermore, this contention of arbitrariness could be presented in the complaint and in affidavit form to resist the Service's motion to dismiss pursuant to *Code* section 7421(a).[127]

Once the threshold issue is determined the terminated taxpayer should encounter no grave difficulty in satisfying the traditional equity requisites. First, this Note has discussed the inadequacies of legal relief for a terminated taxpayer. Secondly, irreparable harm certainly could be asserted from the fact that the taxpayer's entire asset pool is being seized and sold pursuant to an allegedly erroneous assessment.

V. Conclusion

In view of the preceeding discussion it would seem realistic for the Supreme Court, upon hearing this issue, to provide a shelter for the terminated taxpayer against clearly erroneous assessments. It is to be noted, however, that even though this Note suggests serious constitutional considerations, the Court would be unlikely to flatly hold the Service's application of the termination provision unconstitutional if there exist alternative and viable options.[128] One such option should be pre-enforcement injunctive review for arbitrariness. Such a review would serve four important functions. First, it would provide a prepayment forum for the taxpayer to halt clearly erroneous assessments and thereby minimize the procedural due process problem encountered with post-payment judicial review in the form of a tax refund suit. Second, such a solution would not do violence to the recent decisions of *Bob Jones* and *"Americans United"*, as the only action to be enjoined would be that which is clearly illegal. Third, it would alleviate any procedural difficulties of Tax Court review of short pe-

124. Bob Jones University v. Simon, 416 U.S. 725 (1974). Note that the legal basis standard in this area of the law has its genesis in *Miller v. Standard Nut Margerine Co.*, 284 U.S. 498 (1932), where the respondent-taxpayer successfully enjoined the levy of a tax on its product. However, the taxpayer's product was nearly identical to another product upon which the Service had attempted to impose a tax on another taxpayer and which was held to be illegal. Thus, the injunction in *Miller* stayed the levy of a tax that had been previously adjudicated illegal.

125. ICC v. Louisville & Nash. R.R., 227 U.S. 88, 91 (1913).

126. L. Jaffe, Judicial Control of Administrative Action 595 (1965).

127. C. Wright, Law of Federal Courts 278 (2d ed. 1970).

128. Ashwander v. T.V.A., 297 U.S. 288, 347 (1936) (Brandeis, J., dissenting); Siler v. Louisville & Nash. R.R., 213 U.S. 175, 193 (1909).

riods.[129] Finally, it would satisfy the interests of both the taxpayer and the Service without violating a statutory scheme envisioned by Congress to be vital in extraordinary circumstances. Even if the Supreme Court decides to completely affirm the no-deficiency positions of the Second and Seventh Circuits expressed in *Laing v. United States*[130] and *Williamson v. United States*,[131] the future may be brighter for the taxpayer. The American Bar Association's Committee On Collections and Limitations reports that, in such a case, the Committee would draft a legislative recommendation adopting the Sixth Circuit's requisite deficiency position noted in *Rambo*.[132] However, even if the legislature would follow such a lead, the relief will be a long time in coming.

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129. Note, *Termination of Taxable Year: Procedure In Jeopardy*, 26 TAX L. REV. 829, 841 (1971).
130. 496 F.2d 853 (2d Cir. 1974).
131. 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1971).
132. Report, 28 TAX LAWYER 351 (1975).

Case Notes

CIVIL PROCEDURE—EQUITABLE ESTOPPEL APPLIES TO BAR OPERATION OF STATUTE OF LIMITATIONS WHERE A TIMELY ATTEMPT TO EFFECT SERVICE OF ORIGINAL NOTICE WAS THWARTED BY ADDRESS MISREPRESENTATIONS.—*DeWall v. Prentice* (Iowa 1974) (en banc).

Plaintiff was injured when the tractor he was driving was struck from the rear by a truck owned by defendant Prentice and operated by another defendant. Plaintiff brought an action to recover damages sustained as a result of the accident. The action was filed July 9, 1971, and original notices were delivered to the sheriff for service on both defendants five days before the running of the statute of limitations. After unsuccessfully attempting to serve the defendants in Iowa, the sheriff notified plaintiff's counsel by mail that the owner of the truck was living in Minnesota and the operator of the truck was residing in the state of Washington. By this time the two year limitation period had elapsed[1] but plaintiff proceeded to obtain service upon both defendants by way of the Iowa nonresident motorist statute.[2] Defendants then moved to dismiss the action arguing that no legal action was effectively commenced by plaintiff within the two year limitation period. Plaintiff resisted the motion arguing that defendants had misrepresented their addresses as being within the state of Iowa and plaintiff had detrimentally relied on these misrepresentations. Considering the circumstances, plaintiff urged, it was necessary to invoke the doctrine of equitable estoppel to bar operation of the statute of limitations. The trial court overruled defendants' motion and the case proceeded to trial resulting in judgment on jury verdict for the plaintiff. On appeal, the Supreme Court of Iowa, *held*, affirmed, reversed on other grounds,[3] the doctrine of equitable estoppel may deny the defense of the statute of limitations where plaintiff relies on defendant's representations of Iowa residence and makes

1. IOWA CODE § 614.1(2) (1975).
2. IOWA CODE § 321.498-505 (1975).
3. The court considered two other issues: (1) whether instructions given at trial were such as to permit a jury award of double damages to plaintiff, and (2) whether the jury was instructed regarding loss of plaintiff's income and earning capacity in the absence of adequate evidential support.

The court indicated that on the first issue the trial court committed reversible error, stating that the instructions, as given, without a related instruction precluding an allowance for both lost earnings *and* loss of support as a parent or spouse, to the extent such lost earnings would be the source of any loss of support, enabled the jury to award plaintiff duplicate damages.

The trial court's treatment of the second issue was affirmed by the Iowa supreme court. Concluding that the jury was not called upon to assess plaintiff's damages for loss of time and earnings upon mere speculation, conjecture and surmise, the Iowa court found that there was sufficient evidence presented at trial to allow jury calculation of loss of income and earning capacity.