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Repository Citation
Harry Graham Balter, Relief from Abuse of Administrative Discretion, 46 Marq. L. Rev. 176 (1962).
Available at: http://scholarship.law.marquette.edu/mulr/vol46/iss2/7

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RELIEF FROM ABUSE OF ADMINISTRATIVE DISCRETION*

Harry Graham Balter**

"Even tax administration does not as a matter of principle preclude considerations of fairness."1

* * * *

"A high-minded government renounced an advantage that was thought to be ignoble and set up a new standard of equity and conscience."2

I

INTRODUCTORY

A. Clarifying the Terms.

The starting-point for the discussion of a topic as challenging, arresting, and perhaps controversial as the one assigned, of course must be the clarification of terms, at least to the extent of what is meant by "discretion," by "abuse," and by "relief."

In the first place, we must assume that the act or decision of the administrative agency, here the Internal Revenue Service, acting through the Commissioner and his agents or representatives, is based on the exercise of discretion lawfully given him, and is not based upon a usurpation of extra-legal powers.3

* Originally presented as a speech at the Marquette University Thirteenth Annual Institute on Taxation, on October 12, 1962. While the title could apply to any administrative agency, it has specific reference to the Internal Revenue Service of the Treasury Department.

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1 Per Mr. Justice Frankfurter in Angelus Milling Co. v. Com., 325 U.S. 293, 297 (1945).

2 Per Mr. Justice Cardozo in Geo. Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

3 In the context of the field of administrative law, "discretion" has been variously described: (a) "When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof. A statute confers discretion when it refers an official for the use of his power to beliefs, expecta-
Secondly, what is an "abuse" of discretion lawfully exercised? In a strict sense, the term "abuse" connotes the exercise of discretion based upon arbitrary or capricious standards, or in an extreme situation, upon a "dislike" for a particular taxpayer. As respects many laymen, however, abuse may simply be the result of the taxpayer's lack of adequate knowledge of, or information about the justifiable legal basis for the administrative decision, or a failure on his part to understand his rights and obligations under the applicable statutes and administrative regulations, all of which are undeniably legal and correct. In this same vein we must distinguish between what is in actuality an "abuse" and the more common situation of a taxpayer's dissatisfaction with an adverse result which has been fairly reached by the administrative body.

Thirdly, what is meant by "relief?" This term will be used in its broadest sense: it is affording the taxpayer an adequate opportunity for review and for continued negotiation from one echelon to another within the administrative body itself; it includes the right to resort to judicial review; it is the enactment of legislation to eliminate an area of irritation and dissatisfaction between taxpayers and the Internal Revenue Service.4

And lastly, there is the real danger that an incisive discussion of the subject of relief from administrative abuse will be lost in the milieu of general dissatisfaction with a seemingly amorphous tax "system" which exacts an increasing "exorbitant" dollar toll from its "victims," and which contains within itself the seeds of manifest inequities presumably directed only at the critics of the system, while at the same time providing for "escape hatches" and "loop-holes" always for the benefit of the "other fellow."

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4 Many "relief" provisions incorporated in the 1954 Internal Revenue Code are really elections or options given to a taxpayer, which presumably are beneficial to him, if properly exercised and activated. In no sense do these provisions constitute "relief" from an abuse of administrative discretion, unless it be in the event of the Commissioner refusing to give his "consent" when required by the statute as a prerequisite to the validity of the option or election afforded the taxpayer. This latter problem is discussed infra. (See Schwanbeck, Elections and Options Available to Taxpayers in the 1954 Code, 32 Taxes 748 (1954)). There are other provisions of the Internal Revenue Code which, while undeniably in the category of "relief" measures, have no causal relationship to the problem of abuse of administrative discretion, e.g., I.R.C., §172 (net operating loss adjustments); I.R.C., §1301 (spread-back of compensation from an employment).
B. Distinguishing "Abuse of Administrative Discretion" from Other Adverse Internal Revenue Service-Taxpayer Relations.

Continuing our precautionary clarification of terms and delimiting of areas of concern, it should be clear that an "abuse" of administrative discretion, in its strict sense, must not be confused with a situation where the administrative act or decision stems from any of the following criteria, to name only a few:

1. Where the "abuse" is really not at the administrative level at all, but is an "inequity" or unfavorable result to the particular taxpayer, based on the Congressional intent, that is, on the provisions of the Internal Revenue Code itself.

2. Where the administrative decision is based on a clearly lawful exercise of discretion, from a legal point of view, but which is difficult for the taxpayer-layman to square with his sense of fairness, as for example, where the Commissioner's regulations provide that a new taxing statute shall be retroactive rather than only prospective in operative effect.

3. Where the administrative act or decision is within the purview of internal regulations, rulings, and directives, clearly within the confines of the delegated authority specifically provided for in the statute itself.

4. Where at the first level of contact with the Internal Revenue Service, the agent, or at a higher level of review, the "Group Supervisor" or the "Conferee" takes a "hard" stand on an issue, since either a "hard" or a "soft" stand clearly would be correct within the exercise of sound discretion, or within the purview of a permissible agency policy.

5. And where an agent or his reviewing superior refuses to "settle" a controversy on an amicable basis which the taxpayer feels is eminently "fair" even from the Commissioner's point of view, not because of any personal caprice or adamancy on the part of the agency's representatives, but because their authority to settle is limited by lawful administrative directives, to "fact" situations only, which in the controversy in question is not the basis of the proffered "settlement" offer.

Within the strict definition of the term, each of these practices would

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5 I.R.C., §7805(b); on the basis of the rationale of the Supreme Court in Helvering v. Reynolds, 313 U.S. 428 (1941), it is assumed that the Commissioner has this power if exercised on a reasonable basis. MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 3.25; Williams, Retroactivity in the Federal Tax Field, 1960 So. Calif. Tax Inst. 79. Another current example is the agitation, principally in California, to ameliorate or invalidate by a specific act of Congress the position of the Internal Revenue Service, seemingly correct and proper in view of the present state of the law, to the effect that Congressionally-authorized compensatory "awards" made to Japanese citizens who were "interned" during World War II are fully taxable to them as ordinary income.

6 For example, it would have been much easier for a taxpayer to achieve a "satisfactory" result in the area of deductible "travel and entertainment" expenses several years ago than it is today.

not constitute an "abuse"; however, in a broader sense, these can result in a lack of "fair play" as they affect a particular taxpayer or group of taxpayers, and therefore, abuses can and do result in these areas.

II

AREAS WHERE "ABUSE" OF ADMINISTRATIVE DISCRETION IS MOST LIKELY TO APPEAR

Having narrowed our problem by the process of defining terms and excluding what does not properly relate to an "abuse" of a lawfully exercisable discretion, we have not eliminated our problem entirely.

There no doubt are abuses in the exercise of the administrative discretion. It could hardly be otherwise where a gargantuan agency, consisting of more than 50,000 representatives of varying degrees of quality and of varying degrees of personal proclivities, are able to exercise "discretion" at various levels of contact with the taxpayer.

The principal areas where these abuses of discretion could occur, it is suggested, are the following:

A. **Determinations of Questions of "Fact."**

Agents of the Internal Revenue Service must make many decisions of fact in order to determine fairly the proper liability of a particular taxpayer. Most "fact" questions involve not only an analysis and evaluation of documentation, but an appraisal of the truthfulness of statements made by the taxpayer and others. The "human element," i.e., the agent's reaction to the "facts," therefore is clearly an ingredient in the final conclusion, and in extreme situations, may result in an "abuse" rather than the reasonable exercise of "good" judgment.

In this category could be listed, as a sampling, the following:

1. Whether a claimed expenditure was in fact made.
2. Whether an expenditure is "personal" or "business."
3. Valuation problems.
4. Useful life and salvage value in arriving at proper depreciation deductions.
5. Whether the taxpayer was a "dealer" or "investor" vis-à-vis...
vis capital gains; that is, did he hold the property for sale to customers in the "ordinary course of business," or did he hold the property as an "investment."11

B. Situations Where the "Intent" of the Taxpayer is Crucial in Determining the Tax Impact.

Generically close related to "fact" situations, and yet of a different quality, are the areas where under the applicable tax laws and regulations, a determination must be made as to the "intent" of the taxpayer, in order to arrive at the proper tax impact. This kind of determination often is subjective in nature, and there is therefore intrinsically, more room for the exercise of "poor" judgment, to a degree which could constitute an "abuse" of administrative discretion on the part of the Commissioner's agents.

Here are some examples in this area:

1. Whether a corporation retained its surplus and earnings to avoid paying a dividend to its stockholders, or contrariwise, for "reasonable" business purposes.

2. Whether there was a valid "business purpose" or contrariwise, was the "motivation" or "intent" primarily for tax avoidance purposes in:
   a) corporate liquidations, re-incorporations, reorganizations, and re-capitalization situations.
   b) acquisition of "loss" corporations.
   c) organization of "multiple" corporations.12

11 While this problem is classified in the "fact" area, more correctly the problems revolve around mixed questions of "fact" and "law". There is a plethora of litigation in this area. For collection of recent cases, see 3B MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 22.138.

12 Representative references in these areas for further study are:
   b) "Loss" CORPORATIONS: J. T. Slocomb Company, 38 T.C. No. 75 (1962); Huyler's, 38 T.C. No. 77 (1962) (acquiring loss corporations).
3. Whether a corporate distribution of its earnings and profits was as respects the particular stockholder “essentially equivalent to a dividend.”

4. Whether the taxpayer paying over money to a closely-held corporation intended to acquire an “equity” interest (stock) or a “creditor” interest (loan).

5. Whether the taxpayer under-reported his income with “intent” to defraud the revenue.

C. Areas Where Impact on Taxpayer, Beneficial or Otherwise, Depends on a Determination of or Consent by Commissioner as Delegated by Statute.

There are many provisions in the Internal Revenue Code whose operative effect by specific delegation of Congress, i.e., the legislative branch of the Government, to the “Secretary or his delegate,” i.e., the executive branch of the Government, depends in whole or in part either on: (a) a determination to be made by the Commissioner of Internal Revenue (the Secretary's delegate) based on his “judgment” or “discretion,” or (b) upon the “consent” of the Commissioner. To cite several typical examples:

1. Determination by the Commissioner:
   a) Addition to reserve for bad debts.
   b) Allocation of income and expenses between two or more controlled entities.
   c) Whether a jeopardy assessment should be made.
   d) Whether a jeopardy assessment previously made should be abated.

13 Representative references in this area are:

14 Representative references for further study in this area are the following:

15 Neither the civil 50% ad valorem penalty (I.R.C., §6653(b)) nor criminal prosecution for evasion of the revenue laws (I.R.C., §7201) can be sustained unless the underpayment was with “intent” to defraud the revenue. Obviously, therefore, the state of mind of the taxpayer is the crucial “fact” which must be determined by the investigating agents. For full treatment of this subject, see BALTER, TAX FRAUD AND EVASION (Third Edition, 1962).

16 See Calavo, Inc. v. Commissioner, 304 F (2d) 650 (9th Cir. 1962), involving administrative discretion with respect to a proper reserve for bad debts.

17 I.R.C., §482.

18 I.R.C., §6861; 9 MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 49.44.

19 I.R.C., §6862.
e) Whether the taxpayer's books and records should be ignored in computing taxable income for years under audit as not "clearly reflecting income." 20

f) Whether to recommend ad valorem penalties for negligence, delinquency in filing, or fraud; and as a corollary, whether to recommend criminal prosecution for wilful violation of the revenue laws. 21

2. Consent of Commissioner:

a) Change of method of accounting. 22
b) Change of period of accounting. 23
c) Change to LIFO inventory method. 24
d) Change of bad debt deduction method. 25
e) Change in depreciation methods. 26

In all of these areas and many more of similar nature, where the impact is tremendously important to the taxpayer, the Commissioner's affirmative action would be based on the exercise of his judgment, which of course, in the first instance is that of the "man on the spot."

D. In the Exercise of the Delegated Authority to Implement the Bare Outlines of the Enabling Statute With Activating Regulations, and Other Internal Directives.

Congress has recognized that its revenue laws can be administered by the Secretary of the Treasury and his agents only if the provisions in the Internal Revenue Code, often in sparse or general terms, are made specific and are implemented by his own rules and Regulations. 27

20 I.R.C., § 446, 6001; Regs. 1.6001-1, et seq.; 2 MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 12.12; BALTER, TAX FRAUD AND EVASION (Third Edition, 1962), Sec. 10.4-10.
21 Since "intent" to evade tax (civil) or "wilfulness" (criminal) is essentially the same ingredient, the investigating agents, and especially the Special Agent where a "joint" investigation takes place, make the initial determination whether to recommend no penalties, the civil 50% fraud penalty without prosecution, or the civil 50% fraud penalty together with prosecution for violation of the revenue laws. Obviously, this area alone constitutes a fertile ground for potential abuse of administrative discretion, even though a series of administrative reviews are provided for and even though statistics demonstrate that in approximately one-half of the cases where the investigating agents recommend criminal action, this recommendation is set aside after review either in the Internal Revenue Service or the Department of Justice. See BALTER, TAX FRAUD AND EVASION (Third Edition, 1962), Sec. 3.1, et seq.
22 I.R.C., § 446(e): "Except as otherwise expressly provided in this chapter, a taxpayer who changes the method of accounting on the basis of which he regularly computes his income in keeping his books shall, before computing his taxable income under the new method, secure the consent of the Secretary or his delegate." Also see: Wright Contracting Co., 36 T.C. No. 65 (1961); Comm. v. The O. Liquidating Corp., 292 F (2d) 225 (3rd Cir. 1961); Jones v. Comm., (5th Cir. 1962), 62-2 USTC 9629; Lord v. U.S., 296 F (2d) 333 (9th Cir. 1961); American Can Co., 37 T.C. No. 26 (1961); Burns, Accounting Methods, 1962 So. CALIF. TAX INST. 717.
23 I.R.C., § 442.
24 I.R.C., § 472.
25 I.R.C., § 166; Regs. 1.166-1(b).
26 I.R.C., § 167; Regs. 1.167(e)-1.
27 I.R.C., § 7801(a): "Except as otherwise expressly provided by law, the admin
The legislative branch of the Government has in effect said to the executive branch of the Government: "Here is the problem. Deal with it."

In compliance with this edict, and certainly out of practical necessity, the administrator of the revenue laws has unloosed a recurrent cascade of Regulations, Rulings, Revenue Procedures, and other miscellaneous directives, most of which are published and available to the public.

Administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury. I.R.C., §7805:

"(a) Authorization.—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations or rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect...."

Representative of provisions of the Internal Revenue Code where a specific delegation of the rule-making power to the "Secretary or his delegate" is made, are the following sections: I.R.C., §4(b) (optional tax); I.R.C., §72(c) (amortization); I.R.C., §144(a) (election of standard deduction); I.R.C., §167(e) (depreciation); I.R.C., §168(b) (amortization of emergency facilities); I.R.C., §170(a)(2) (charitable gifts); I.R.C., §171(c) (amortizable bond premiums); I.R.C., §173 (circulation expenditures); I.R.C., §174 (research and experimental expenditures); I.R.C., §247 (dividends paid—public utilities); I.R.C., §248 (organizational expenditures); I.R.C., §263(c) (capital expenditures; intangible drilling and development costs); I.R.C., §266 (carrying charges); I.R.C., §302 (distribution in redemption of stock); I.R.C., §307 (basis of stock in distribution); I.R.C., §333 (elections in certain liquidations); I.R.C., §362 (basis to corporation on reorganization); I.R.C., §381 (carry-overs in corporate acquisitions); I.R.C., §402-404 (employees' trusts, pensions, etc.); I.R.C., §441 (computation of taxable year); I.R.C., §443 (returns for period of less than 12 months); I.R.C., §446 (methods of accounting); I.R.C., §452 (prepaid income); I.R.C., §482 (allocation of income and deductions among taxpayers); I.R.C., §545 (undistributed personal holding company income); I.R.C., §556 (undistributed foreign personal holding company income); I.R.C., §565 (consent dividends); I.R.C., §642 (estates—credits and deductions); I.R.C., §663(b) (special rules applicable to executors of separate trusts, etc.); I.R.C., §743 (optional adjustments to basis of partnership property); I.R.C., §755 (rules for allocation of basis in partnership situations); I.R.C., §863 (income from within and without the United States); I.R.C., §1033 (involuntary conversion); I.R.C., §6011 (who shall file returns, etc.); I.R.C., §6014 (income tax returns where tax not computed by taxpayer); I.R.C., §6046 (returns as to formation or reorganization of foreign corporations); I.R.C., §6071 (time for filing returns not otherwise stated in Code); I.R.C., §6081 (extensions to file returns); I.R.C., §6091 (place to file returns); I.R.C., §6101 (period covered by returns); I.R.C., §6103 (publicity of returns and list of taxpayers); I.R.C., §6161-6165 (extensions for payment of tax); I.R.C., §6302 (collection of taxes); I.R.C., §6325 (release of liens or partial discharge of property); I.R.C., §6402 (credits and refunds as limited by Sec. 6405); I.R.C., §6411 (tentative carry-back adjustments). In the following sections of the Internal Revenue Code, the rule-making delegation includes the power to find facts or make other determinations: I.R.C., §482 (allocation of income and deductions among taxpayers); I.R.C., §§455-456 (undistributed personal holding company income); I.R.C., §§555-556 (undistributed foreign personal holding company income); I.R.C., §§691(b) (recipients of income in respect of decedents); I.R.C., §§863 (allocation of income within and without the United States).

28 DAVIS, ADMINISTRATIVE LAW 46 (Sec. 17) (1951).
No fair-minded student of the administrative process can quarrel with the proposition that an administrative agency must have its own rules and regulations if it is effectively to administer a given law. It is also generally agreed that the agency must put flesh and blood into what is usually a skeletonized statute. This must mean going into greater detail and specificity.

There is also basic agreement that to some extent, consistent with the declared legislative intent, the administrative agency must "interpret" the governing statute.

The point of departure is generally centered on the question: to what extent shall the administrative agency be permitted to "interpret" the statutes, particularly where, as the Supreme Court has said in one case: "There is presented a vexing situation—statutory language which is inconclusive and legislative history which is irrelevant...

Some students of the subject insist that the interpretative process must start and end with the Legislature; or conversely, that neither the Executive (the administrative agency) nor the Judiciary (the courts) have the right to "legislate by interpretation."

Others insist with equal sincerity that neither the Legislature nor the Courts are equipped to fill the day-by-day needs for interpreting what the tax laws mean; and that out of necessity that task must be left in the first instance to the administrative agency with the remedy available both in the Courts and in the Legislature if the interpretive process by the Administrator gets "out of hand." In the view of these knowledgeable students of the taxing process, although admittedly all avenues are open to imperfections and inequities, "taxation by interpretation" still is preferable to "taxation by legislation" or "taxation by litigation."

Be that as it may, there can be little doubt that the Commissioner, with the consent of the Secretary of the Treasury, through the process of promulgating Regulations, interprets the laws as passed by Congress "to the hilt," from the point of view of: (1) expanding the legislative intent to the arguable outer-limits of taxability, (2) with an eye for plugging-up "loop-holes" which would seem to be available to taxpayers on the basis of the literal language of the statute, and (3) with an eye toward effective administration.

To the extent that the "interpretation" of tax laws is left to the administrator, who realistically is prosecutor, judge, and collector all in

one, in most day-by-day situations, an over-zealous attitude well may result in an "abuse" of the administrative "discretion" in a specific situation.\textsuperscript{32}

\textsuperscript{32}Pears, Jr., General Principles of Taxation: An Initial Survey (Second Installment), 6 Tax L. Rev. 481-486: "B. Administrative Attitudes

1. Regulatory Law.

There is a strong tendency for tax administrators to mold the tax laws to the shape they desire, usually through the medium of formal or informal regulation, under authority expressly granted or assumed, or even in the face of inconsistent, statutory expressions. Regulations are meant to have the binding weight of statute on taxpayers, but administrators resist being bound similarly by their own regulations.

In studying the practices, as distinct from the powers, of tax administrators, the first phenomenon to be examined is the tax regulation. The regulation plays a very large part in shaping the law because it is less concerned with balancing the pressures of different interest groups each of which seeks to minimize its share of the tax burden.

Many regulations stem from express delegation of authority, under such phrases as 'as the Bureau of Internal Revenue may prescribe,' or 'subject to requirements to be prescribed by the Commissioner;' or 'with the consent and approval of the Commissioner.' Others arise from the necessities of interpretation where the law is vague or phrased in broad terms, or where the fact situation involved is very complex. Many of these involve matters of trivial detail not appropriate to statute; hence even in those states where the administrator is not considered as having rule-making powers, such matters as the form for tax returns and the instructions printed on the back are almost necessarily administratively determined. Still other regulations (these are the least justifiable) arise from cases where the administrator is dissatisfied with the provisions of the statute or with the results derived from it, and is impatient of delay in passage of desired amendments.

The tendency to volunteer interpretive regulations has been termed unfortunate, because the administrator thus diverts attention from the real (legislative) law, and because this practice contravenes the common law philosophy that such statutory gaps are to be judicially filled, each one in the light of an actual, bilaterally contested case in point. The administrative pressure involved in these regulations goes beyond a desire for a detailed code of the civil law type, covering every point. It stems at least partly from a philosophy of tax law, as is seen when tax officials exert themselves by lobbying, public campaigning and extra-legal pressure on assessors and taxpayers to increase the total revenue of the state beyond what the existing law calls for. This is manifestly a legislative rather than an administrative problem.

Another indication that administrative attitudes are not entirely the result of a mere desire to have all questions covered by some regulation is seen in the reluctance of the Commissioner of Internal Revenue to be bound by rulings issued from the Bureau except after the most careful scrutiny, so that most of the numerous types of rulings issued are considered only advisory so far as the Commissioner is concerned, however rigorously they may be enforced against the taxpayer.

Numerous concrete criticisms have been directed at tax administration in addition to these theoretical objections to regulatory law. Discounting these for bias that the probable disgruntled-taxpayer origin of many of them, the three most general, practical comments are that the tax administration is unnecessarily slow, and that the regulations purporting to be for taxpayers' guidance are unduly vague in many respects, while in others they are so detailed and picayune as to suggest an origin in ingrown bureaucracy. The fact that it is more convenient to specify the criticisms than to list the advantages of regulations, is indicative of their many good features. They provide many a point of clarity and convenience not to be found in the statute.

2. Regulations as Creatures of Policy.

Administrative tax regulations are the instrument used to reflect and give effect to executive tax policy. They indicate that executive tax policy is primarily concerned with full and uncompromising collection of all taxes due under the law, and with plugging loopholes left in the law by the legislature.
If a Regulation exceeds the taxable impact intended by the Legislature, it is hardly a solace to the taxpayer thereby aggrieved to be told that he should seek judicial redress, which as we shall see, in the great majority of situations is a weak reed on which to lean.

They also show how certain non-tax attitudes of the executive tend to intrude into tax administration.

A major manifestation of administrative attitudes in tax regulations is seen in their reflection of executive policy. Examples follow:

(A) Loophole-plugging. This is a perpetual policy concern of tax administration and lies behind many of the more flagrant instances of extra-statutory administrative regulations, such as the Clifford Regulations. Loophole-plugging also influences the quiet, everyday conduct of administration. Only occasionally does the mole's trail come to public view, as when state and federal administrators agreed recently to facilitate their work by exchanging information on tax offenders.

(B) The Pound of Flesh. Ungenerosity goes traditionally with being a tax collector, and no personal criticism is due those who fall under the spell of the mantle on taking office. The federal tax regulations are liberally scattered with such examples as the insistence that deductions be taken in the proper year or never, even though it may be difficult in a given case to guess what year the Commissioner will deem the proper one. The Commissioner has not been accused of squandering the public substance by undue leniency in applying the statute.

In Wagman, The Entity Concept in Federal Income Tax Returns for Affiliated Corporations: Administrative Erosion of a Statutory Doctrine, 17 Tax L. Rev. 576, 592 (1962), the author criticizes the Commissioner for having, without justification, "legislated" in the area of the use of consolidated returns by affiliated corporate groups through the means of Regulations and Rulings:

"If the Treasury feels that the entity concept is not workable, or only partially workable, it should recommend to Congress that appropriate legislation be enacted and regulatory power granted. Absent such legislation, the entity concept should be recognized for purposes of affiliated group taxation, and a comprehensive revision of the Regulations should eliminate present ambiguities with respect to actual realization, measurement, timing, and characterization of investment profits in such groups. Rulings should then express, in terms of these indicia, how the concept is being applied. If an exception is deemed to be required, it should be separately provided for in the Regulations. If it is not within the Treasury's regulatory powers, legislation should be requested."

Very few Regulations are set aside by the courts as being outside the bounds of the statutory mandate, but occasionally it does happen:

1. The Clifford regulations [Regs. 111, §29.22(a)-21; Regs. 118, §39.22(a)-21], presumably within the purview of the Clifford Rule in relation to short-term trusts, enunciated by the Supreme Court in Helvering v. Clifford, 309 U.S. 331 (1940), were considered sufficiently "out of bounds" to generate a mild revolution of criticism eventually resulting in a statutory contraction (I.R.C., §671-675). Pavenstedt, The Distortion of the Clifford Rule, op. cit. fn. 30, supra; 4 CCH Std. Fed. Tax Rep., Par. 3703 (1962).

2. The Court of Appeals for the Fourth Circuit in Mitchell v. Commissioner, — F. 2d —, 62-1 USTC 9320, in reversing the Tax Court, held invalid Regulations of the Commissioner under I.R.C., §1239, to the effect that beneficiaries of a trust would be considered owners of stock for the purpose of application of that statute. The court therefore held that the sale by a taxpayer of depreciable property to a corporation in which the taxpayer, his wife and minor children owned approximately 79% of the stock and where a trust for the taxpayer's minor children held the remaining 21% of the stock, was outside the scope of I.R.C., §1239, notwithstanding the provisions of the Commissioner's Regulations which provided otherwise in this type of a situation.

3. The Tax Court in Edmund P. Coady, 33 T.C. 771 (1960), aff'd, per curiam 289 F. 2d 490 (6th Cir. 1961), held invalid that portion of Reg. 1.355-1 which had provided that the division of a single business into separate
But in the vast majority of situations, the Regulations do not exceed permissible statutory bounds, and for all practical purposes have the same force as the Congressional law itself.\(^{34}\)

While Rulings, Revenue Procedures, and other "internal" guides and directives carry a lesser degree of legal persuasiveness than do Regulations, this is true only in the event of litigation. In the day-by-day contacts between the taxpayer and the agents of the Internal Revenue Service, these "internal" edicts mold the "discretion" exercised by the agents in the reaching of their conclusions as to the extent of the tax impact to be imposed in a particular situation.\(^{35}\)

segments did not meet the "5-year active business" standard in order to qualify as a reorganization under I.R.C., §355.

\(^{34}\) I.R.C., §7805 (a); Lykes v. United States, 343 U.S. 118 (1952); Commissioner v. So. Texas Lumber Co., 333 U.S. 496 (1948); 1 MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 3.20, 3.21; MERTENS, CODE COMMENTARY, Sec. 7805.1:

"The Supreme Court has said that interpretative regulations of the Treasury Department are entitled to great weight, and, as contemporary constructions, are not to be overturned except for cogent reasons. Under numerous provisions of the Code, the 'Secretary or his delegate' is directed to promulgate regulations filling in gaps deliberately left in the statutory provision, and such regulations receive even greater weight and ordinarily will not be set aside. The Supreme Court has also declared often that regulations and administrative interpretations long continued without substantial change, applying to statutory provisions which are re-enacted in the same or substantially unamended form, are deemed to have received Congressional approval and have the effect of law..." See Safe Harbor Water Power Corp. v. United States (U.S. Ct. Cl. 1962), 62-2 USTC 9532, for an interesting illustration of the Commissioner's broad power to change a long-standing basis for interpreting what constitutes "gross income" to the taxpayer under the Internal Revenue Code. In this case, by Mimeos 6779 and 51 in the year 1952, the Commissioner revoked a policy extending back to 1923 whereby for the first time he would include in the taxpayer's income not only the initial income tax paid by customers on behalf of the taxpayer, but the income tax on the income tax.

The question raised before the court was: "Was the change as to computation of income taxes reimbursed to the taxpayer, affected by Mimeos 6779 and 51 in 1952 by the Internal Revenue Service, a reasonable interpretation of the definition of gross income under the law?"

The court answered this question in the affirmative and held that the change in computation was not discriminatory: "It requires plaintiff to pay income taxes to only the same extent required of any other corporation in order to retain the same net income after taxes."

"Plaintiff argues that for almost 30 years under the former Bureau directive, the Government did not require pyramiding or the use of an algebraic formula, but only required taxpayers to include the initial tax as taxable income. Plaintiff concedes in its Reply Brief that 'while these actions may not be conclusive on this court, they should be persuasive.' However, plaintiff also argues that the long-continued acquiescence by Congress in the announced directive of the Treasury Department from 1923 to 1952 affords such rule the force and effect of law."

The court rejected this argument, stating: "Such a rule would require Congress to change the basic statute each time there was a change in administrative construction, or to correct the interpretation."

The court concluded: "We conclude that the change in interpretation of the taxing statute by Mimeos 6779 and 51 in 1952 by the Internal Revenue Service was not unreasonable or beyond its discretion under the law." There were 2 dissenting opinions.

\(^{35}\) MERTENS, CODE COMMENTARY, Sec. 7805.1:

"In order to better enable taxpayers to understand the consequences of the law which they are required to observe, and particularly with respect to pro-
Finally, what must often appear to the taxpayer to be the last drop in his cup of frustration is the exercise by the Commissioner of a traditionally, but arguably unfounded, "right" to refuse to follow, as a basis for determination of the tax impact in his agent's dealings with the taxpayer, the holdings of courts of law in relevant litigated situations, with which holdings or reasoning the Commissioner chooses not to agree.

Periodically, the Commissioner publishes a list of court decisions with which he does not "acquiesce." Short of the Supreme Court itself, no court of law from the Courts of Appeals through the Court of Claims, the United States District Courts and the Tax Court, can escape the Commissioner's activated frown of disapproval.

Until the Commissioner decides to abandon his "non-acquiescence" either because of a change of policy or because of the sheer weight of adverse court decisions, the agents of the Internal Revenue Service will continue to ignore those edicts of courts of law which are favorable to the taxpayer. To this extent the Commissioner, for all practical provisions as to which the impact on a contemplated transaction is in doubt, the Internal Revenue Service has adopted the practice of issuing advisory rulings and determination letters in response to requests submitted in writing. These administrative pronouncements are of two kinds. One is known as a 'ruling' and is issued by the national office in Washington, and the other, a 'determination letter', is issued by the District Directors. Determination letters are issued only with respect to completed transactions, and only where the determination involves the application of clearly established rules. Special provision is made for the issuance of determination letters on the exempt status of an organization and the qualification for exemption of an employees' trust or plan. Rulings are available in areas which fall outside the scope of determination letters. Neither will be issued generally, in connection with a transaction as to which a return has already been filed and as to which the period of limitations has not expired, or where the question is one primarily of fact. Rulings and determination letters generally will be adhered to on audit of a return if there has been no material change of fact or law from that posed by the application for the ruling or letter. A request for a ruling or determination letter may be withdrawn, but the papers are not returned to the taxpayer and information concerning the request may be forwarded to and considered by the District director in connection with the taxpayer's returns.

Recent examples of abandonment of "non-acquiescence" to court decisions are the following:

1. Rev. Rul. 62-102: where the Internal Revenue Service concedes that it will no longer contend that Sec. 101(b) of the Internal Revenue Code applies to limit to $5,000 the exclusion from gross income of an amount paid to the widow of a deceased employee, where the payment otherwise qualifies as a gift excludable under Sec. 102(a) of the Code, "the Service has abandoned its former contention in view of adverse decisions in the cases of . . . The Government withdrew this argument in its defense of the case of . . . The Service will continue to argue that in extending Sec. 101(b) of the Code to non-contractual payments, Congress assumed that such payments did not qualify as gifts, thereby endorsing the Service's ruling in I.T. 4027, C.B. 1950-2, 9, that widows' payments generally are not gifts."

2. Rev. Rul. 62-127: "The Internal Revenue Service will follow the decision of the United States Court of Appeals for the Sixth Circuit in Herbert Humphreys v. Commissioner, 301 Fed. (2d) 33 (1962), reversing T.C. Memo. 1961-
poses, stands above the courts and exercises his own judicial function. In his defense, however, it can be argued that since the Commissioner administers the tax laws on a national basis, only the decisions of a national as opposed to a local or a regional tribunal, should bind him. But this bit of philosophy of tax administration is of little comfort to a particular taxpayer in Milwaukee who cannot rely on a favorable decision of the Court of Appeals for the Seventh Circuit, in whose jurisdiction he resides, and which is indeed a high level federal court, simply because the "non-acquiescence" label has been placed on that decision by the Commissioner. The taxpayer's only resort is to litigate. Obviously, under these circumstances, he may, from an economic standpoint, be "pressed" into an unrealistic settlement which at least in his eyes is the result of an "abuse" of administrative discretion.

III

RESTRAINTS "RELIEF" FROM ADMINISTRATIVE ABUSE

A. Statutory Provisions.

Keeping in mind the distinction between the hurt to the taxpayer

9, with respect to the issue whether taxpayers are entitled to an amortizable bond premium deduction under section 171 of the Internal Revenue Code of 1954 where the purchase of bonds did not have an investment purpose. The decision in the Humphreys case is in accord with an earlier decision of the Seventh Circuit in Maysteel Products, Inc. v. Commissioner, 287 Fed. (2d) 429 (1961), and cases in other Circuits. The issue involved will not be further litigated.

It should be noted, however, that the decision not to further litigate in the specific situation above described in no way affects the position of the Service that a transaction, in general, will not be recognized for tax purposes if it is a sham or otherwise lacks economic reality.

3. "U.S. Internal Revenue Service announced today that it will follow the decision of the United States Court of Appeals for the Sixth Circuit in Commissioner v. William N. Fray, Jr., 283 F. 2d 869 (1960), and the decision of the United States Court of Appeals for the Seventh Circuit in Laird Bell v. Harrison, 212 F. 2d 253 (1954).

These cases hold that a remainderman of a trust, the corpus of which consists of corporate stock, who purchases the interest of a life beneficiary of the trust, is entitled to recover his cost through amortization over the period of the beneficiary's life expectancy, by ratable annual deductions.

The Service had argued that the purchased life interest became merged with the remainder interest, with the result that the cost of the purchased life interest could be recouped only at the time of the sale or other disposition of the stock.

The Service noted that the transactions in these cases appeared to be bona fide and without a tax avoidance motive. The Service's announcement means that these cases will be followed in the disposition of other cases in which the facts are substantially the same."

Further tenable grounds for non-acquiescence other than doubt of the soundness of any particular decision, would be: (1) quite often there is a conflict between decisions of different courts on related problems, and until the conflict is resolved, either by the Supreme Court or by additional decisions whose soundness satisfies the Commissioner, he reasonably may elect not to be bound by a specific decision which may eventually prove to be unsound, and (2) the very purpose of non-acquiescence may be to influence legislative change so as to establish statutory justification for what the Internal Revenue Service has already been doing through its "interpretative" process. Hauser, Litigation Policy of the Chief Counsel in Civil Tax Cases, XIV Tax Executive 218 (1962).
from an "abuse" of administrative discretion rather than that from the
terms of the taxing statute itself, as reasonably interpreted by the ad-
ministrative agency, we are able to follow the same dichotomy in specific
statutory "relief" measures.

There are some true "relief" provisions in the Internal Revenue
Code itself which clearly were passed to avoid entirely or to ameliorate
the administrative abuse potential.

Some of these provisions which come to mind are:

1. Restraints on Successive Audits.

   I.R.C., §7605 (b), provides that:

   No taxpayer shall be subjected to unnecessary examination
   or investigations, and only one inspection of a taxpayer's books
   of account shall be made for each taxable year unless the tax-
   payer requests otherwise or unless the Secretary or his delegate,
   after investigation, notifies the taxpayer in writing that an addi-
   tional inspection is necessary.

   The rationale underlying this safeguard against undue harrassment
   has been aptly stated:

   ... These examinations may well be burdensome to the tax-
   payer but by no other means can the tax laws be enforced. As
   the years pass, however, the burden of examinations on the tax-
   payer increases, the memories fade, records may be lost or mis-
   laid, indeed to conserve space honest taxpayers may well destroy
   their records relating to years as to which the statute of limita-
   tions has run, and persons who have assisted taxpayers in pre-
   paring their returns may die, move away, or for one reason or
   another be no longer available. For instance, the taxpayer here
   asserts that the legal counsel who prepared his returns for the
   'closed' years has died and the accountant who assisted in their
   preparation, is now over 80 years of age, and is suffering from
   a defective memory.

   We may well assume that considerations such as these had
   weight with Congress when it legislated in Sec. 7605 (b) to curb
   excessive administration zeal by protecting taxpayers from un-
   necessary examination and investigation.88

As to years which are still "open" to audit, that is, where the normal
3-year statute of limitations for assessment of deficiencies in tax has
not yet run, it is not difficult for the Commissioner to comply with the
statute. If they so desire, it is no problem for the investigating agents
obtain a written notice informing the taxpayer that it has been found
necessary to make an additional examination.89 In concluding that a

89 Even if the objection by the taxpayer is timely and a Commissioner's sum-
mons has already been issued to the taxpayer, the notice still may be requis-
tioned, and a second summons may be issued which, if otherwise effective,

If no opposition to the summons is made on the ground of successive ex-
written notice to the taxpayer was not necessary, a Circuit Court held that the statement in the deficiency notice to the effect that it was based upon “information on file in this office” was not sufficient to indicate that the Government had already adequately or completely examined the

aminations without the written notice having been obtained, the routine administrative processing on a deficiency assessment will proceed without obstruction. U.S. v. O’Connor, 237 F. (2d) 466 (2nd Cir. 1956); Leslie A. Sutor, 17 T.C. 64 (1952).

In two recent decisions, the problem of the remedies available to the taxpayer who feels aggrieved by successive examinations which he alleges to be in violation of I.R.C., §7605(b) are highlighted:

a) In the case of Leonardo 62-2 USTC 9614, (D.C. Cal. 1962), an application was made to the United States District Court by the partners of the Avila Meat Co., under the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure, for an order directing the return of seized property and the suppression of evidence allegedly obtained by Government revenue agents in violation of I.R.C., §7605(b), as well as in violation of their constitutional rights under the Fourth and Fifth Amendments. The partnership had been audited for the years 1954 and 1955. Deficiencies had been determined for these years and were paid. Sometime later a revenue agent, while investigating a different company, noticed in its records, business transactions between that company and Avila. Upon the basis of this knowledge, the agent became interested in a re-examination of Avila for the years 1954 and 1955. This agent, together with a Special Agent, returned to Avila, and on the representation that they were interested in auditing the years 1956 and 1957, they were given the company's books which contained information for all the years from 1954 through 1957. When Avila's accountants discovered that the audit being conducted was really for 1954 and 1955, a prompt objection was made to this re-examination for the earlier years. In an interesting decision the District Court granted the relief asked for, not on the basis of relief under Rule 41(e) of the Federal Rules of Criminal Procedure for violation of constitutional rights, but rather on the basis of a violation of Sec. 7605(b) of the Internal Revenue Code. An order was entered suppressing the information gained by the revenue agents with respect to the years 1954 and 1955, whether it be in the form of testimony of the agents or in the form of their notes and memoranda. Additionally, the United States Attorney was restrained from presenting or using this evidence as a basis for prosecution.

b) In the case of Reineman v. United States, ----F. (2d)---- (7th Cir. 1962), 62-1 USTC 9386, the facts were that the books and records of the taxpayer, who was a horse breeder, had been inspected for the year 1954, and as a result of this audit a deficiency of approximately $2,000.00 had been assessed and paid. Later, in 1957 another revenue agent notified the taxpayer that he was assigned to audit his 1955 books, but did not state that he would re-audit the 1954 books. Nevertheless, the agent re-audited 1954 and determined an additional deficiency in the amount of approximately $76,000. The taxpayer first became aware of the re-audit for 1954 when he received a 10-day I.R.S. letter notifying him of the additional deficiency. The taxpayer paid the tax, filed a claim for refund and then sued in the United States District Court, alleging alternatively that the assessment was improper as a matter of law, and that it was improper procedurally since a second audit for 1954 had taken place without the notice being sent to him as provided for in I.R.C., §7605(b). The Commissioner resisted the second position on the ground that having failed to resist the second examination, the taxpayer could not now complain. The Court of Appeals affirmed a District Court ruling in favor of the taxpayer on this issue without reaching the merits of the tax itself, saying, among other things: "The question of the relief to be granted a taxpayer for violation of Sec. 7605(b) with a resulting deficiency assessment appears to be essentially one of first impression. No case has been cited, and our research has revealed none, where a deficiency assessment under this situation has been either upheld or invalidated. Under the facts of this case, taxpayers are left without any remedy to correct the illegal action taken by the Commissioner unless the deficiency assessment is set aside. We hold that the District Court did not err in its conclusion of law to this effect..."
taxpayer's books in a prior audit so as to bring Sec. 7605(b) into play.\(^4\) In other words, a cursory preliminary examination of the taxpayer's books is not equivalent to an examination within the meaning of I.R.C., Sec. 7605(b).\(^4\)

It has also been held that if in fact the first examination has never been terminated, Government agents may continue their examination without it being necessary to meet the statutory requirements for a written notice to the taxpayer for making a re-examination.\(^4\) However, if the taxpayer is satisfied that he can show that a successive examination for the same "open" year is unnecessary or unwarranted in spite of the Commissioner's written notice to that effect, he may demand a hearing in court where he may resist on that ground the agent's efforts to enforce the summons.\(^4\)

Particularly as regards the examination of "closed" years, i.e., after the normal 3-year period for assessment has run, the courts have required a showing by the Commissioner of the materiality and relevancy of the requested re-examination of the taxpayer's books. This additional burden placed upon the Commissioner derives not from the statute, but is based in principle upon the Fourth Amendment to the Constitution which protects against unreasonable searches and seizures. For closed years the taxpayer's books and records may not be inspected merely on the basis of a "fishing expedition." Since only proof of fraud will sustain an assessment for an otherwise "closed" year, the courts have required some showing on the fraud issue before enforcement of an administrative summons against the taxpayer will be ordered.\(^4\) While the courts have not agreed either on the quantum or the quality of the showing required,\(^4\) no court seems to have demanded actual proof of

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\(^4\) Tax Liability of Norda Essential Oil & Chemical Co., Inc., 253 F. (2d) 700 (2nd Cir. 1958).
\(^4\) National Plate & Window Glass Co., Inc. v. United States, 254 F. (2d) 92 (2nd Cir. 1958).
\(^4\) Boren v. Tucker, 239 F. (2d) 767 (9th Cir. 1956).
\(^4\) For example, in U.S. Aluminum Siding Corp. v. Eshleman (DC ND Ill. 1958), 170 F. Supp. 12, the court held that merely sending a letter to the taxpayer indicating the need for a second examination of an "open" year is not conclusive, but that if the Government wishes to enforce the summons, a court hearing is required and the summons will be enforced only if on the basis of evidence introduced, it is satisfied that there is a justification for re-examination.
\(^4\) Where no return was filed the effect, of course, would be the same as where a fraudulent return was filed; but the typical case involves the issue of fraud. On that basis, a successive examination would be approved. National Plate & Window Glass Co., Inc. v. United States, op. cit. fn. 41, \textit{supra}; \textit{In re Wood} (DC SD Ky. 1954), 133 F. Supp. 297; Thelma Blevins, 14 TMC 840 (1955). It should not be overlooked that where the agents are able to sustain the Commissioner's burden of proof, a 6-year statute of limitations would apply even in the absence of fraud where an understatement of gross income of 25% or more can be established. I.R.C., §6501(e) (1) (A).
\(^4\) Some courts, perhaps a majority, have required hardly more than a showing of "good faith" suspicion on the part of the agent that fraud may exist in the "closed" years. Other courts, perhaps a strong minority which may presage
fraud, since it is recognized that the taxpayer's books and records in themselves may be the only solid evidence to sustain the existence of fraud. When contested, this issue becomes one for a court to determine after a full hearing.

2. No Levy Pending Petition in Tax Court.

I.R.C., §6213(a) provides that:

Within 90 days . . . after the notice of deficiency . . . is mailed . . . the taxpayer may file a petition with the Tax Court for a re-determination of the deficiency. . . . Except as otherwise provided . . . no assessment of a deficiency in respect of any tax imposed . . . 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 . . . period . . . 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 Sec. 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.

This provision has been held to be applicable even where the failure to send the notice was due to the belief that the assessment was not that

an eventual majority position, require something more than the subjective expression of suspicion on the part of the agent. These courts require what has been called variously "probable cause," "reasonable cause," and "reasonable basis for suspicion." Matter of Carroll (DC SD N.Y. 1957), 149 F. Supp. 634. The rationale for this view is that the examination of a taxpayer's books and records is an administrative and not a judicial function, and that neither the taxpayer nor the court should substitute their judgment as to whether there is a good faith suspicion of fraud to open a "closed" year. O'Connor v. O'Connell, op. cit. fn. 38, supra; Tucker v. Hubner (DC SD Cal. 1955), 129 F. Supp. 110.

In McDermott v. John Baumgarth Co., 286 F. (2d) 864 (7th Cir. 1961), the District Court had ordered the administrative summons enforced against the taxpayer as to the years 1951 and 1952 on a showing "that there are reasonable grounds to suspect" that the taxpayer had filed "false and fraudulent" returns for those 2 years. In affirming on this issue, the Court of Appeals said:

"As to the summons pertaining to the production of the corporation's books and records for 1951-1952, we have set forth the nature and scope of the investigation made by McDermott. We hold that a sufficient showing has been made by the government to support the order of the district court, under 26 U.S.C.A. §7604(a), to enforce the summons issued by the Internal Revenue Service, under the authority of 26 U.S.C.A. §7602. This is so, whether we apply the rule announced by the Second Circuit in Foster v. United States, 265 F. 2d 183, (2nd Cir. 1959), and United States v. United Distillers Products Corp., 156 F. 2d 872, (2nd Cir. 1946) that a §7602 examination is for the purpose not only of ascertaining the correctness of any return but also for determining the liability of any person for any internal revenue tax and that the Commissioner is entitled to the examination, or the rule prevailing in the Fifth, Sixth and Ninth Circuits, that the Service must show reasonable grounds for suspicion of fraud, Falsone v. United States, . . .; Globe Construction Co. v. Humphrey, . . .; Peoples Deposit Bank & Trust Co., Paris, Ky., v. United States, . . .; Corbin Deposit Bank of Corbin, Ky., v. United States, . . .; Boren v. Tucker, . . ."

46 In re Andrews Tax Liability, 105 F. (2d) 583 (3rd Cir. 1939).
of a deficiency. An injunction has also been granted where the statutory notice was mailed to an improper address.

3. Limitations on Sales Under Jeopardy Assessments

I.R.C., §6863(b)(3) provides that: "... property seized for the collection of tax" under a jeopardy assessment "shall not be sold" if a timely petition is filed with the Tax Court.

If the Director of Internal Revenue has not complied with this provision, an injunction will be issued prohibiting him from making a sale of seized property in contravention of the statutory mandate.

4. Mitigation Statutes

I.R.C., §1311 to 1315, in certain limited situations allow corrections of errors by either the Government or the taxpayer for years which would otherwise be barred by the statute of limitations. This "mitigation" statute more often has been used effectively as a tool by the Government against taxpayers, but there are many situations in which the taxpayer on his part has been able to obtain relief from an inconsistent position by the Government through resort to this statutory remedy.

5. Limiting Areas of Friction.

Recognizing that certain perennial "fact" and "intent" situations by their very nature tend to cause excessive friction between taxpayers and the Internal Revenue Service, Congress at various times has attempted to minimize these areas of friction and therefore potential areas for administrative abuse, by establishing statutory formulae to create a degree of certainty into what otherwise would be highly subjective areas. Some examples are as follows:

a) I.R.C., §341—statutory "escape routes" in collapsible corporations.
b) I.R.C., §531—$100,000 exemption in determining "accumulated earnings tax" impact.
c) I.R.C., §1237—capital gain treatment afforded to "small" subdivisions.
d) I.R.C., §2035(b)—3-year conclusive presumption for gifts made in contemplation of death.

Maxwell v. Campbell, 205 F. (2d) 461 (5th Cir. 1953).
Barack v. United States (DC ED Mo. 1956), 56-2 USTC 9961, 51 A.F.T.R. 1350. But an injunction was denied where the notice of deficiency was mailed to the taxpayer at his "last known address" within the meaning of the applicable statute, this being the address indicated on the tax returns which were filed in the district where the address was located, even though later returns filed in a different district showed the correct address. Luhring v. Glotzbach, 304 F. (2d) 556 (4th Cir. 1962).

Smith v. Finn, 261 F. (2d) 781 (8th Cir. 1958), mod. and rem'd. per curiam on petition for rehearing 284 F. (2d) 523 (1959); I.R.C. §6863(b)(3)(B) provides, however, that property so seized may be sold if (1) the taxpayer consents to the sale; (2) the Commissioner determines that the expenses of conservation and maintenance will clearly reduce the net profits, or (3) the property is of a perishable nature.
B. Extent of Review in the Courts

1. Judicial Review After Assessment (Proposed or Made) Whether Payment Has Been Made or Not.

It may come as a surprise to learn from our Supreme Court itself that there is no constitutional requirement that taxpayers be given a judicial hearing in tax cases; the right to bring an action in the courts to recover taxes may be abolished if a fair and adequate administrative remedy directly against the Government is substituted.\(^5\)

Regardless, Congress, no doubt in deference not only to the traditional public distrust of the “tax-gatherer,” *sui generis*, but as well as being unwilling to consider him as the exclusive repository for “appeals” from “abuses” of his own discretionary actions, has provided for review by the courts.

However, judicial review, it must be noted, as far as volume of controversies is concerned, is a miniscule remedy for aggrieved taxpayers. Only a tiny fraction of the disputes between the Commissioner and the taxpayer ever reach the courts at all. The vast majority of controversies are settled, by agreement, internally at the various levels of review within the Internal Revenue Service itself.

Nevertheless, since the public image of “relief by litigation” probably is blown-up out of all proportion to the reality, it is important that a thumb-nail sketch be given of the measure and scope of judicial review.

The bulk of tax litigation finds its way into the Tax Court of the United States,\(^5\) probably because the proposed deficiency assessment need not be paid before it is contested.\(^5\) Interestingly, the genesis of the Tax Court can be traced to administrative review procedures within the Internal Revenue Service itself.\(^5\)

A much smaller volume of tax litigation is lodged in the United States District Courts throughout the country, and in the United States Court of Claims; the relative paucity of litigation in these courts probably stems from the fact that their jurisdiction is based on a rejected claim for refund, preceded by the payment of the tax involved in the proposed assessments.\(^5\)

In a real sense, this ability to resort to the courts is an avenue for “relief” from adverse administrative action, but not necessarily from an “abuse” of administrative “discretion.”

\(^{5b}\) For fiscal year ended June 30, 1961, there were 1,370 refund suits brought by taxpayers in all the federal District Courts and in the Court of Claims (Annual Report of the Attorney General of the United States for fiscal year ended June 30, 1961), as compared with 6,983 cases which were docketed in the Tax Court for the comparable period (Annual Report of the Commissioner of Internal Revenue to the Secretary of Treasury, I.R.S. Pub. No. 55).
\(^{5c}\) 28 U.S.C. 1346(a) (1); I.R.C., §7422(a); Flora v. United States, 357 U.S. 63 (1958), (second case), 362 U.S. 145 (1960).
2. Judicial Review of Pre-Assessment and Collection Activities.

The quantum of judicial relief from administrative abuses which may arise either from a situation where an assessment has been made or proposed, or from a situation other than that clearly inhibited by statute is extremely limited for the reasons we shall now explore:

Whether policy-wise, it is entirely justifiable, the Internal Revenue Code itself bars injunctive interference by the courts "... for the purpose of restraining the assessment or collection of any tax..."\(^{57}\)

To a very limited extent, and much less than supposed by the public or by tax practitioners, the Supreme Court has softened the Congressional anti-interference edict, sufficiently to allow judicial interference in "extraordinary" or "exceptional" circumstances.

On the basis of the rationale of its 1932 decision in *Miller v. Standard Nut Margarine Co.*, lower federal courts on occasion have found "extraordinary" or "exceptional" circumstances in a variety of tax cases justifying the granting of injunctive relief against abuses by the Commissioner in varying aspects of collection and enforcement procedures.\(^{59}\)

However, the 1962 Supreme Court decision in *Enochs v. Williams Packing & Navigation Co., Inc.*\(^{60}\) has shed a cold and sobering light dulling any undue enthusiasm on the part of those who had hoped that court interference with collection procedures may become a really useful tool in the curbing of administrative "abuses." The facts in the *Enochs* case were these: Fearing that the District Director of Internal Revenue for Mississippi would attempt to collect allegedly past due social security and unemployment taxes for the years 1953, 1954 and 1955, Williams Packing & Navigation Co. brought suit in the United States District Court, maintaining that it was not liable for the exactions and seeking an injunction prohibiting their collection. The court, relying upon the Supreme Court decision in the *Nut Margarine* case, permanently enjoined collection of the taxes on the ground that they were not in fact payable, and because collection would destroy Williams' business. Williams was engaged in the business of providing trawlers to fishermen who operated off the Louisiana and Mississippi coasts. It was the Government's position that these fishermen were the corporation's "employees" within the meaning of the statutes imposing social security and unemployment taxes. Williams insisted that these fishermen were not its "employees." Additionally, in its attempt to establish a basis for

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\(^{56}\) See footnotes 38-50, *supra*.
\(^{57}\) I.R.C., §7421 (a).
\(^{58}\) 284 U.S. 498.
\(^{59}\) Chief among them are those where it is found as a fact that irreparable damages would result if the taxpayer were delegated to the normal remedy of a suit for refund. A list of exceptions to the "no injunction" rule can be found in *Communist Party, U.S.A. v. Maysey* (DC SD N.Y. 1956), 141 F. Supp. 340; *United States v. Brodson*, 234 F. (2d) 97 (7th Cir. 1956). Also see collection of authorities in *9 MERTENS, LAW OF FEDERAL INCOME TAXATION*, Sec. 49.212.
\(^{60}\) ——U.S.——, 8 L. Ed. (2d) 292.
equitable jurisdiction, Williams maintained that it would be "thrown into bankruptcy" if required to pay the entire assessment of $41,568.57. The Government resisted on the ground that Williams improperly denuded itself of assets in anticipation of its tax liability, and that in any event it could pay the assessment for a single quarter and then sue for a refund, thus testing the validity of the assessment.

In reversing the decree of the District Court and ordering the complaint dismissed, the Chief Justice, speaking without a dissent, said:

The object of §7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes. In Miller v. Standard Nut Margarine Co. . . . this Court was confronted with the question whether a manufacturer of "Southern Nut Product" could enjoin the collection of federal oleomargarine taxes on its goods. Prior to the assessment in issue three lower federal court cases had held that similar produces were non-taxable and, by letter, the collector had informed the manufacturer that "Southern Nut Product" was not subject to the tax. This Court found that "a valid oleomargarine tax could by no legal possibility have been assessed against . . . [the manufacturer], and therefore the reasons underlying . . . [§7421(a)] apply, if at all, with little force." Noting that collection of the tax "would destroy its business, ruin it financially and inflict serious loss for which it would have no remedy at law," the Court held that an injunction could properly issue. . . . The courts below seem to have found that Nut Margarine decides that §7421(a) does not bar suit for an injunction against the collection of taxes not due if the legal remedy is inadequate. We cannot agree. . . .

The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under "no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the Nut Margarine case, the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax. . . .

We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund. And to permit even the maintenance of a suit
in which an injunction could issue only after the taxpayer's non-liability had been conclusively established might "in every practical sense operate to suspend collection of the . . . taxes until the litigation is ended." . . . Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes "when [the collecting] officers . . . have made the assessment, and claim that it is valid. . . .

The record before us clearly reveals that the Government's claim of liability was not without foundation. . . .

Even in "peripheral" areas where the taxpayer, finding himself enmeshed within the tentacles of the vast enforcement machinery of the Internal Revenue Service, cries out in despair for "relief" in a situation which should generate some degree of sympathy, the courts, at least at the appellate level, have shied away.\textsuperscript{61}

C. Administrative.

Despite the gargantuan powers which Congress has vested in the administrative agency, it must be stated in fairness that "abuses" of the Commissioner's "discretion," as these terms have been de-limited by clarification and distillation, have been the rare exception rather than the rule, in spite of the vast potential for distortion of the available discretion.

If the published statements of the last two Commissioners of Internal Revenue is any criterion of a trend, there is evidence of a conscientious and dedicated effort by the administrative agency to eliminate "abuses" as much as it is possible to do so, considering all factors involved.\textsuperscript{62}

Indeed, as has been pointed out, the "self-assessment" system may well break down if the taxpayer builds up an image of unfair treatment by the Internal Revenue Service.\textsuperscript{63}

\textsuperscript{61} a) The case of United States v. Brodson (DC ED Wisc. 1956), 136 F. Supp. 158, rev'd. on appeal, 241 F. (2d) 107 (7th Cir. 1957), brought to light the difficulties a defendant in a tax evasion case faces when all of his funds are tied up with jeopardy assessments, making it impossible for him to employ competent accounting assistance in aid of his defense. The Section of Taxation of the American Bar Association recommended corrective legislation, but to date Congress has not seen fit to make any changes in the basic jeopardy assessment statutes. See \textit{Report of Section of Taxation}, American Bar Association, Los Angeles Meeting (1958), p. 157, et seq.

b) In Campbell v. Gutersloh, 287 F. (2d) 878 (5th Cir. 1961), it was held that it was improper for the District Court (DC Texas 1960, 184 F. Supp. 392), to grant an injunction denying the Commissioner the right to determine proposed deficiencies through the use of the bank deposit and expenditures method of reconstructing income, merely because the method, relying as it would on bank transactions covering many years, could deprive taxpayers of any reasonable explanation and defense, this not being an allegation of the "exceptional circumstances" which is a prerequisite for injunctive relief in derogation of the anti-injunction statute.


\textsuperscript{63} Caplan, \textit{The Role of the Commissioner}, op. cit., fn. 62, supra, at p. 14: "Our system is based on the good faith of the American people and their confidence that the law is operating fairly and impartially, and that their neighbors are
Towards the end of sustaining an image of "fair-dealing" there is
the impetus for self-analysis and self-improvement, which on the whole,
with the exception of atypical aberrations, has been a continuous
process.

Circa late 1962, the Internal Revenue Service itself has developed
substantial bulwarks which should minimize the occurrence of "abuses"
on more than a sporadic basis, among which the following should be
mentioned:

1. "Top" officials of the Service, that is, Assistant Commissioners
in the National Office, Regional Commissioners, and District Directors,
are selected in strict compliance with Civil Service principles of merit
promotion.

2. Recruiting and training programs for the more than 50,000 agents
of the Service have been stepped up and intensified.

paying their proper share of the taxes. We must do everything possible to
strengthen this confidence. . . ."

The 1951-1952 "tax scandals," centered mostly in the Bureau of Internal Reve-
nue, shook the citizens' confidence in the integrity of the entire tax-collecting
system. See BALER, FRAUD UNDER FEDERAL TAX LAW (2nd ed.), p. 63, et seq.,
for a review of this unsavory epoch.

Caplin, The Role of the Commissioner, op. cit., fn. 62, supra, 1, 2:
"One of the main administrative duties is to select key officials for the Ser-
vice—such officials as the Deputy Commissioner, the six Assistant Commis-
sioners, Regional Commissioners and the District Directors. These top posi-
tions, like all others in the Service, are filled in strict compliance with the
Civil Service principle of merit promotion. The importance of the merit system
in staffing the Internal Revenue Service has been unequivocally endorsed
by the President and the Secretary of the Treasury and cannot be over-empha-
sized."

Caplin, The Role of the Commissioner, op. cit., fn. 62, supra, 1, 3:
"Other important administrative tasks include devising ways of upgrading
our space and equipment, stepping up recruiting and training programs, im-
proving enforcement techniques and administrative procedures, and maintain-
ing a proper balance in our salary structure including supergrade positions. . . .
Of vital importance, too, is maintenance of the highest integrity in every phase
of our operations. Another essential program is designed to provide effective
evaluation of the performance of our employees. We are making progress in
this area by elevating the standards upon which employees are rated, and by
substituting more sophisticated, more subjective bases for evaluation closely
tied to case-and-dollar production statistics."

Latham, Responsibilities of the Internal Revenue Service, op. cit., fn. 62,
supra, 1, 8:
"To me, our first responsibility is to ensure employee competence. Without
it, none of our specific responsibilities can be discharged.

Competence covers both managerial and technical areas and includes the
ability to understand and embrace our basic policies. Our people must know
that advancement within the Service is based on overall performance and not
on quotas, either in dollars produced or cases disposed of. They must be
trained to evaluate facts on an objective basis. Innate courtesy must become
a part of the fabric of their lives.

All this requires as the first step an effective recruiting program. This we
have. Most of our technical people now are recruited through vigorous efforts
aimed at college seniors. They include careful and realistic evaluation and
selection methods. It is indeed a far cry from the days when employee re-
recruitment was based upon blanket invitations to apply appearing on Post
Office bulletin boards next to 'Wanted' posters, and when selections were
based on rigid written examinations which, of course, can test only a few of
the elements that should be measured by an effective selection process.
3. There is a concentrated effort at all levels within the Service to settle controversies, other than those of an inherent litigious nature, on a fair and equitable basis.\textsuperscript{67}

4. Towards this end, "settlement," "conference," and "review" procedures have been improved.\textsuperscript{68}

5. Regulations in particular, and Rulings and Revenue Procedures to a lesser degree, are drafted, promulgated, and made available in accessible publications, only after a painstaking and knowledgeable sifting process through several echelons of review and re-evaluation, which should increase the probability that they will be equitable and practical in operative effect.\textsuperscript{69}

The next step in the discharge of our responsibility to achieve competence is adequate training. . . . I will say only that no agency in or out of Government does a better job in this field than does the Internal Revenue Service. Our goals in this area are being constantly expanded.\textsuperscript{67}

\textsuperscript{67}We also seek to reach settlements at the earliest stage possible. More than 98% of all tax controversies are settled at the Revenue Agent level. More than one-half of cases going beyond the agent to informal conference are disposed of there. Of the cases going on to Appellate, the bulk are agreed without a petition to the Tax Court. Of the cases handled by Appellate in the docket stage, approximately 18 out of 19 are settled without trial. In fiscal 1959 less than 900 cases were tried before the Tax Court. Commissioner Latham, 1960 So. CALIF. TAX INST., p. 1, 12.

Also see I.R.S., Publication No. 55, Annual Report of the Commissioner of Internal Revenue to the Secretary of Treasury, as reported in 16 J. TAXATION 177 (March, 1962), which sets forth settlement statistics for fiscal year ended June 30, 1961. Approximately 3.5 million returns were selected for audit. Of this amount, only 15,724 reached the Appellate Division. The 6,983 cases which were docketed in the Tax Court were disposed of as follows: agreed or stipulated, 5,614; dismissed or defaulted, 330; tried on merits, 1,039.

\textsuperscript{68}Rev. Proc. 60-18; Rev. Proc. 62-8; 9 MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 49.110.

\textsuperscript{69}MERTENS, LAW OF FEDERAL INCOME TAXATION, Regulations (1954-1960), p. VI:

"When issued, Regulations become known as Treasury Decisions to which specific numbers are assigned. The promulgation of a Treasury Decision represents the end process of an elaborate administrative procedure. . . . The internal effort which underlies the development both in tentative and formal form of Revenue Regulations is extremely interesting.

The initial draft of a proposed Treasury Decision originates either in the Technical Planning Division of the Office of the Assistant Commissioner (Technical) or in the Legislation and Regulations Division of the Office of the Chief Counsel. As a matter of practice, both of these staffs work together closely as respects all of the proposed Treasury Decisions. If one staff provides the initial draft, the other normally will provide the review. . . . These two groups, working together, develop working drafts of Regulations in question. After suitable working drafts have been prepared, they are reviewed at various supervisory levels within the Internal Revenue Service. Thereafter a draft of the Proposed Regulations is delivered to the Legal Advisory Staff of the Office of the Secretary of the Treasury for tentative approval. Often, after considerable and extended discussion, these Regulations are then published, pursuant to the Administrative Procedure Act, in the Federal Register as a 'Notice of Proposed Rulemaking.'

While the Administrative Procedure Act itself does not prescribe the form of the notice of proposed rulemaking, it is the practice of the Treasury to issue Tentative Regulations, in the general case at least, in form which is as close as possible to that which the Department considers will be the final form. For this reason, if no comments are received by the public within the 30-day period allowable for 'protests,' the Regulations may well be finalized, i.e., promulgated as a Treasury Decision with an assigned number in the precise form in which they were published as a Notice of Proposed Rulemaking.
6. Advice on how to improve administrative procedures is sought on a continuing basis from business, from the organized bar, and from the accounting profession, through "advisory" and "liaison" groups. But in spite of all this, for the average taxpayer, the reality still persists that his image of the Service and its predilection *vel non* for abusing its administrative discretion, will continue to depend on his day-by-day dealings with the agent "on the ground floor." As has been succinctly stated by former Commissioner Latham:

"More often, however, comments will be received concerning the contents of the Notice of Proposed Rulemaking by the Treasury. These comments, which may be submitted by any interested taxpayer, are assigned to Revenue Service and Treasury officials who had been engaged in preparation of the Tentative Regulations and are reviewed by them with extreme care. Time and place is thereupon set aside by the Revenue Service for public hearing, in which the written comments may be discussed orally with officials familiar with the Regulation in question. Thereafter, a period then follows, within the Treasury and Revenue Service, during which time the various taxpayer comments are collected and assimilated and decisions are made within the Department as to which taxpayer suggestions will be accepted. In addition it is often a Treasury practice to question the field forces of the Revenue Service for their comments concerning the usefulness of the Tentative Regulations. The comments of interested professional groups, such as bar, accounting, and industry groups, are also received. It is a general, although not a binding, practice for the Treasury, when changes are made, to limit itself only to those changes which are more favorable to the taxpayer than appear in the Notice of Proposed Rulemaking. If the changes desired will be more restrictive, the Tentative Regulations are withdrawn and a new 'notice' is published.

After transition from proposed to final Regulations, which may represent as little as a month, or as much as a year or more, from the time of original publication as a notice, a Treasury Decision is ultimately promulgated. At this point, field forces of the Revenue Service are expected to comply with the various policies expressed in the Regulations. Taxpayers may also expect that a position taken in the Regulations will be adhered to by the Treasury except until such time as the position taken is changed or until the Regulations are invalidated by the Supreme Court."

Caplin, *The Role of the Commissioner*, op. cit., fn. 62, supra, 1, 12:

"Another major responsibility of the Commissioner and the Service is to maintain good working relationships and a high degree of cooperation with business and the organized bar and accounting societies.

I have continued the Commissioner's Advisory Group initiated by my predecessors and have been able to get valuable assistance from these outstanding leaders in the tax field. This group consults with and advises the Service on current problems and considers a broad range of future programs to improve our tax administration. We are very pleased with the significant contribution it is making to the development of stronger and better tax administration.

In addition, I am trying to keep in close touch with a number of interested organizations—the American Bar Association, the American Institute of Certified Public Accountants, the National Society of Public Accountants, the Tax Executives Institute and non-practitioner groups, as well. These contacts include not only participation in their meetings, but cooperation with their committees throughout the year in discussing common problems. In addition, we have been inviting business groups to confer with Internal Revenue officials in Washington or to submit written positions on technical issues in which they have an interest. We do not want to operate in a vacuum, and we are anxious to get a broad expression of views before reaching basic policy decisions. Our current depreciation project, study of audit procedures for different industries, and certain rulings with industry-wide impact have all been assisted by this public cooperation and discussion." *IRS News Release* No. IR-533, Sept. 4, 1962, CCH Std. Fed. Tax Reporter 1962, Par. 6502.
the tax administrator must execute his responsibilities through an organization of over 50,000 employees. This means—not merely that he is responsible for the actions of people he has never even seen—but that he cannot achieve his objective unless he can somehow cause thousands of people in high and low positions, in the myriad decisions they make in the course of a year, to follow the policies, the procedures, and even the philosophy theretofore prescribed. ... Never to be forgotten is the terrifying thought that if each employee makes but one mistake a year, we will have a total of 50,000 mistakes, each one of which inevitably reflects to some extent upon the Service as a whole.\footnote{Latham, Responsibilities of the Internal Revenue Service, op. cit., fn. 62, supra, 1, 7.}

IV

SUGGESTED AREAS FOR IMPROVEMENT

With considerable temerity, the author ventures to record several suggestions which it is hoped may afford additional "relief" from "abuse" of administrative discretion. It is not claimed that all of these suggestions are novel or ingenious. Some have been made before, but were promptly interned. It is time for a reappraisal and re-evaluation.

A. Statutory and Judicial.

On the whole, independent judicial review outside of the Internal Revenue Service not only reaches a very small segment of "aggrieved" taxpayers, but additionally the entire judicial machinery is handicapped by limitations, jurisdictional and otherwise, which sought to be removed by legislative changes, for example:

1) The Tax Court.

On balance, the Tax Court has played a vital role in affording taxpayers, rich and poor, a ready forum for contesting proposed deficiency assessments.

The feature of no pre-payment has been the chief magnet for Tax Court dominance in the litigation field.

Yet the full capacity of the Tax Court as a forum for disposition of litigious controversies is not attained because of jurisdictional limitations. At present, only (1) years for which a deficiency in tax is proposed by the Commissioner, and where either (2) income taxes, (3) estate taxes or (4) gift taxes are involved, may be "redetermined" by the Tax Court.

There is a vast and increasing area of controversies involving social security and "withhold" tax and a myriad of miscellaneous excise taxes which are not within the Tax Court purview. They should be. "On paper," there are reasonably adequate internal administrative procedures for review of these taxes, but the absence of a judicial review by the Tax Court, for practical purposes, often lodges the judicial function in the Appellate Division of the Regional Commissioner's office, where
it does not belong. Additionally, it is not a complete answer to say that the District Courts and the Court of Claims are open as forums where the proposed deficiencies may be contested. Putting aside the problem of pre-paying the tax, these are not specialized tax courts. There is advantage both to the Government and to the taxpayer to have their controversies in these areas aired in a forum where the Judges are knowledgeable about these types of taxes, which often are mystifying to other Judges who hear tax cases only occasionally, and even then rarely have to deal with taxes other than the familiar income, estate and gift taxes.

Finally, jurisdiction of the Tax Court ought to be expanded so as not to be hide-bound to the “no deficiency—no jurisdiction” rule. There are so many situations where deficiencies are proposed for some years and not for others, all years having been under the same audit; there would seem to be no reason why the Tax Court should not hear and adjudicate the entire “package.”

2. The Refund Route.

The decisions of the Supreme Court in the two Flora cases have diluted to a material extent the availability of the District Courts and of the Court of Claims as forums for contesting allegedly improper assessments in the dominant fields of income, estate, and gift taxes.

Regardless of whether Flora is sound on the basis of statutory construction and legislative history, it leaves much to be desired from the point of view of the fair administration of the revenue system. Requiring a taxpayer to prepay the whole “ball of wax” of proposed deficiencies which may involve many tax years, including penalties, if any, and probably including all accumulated interest, as a condition prece-

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23 It is generally assumed that the Flora decisions (op. cit., fn. 55, supra) are authority for the proposition that where the deficiency in tax is divisible, a refund suit may be brought on the basis of a deficiency arising from a single “completed transaction” for the full calendar year. In the area of excise and other “miscellaneous” taxes, this would involve “pre-payment” of a relatively minor sum. Steele v. United States, 280 F. (2d) 89 (8th Cir. 1960); Ruby v. Mayer (DC N.J. 1961), 61-2 USTC 9604; Bellah v. Patterson (DC MD Ala. (1960), 61-1 USTC 9119; O'Neil v. United States (DC ED N.Y. 1959), 172 F. Supp. 904; Jones v. Fox (DC MD 1958), 162 F. Supp. 449.
24 Flora v. United States, op. cit., fn. 55, supra.
25 As indicated in footnote 73, supra, the effect of Flora is relatively mild in the area of excise and “miscellaneous” taxes.
26 For comments on the Flora decisions, see: Kaminsky, Mandatory Injunction: A Promising Escape From Flora v. United States, 39 TAXES 699 (1961); Lore, Supreme Court, in Second Flora Decision, Reveals Weakness in Rule Established, 12 J. TAXATION 371 (1960); Riordan, Must You Pay Full Tax Assessment Before Suing in the District Court?, 8 J. TAXATION 179 (1958).
27 Whether the payment of interest is a jurisdictional prerequisite is not clear. On the one hand, the first Flora decision (op. cit., fn. 55, supra), may imply that interest is not part of the deficiency in tax. On the other hand, I.R.C., Reg. 301.6201-1 provides as follows:

The District Director is authorized and required to make all inquiries
dent to availing himself of a forum where he is entitled to a jury trial, in many situations is an undue hardship. Congress can and should ameliorate this situation.


One cannot quarrel with the basic proposition that where the taxpayer seeks a "redetermination" of a proposed deficiency assessment, or to recover taxes he has already paid, being the "plaintiff" he should have the ultimate "burden of proof." Necessary to the determination and assessment of all taxes imposed by the Internal Revenue Code of 1954 or any prior internal revenue law. The term 'taxes' includes interest, additional amounts, additions to the taxes and assessable penalties. cf. Kell-Strom Tool Co., Inc. v. United States, —F. Supp.— (DC Conn. 1962), 62-2 USTC 9541.

Of course, if the taxpayer chooses the Court of Claims as the forum for his refund suit, he will not be entitled to a jury trial. However, the bulk of claims for refund litigation is in the District Courts, where a trial by jury, of course, is available. In the author's experience he has yet to find a taxpayer who has been willing, even if in isolated cases he is able to do so, to pay the total "tax bill" represented by the proposed deficiency, including penalties, even though he has been counseled that his chances for "beating" the Government's case in whole or in part are better in the District Court than in the Tax Court, principally because of the availability of a jury trial. Apart from the financial burden, there seems to be a psychological ingredient to the effect that if the taxes are paid in advance of contest, there is some sort of an admission that the taxes are actually due.

Since the Flora decisions (op. cit., fn. 55, supra) draw the conclusion from an interpretation of pertinent statutes, any change in this respect would have to be statutory rather than judicial. There has been recent agitation to correct alleged abuses in not allowing taxpayers the speedy right to file a claim for refund through the device of the District Director refusing to accept the taxpayer's payment. This problem has been clearly set forth by C. W. Wellen of the Houston, Texas Bar in a Proposed Amendment of the Internal Revenue Code to Prescribe Definite Procedures for Assessing Tax, which will be presented to the Section of Taxation of the American Bar Association:

"Fair administration of the tax law should permit a taxpayer faced with a proposed deficiency to pay the deficiency and have it assessed immediately in order to stop the running of interest, and he should be allowed to institute a refund suit to settle such tax liability as soon as possible. Under present law, funds delivered in payment of a proposed deficiency may be placed in a 'suspense account' and not considered 'paid' until the Commissioner, in his uncontrolled discretion, decides to make an assessment. The object of the proposed legislation outlined below is to correct this situation by requiring that amounts delivered in payment of proposed deficiencies or in respect of a tax must be assessed shortly after receipt." Also see Baird, Is IRS Justified in Refusing Payment of Tax Liabilities?, 16 J. TAXATION 251 (1962).

It has been pointed out that the term "burden of proof" has two distinct meanings in law: "One is the obligation of producing evidence at some stage of the contest; the other the burden of convincing the tribunal where the evidence is in even balance. Where the evidence is in even balance, and the tribunal cannot say which should win, the party upon whom rests the burden of proof will lose." Procedure and Practice Before the Tax Court of the United States (CCH, 12th Ed. 1952), 119.

It has also been pointed out that "James Bradley Thayer in his treatise on evidence demonstrated that the phrase 'burden of proof' was applied to two distinct evidentiary burdens: the burden of producing sufficient evidence on an issue of fact to entitle the party to have the issue decided by the trier of fact, and the burden of persuading the trier of fact. In order to distinguish between the two, the first burden is called the burden of producing evidence, or the burden of going forward with evidence, while the second is often referred to, although largely by legal writers rather than courts, as the burden of persua-
Nor is there much to be said against the application in tax cases as in other litigation, of traditional "presumptions" and "inferences" such as that corporate action is regular unless it is shown otherwise,\(^2\) that a deed absolute on its face is what it says,\(^8\) that the record owner of stock is the actual owner,\(^4\) that a mailed letter was received,\(^5\) etc. In the main, these types of "presumptions" simply shift to the adversary the temporary duty of "going forward" with contrary proof, and once this temporary burden is met, the "presumption" disappears; it has no effect on the ultimate burden of proof.

In litigated tax cases, whether in the Tax Court, in the District Court, or in the Court of Claims, the taxpayer not only has the ultimate burden of proof, which he should, but is handicapped by presumptions against him, the fairness of which is open to some doubt: First, there is the presumption that the Commissioner's proposed determination of a deficiency in tax is prima facie correct.\(^6\) There is considerable confusion as to what this presumption really means.\(^7\) But, at the minimum, it means that unless the taxpayer is able by some relevant and competent testimony to show that the Commissioner may be wrong in his determination, the Commissioner can rely on this presumption of correctness alone to demonstrate that the taxpayer has not sustained his burden of proof. Whether under these circumstances the taxpayer would have lost anyway, because of his ultimate burden of proof, regardless of the presumption of correctness, is debatable.\(^8\)

That these two distinct burdens necessarily result from the functions of the judge and the trier of fact (even if the judge is also the trier of fact) in our adversary system of litigation has been succinctly stated in the following terms:

Where the burden of producing evidence, which one of the parties must have at the outset, has been satisfied by the production of legally sufficient evidence, this does not shift that burden to the other party. If the party whose burden of producing evidence has been satisfied also has the burden of persuasion, the opponent may rest his case and still prevail if the trier of fact is not persuaded by the evidence which has been produced. If, on the other hand, the evidence produced is so strong as to require a finding for the party originally having the burden of producing evidence, that burden is shifted to the opponent. The burden of persuasion, on the other hand, does not operate at all during the production of evidence, but only comes into play when the evidence is being weighed by the trier of fact. ...” Ness, *The Role of Statutory Presumptions in Determining Federal Tax Liability*, 12 Tax L. Rev. 321, 329-332 (1957).

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\(^2\) John H. Parrott, 1 BTA 1 (1924).
\(^3\) Bernard Long, 1 BTA 792 (1925).
\(^4\) Fort Cumberland Hotel Co., 1 BTA 1256 (1925).
\(^5\) Lawrence v. Ham, 19 F. (2d) 643 (DC SD Maine 1927). cf. Ruth W. Oppenheimer, 16 T.C. 515, 527 (1951). (It is not presumed that the Collector's stamp is the date on which the return was filed in the face of convincing evidence to the contrary).
\(^6\) Rules of Practice, Tax Court, Rule 32, provides as follows: "The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent."
\(^7\) See Balzer, *Tax Fraud and Evasion* (3rd ed. 1962), Sec. 10.4-5, et seq.
\(^8\) "In a tax litigation, regardless of forum, the taxpayer normally has the initial burden of producing evidence by virtue of the presumption of correctness of
Be that as it may, secondly, there is less justification for a plethora of provisions in the Internal Revenue Code specifically aiding the Commissioner in potential litigious controversies with taxpayers, by creating presumptions in favor of the Commissioner and against the taxpayer.

Here are a few of these statutory presumptions:

1. I.R.C., §269(c) provides that in a situation of the acquisition of a corporation "to evade or avoid income tax" the fact that the Commissioner's determination. It is well established, however, that this presumption is merely a formula for requiring the taxpayer to present legally sufficient evidence negating the Commissioner's determination, which covers each essential element of non-liability and is not itself capable of destructive analysis.

When legally sufficient evidence has been introduced contrary to the Commissioner's determination and both sides have rested their cases, the issue must then be decided by the trier on the basis of the evidence, without regard to the presumption of correctness. But it is at this point that the further burden of persuasion comes into play. It is the taxpayer again who has this burden which entails the production of a preponderance of the evidence. Ness, The Role of Statutory Presumptions in Determining Federal Tax Liability, op. cit., fn. 81, supra. Balter, Rules of Evidence Applicable in Proceedings Before the Tax Court of the United States: Burden of Proof and Presumptions, 6 MARQ. UNIV. INST. ON TAX. 1 (1956).

The courts seem to draw no sharp line between presumption of correctness and burden of proof. For example, in Welch v. Commissioner, 297 F. (2d) 309 (4th Cir. 1961), where the Commissioner had assessed both deficiencies and fraud penalties for the years 1950 through 1956, and where the deficiencies had been determined by use of the net worth increase method except for the year 1952, for which year the Commissioner intended to use the specific item method because if he used the net worth method no deficiency would have been shown for that year, the Tax Court had found for the Commissioner on all years. The Court of Appeals reversed as to the year 1952, holding that the Tax Court had no right to base its decision for that year on the presumption of correctness of the Commissioner's findings since such presumption should fade in view of the inconsistency between the net worth statement which he used for all other years and the specific adjustments which he used for the year 1952, particularly as to the cost basis of real property sold in that year, saying:

"The taxpayer, however, did make the point at the trial that the deficiency determination for 1952 was clearly at variance with the figures used by the Commissioner in establishing the net worth determination for other years in the consolidated cases and renewed the contention after the opinion of the Tax Court was published, in a motion for reconsideration which the Tax Court denied. . . . The net worth computations used by the Commissioner with respect to the net worth years showed beyond question that the taxpayer was entitled to deductions for the cost basis of property sold and the operating expenses incurred in the year 1952 and that the Commissioner's rejection of these deductions in toto was plainly wrong. In short, the presumption of correctness to which the determination of the Commissioner is ordinarily entitled was destroyed by its own inherent defect. Under these circumstances the burden of proof did not rest upon the taxpayer, and the Tax Court was not justified in basing its decision upon the failure of the taxpayer to show the precise amount of the deductions to which he was entitled."

It would seem more precise not to confuse the absence of the presumption of correctness with the shifting of the burden of proof. For further study of the complicated and often confusing area of burden of proof, presumption, and duty of going forward with evidence, see: 9 MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 50.61, et seq.; 2 CASEY, FEDERAL TAX PRACTICE, Sec. 737, 8 TAX, FORMS AND PRACTICE BEFORE THE TAX COURT OF THE UNITED STATES (CCH, 15th Ed. 1955) 141, et seq.; Orkin, Duty of Going Forward in Civil Tax Fraud Cases, 42 A.B.A.J. 947 (Digest of Tax Articles, Dec. 1956, p. 61).
eration paid upon the acquisition is "substantially disproportionate" shall be prima facie evidence of the principal purpose of evasion or avoidance of federal income tax.

2. I.R.C., §341(c), covering the taxability as ordinary income of the gain of shareholders of a "collapsible" corporation, provides a presumption that a corporation is a collapsible corporation by stating that if the fair market value of the corporation's "Sec. 341 assets" constitutes 50% or more of the fair market value of total assets and is 120% or more of the adjusted basis of such "Sec. 341 assets," the "corporation shall, unless shown to the contrary, be deemed to be a collapsible corporation."

3. I.R.C., §533(a), providing for a surtax on accumulations of corporate earnings and profits beyond the reasonable needs of the business, and stating that such accumulations are within the prohibited purposes "unless the corporation by the preponderance of the evidence shall prove to the contrary."^98

4. I.R.C., §672(e), relating to the area of taxability of the grantor of an inter vivos trust on the basis of continued substantial ownership of the trust income, the taxable nature of certain trust powers depending on whether a related or subordinate party who possesses such powers, is "subservient" to the grantor, and providing that such subserviency shall be "presumed—unless such party is shown not to be subservient by preponderance of the evidence."

5. I.R.C., §2035(b) raises the presumption of contemplation of death by providing that a transfer made within three years of the date of death "shall, unless shown to the contrary, be deemed to have been made in contemplation of death..."^99

Finally, it should be pointed out that in a very narrow orbit of controversies, the "burden of proof" by statute is lodged with the Commissioner rather than with the taxpayer, namely: (1) where fraud is an issue,^100 (2) where the Commissioner attempts to remove the bar of the normal statute of limitations for additional assessments,^101 (3) where

^98 However, I.R.C., §534 conditionally imposes on the Commissioner in a Tax Court proceeding the burden of proof as to an allegation that accumulations are unreasonable in order to give rise to the statutory presumption. The conditions for the imposition of such burden on the Commissioner are, alternatively, the failure of the Commissioner to give the taxpayer a special notice that a proposed deficiency includes an amount with respect to the accumulated earnings surtax or, if such notice is given, the filing by the taxpayer of a statement of the grounds on which he relies to establish the reasonableness of the accumulation.

^99 This provision is not too unlike that found in the Revenue Act of 1950 [Sec. 501(a)], which contained a provision that no transfer made before this 3-year period should be treated as having been made in contemplation of death.

^100 This would be true whether the normal 3-year statute of limitations applied, the 6-year statute of limitations applied because of an alleged understatement of 25% or more of gross income, or whether the Commissioner claims that the normal 3-year statute of limitations does not apply because of a valid exten-
the Commissioner attempts to attach liability to someone other than the original taxpayer as a transferee, and (4) where the Commissioner, in his answer to the taxpayer's petition in the Tax Court, asks that the proposed deficiency be determined in excess of that set out in the notice of deficiency. While specifically the rules apply only in Tax Court proceedings, by judicial transposition they have in the main been adopted as well in District Court and Court of Claims controversies. There ought to be specific clarifying legislation to this effect for the sake of uniformity in all courts.

In conclusion, a re-evaluation is in order of the entire perplexing and often obfuscatory area of "burden of proof" and "presumption of correctness" so that by statute a fairer balance may be achieved between the litigious positions of the Commissioner and the "aggrieved" taxpayer. As it now stands, the advantages are clearly with the Commissioner.

4. The Problem of Injunctive Relief.

The rationale of the extremely severe statutory prohibition against judicial interference with the assessment and collection processes, other than the pre-assessment resort to the Tax Court, must be that (a) there

I.R.C., §6902(a).

Rules of Practice, Tax Court, Rule 32; Joseph A. Petnel, 12 T.C.M. 595 (1953); Peter Goralski, 11 T.C.M. 543 (1952); Estate of John Joseph Nweeya, 10 T.C.M. 630 (1951); Charles O. Mensik, 37 T.C. No. 71 (1962); John W. Snow, Jr., 12 T.C.M. 1281 (1953).

(a) District Courts: See discussion in 3 CASEY, FEDERAL TAX PRACTICE, Sec. 11.44, at p. 240, et seq. The Courts of Appeals in seven circuits, as well as the Court of Claims hold that the burden of proof is on the Government on the issue of fraud in a refund suit. Representative cases are: United States v. Thompson, 279 F. (2d) 165 (10th Cir. 1960); Paddock v. United States, 280 F. (2d) 563 (2nd Cir. 1960); Carter v. Campbell, 264 F. (2d) 930 (5th Cir. 1959); Ohlinger v. United States, 219 F. (2d) 310 (9th Cir. 1955); Reeves v. United States (DC Neb. 1959), 168 F. Supp. 720; Bukowski v. United States (DC SD Texas 1955), 136 F. Supp. 91; Koch v. United States (DC ND Ia. 1955), 55-2 USTC 9559. The Government has now abandoned further litigation to stem this tide. (Annual Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1961, p. 308). CASEY, in 3 FEDERAL TAX PRACTICE, Sec. 11.44, feels that some clarification is needed to resolve the conflict in the cases as to the Commissioner's burden of proof on the issue of fraud in a refund suit. It would seem, however, that the majority rule placing the burden on the Commissioner is so overwhelming that as a practical matter the Government would be compelled to acquiesce to this rule in practically every jurisdiction.


Ness, The Role of Statutory Presumptions in Determining Federal Tax Liability, op. cit., fn. 81, supra.
are adequate internal remedies within the Internal Revenue Service itself to remove "abuses" and "inequities," and (b) that the ability to resort to the Tax Court is adequate relief.

The Supreme Court itself, however, has recognized the inadequacy of this rationale by indicating that there are some situations, albeit of a rara avis variety, where injunctive relief by judicial interference is not only justified, but indispensable. Even if it assumed that its decision in Enochs v. Williams Packing & Navigation Co., Inc.⁹⁷ is its last word, there remain many areas of potential "abuses" of the administrative "discretion" where any remedy short of injunctive relief clearly is inadequate and inequitable. Particularly in the field of jeopardy assessments, and post-assessment procedures such as liens, distraints, and collection activities, abuses are likely to occur.⁹⁸

The harshness of the statutory anti-injunction edict should be ameliorated. There is little likelihood that the courts, given greater power to interfere on what must be only rare occasions, would abuse this power to the extent of weakening the normal assessment and collection procedures of the administrative agency.

5. A Court of Tax Appeals?

Review is available from decisions of the Tax Court, the District Courts,⁹⁹ and the Court of Claims.¹⁰⁰

Considerable controversy has arisen over the seemingly firm position of the Tax Court that it is not bound as a precedent by an adverse ruling of the Court of Appeals for the circuit from which a review of its decision took place, beyond the purview of that particular case.¹⁰¹

⁹⁹ Appeals from the Tax Court and from the various District Courts would lie in the Courts of Appeals for the appropriate Circuits.
¹⁰⁰ An appeal from the Court of Claims by-passes the Courts of Appeals and goes directly to the Supreme Court. 28 U.S.C., Sec. 1255.
¹⁰¹ In Arthur L. Lawrence, 27 T.C. 713 (1957), the Tax Court justified at length its refusal to follow a contrary rule laid down by the Court of Appeals in the instant Circuit which had jurisdiction to review its decisions arising in that circuit. In the earlier case of William E. Edmonds, 16 T.C. 110, 117 (1951), the Court had this to say:
"... the question we face here is whether we will stand by our decision in the Strauss case and respectfully decline to follow the Second Circuit's decision, or whether we will accept it as laying down the correct law and follow it in the instant case. If, of course, goes without saying that the reversal by the Second Circuit of our decision in the Strauss case makes the law for that case. Inasmuch, however, as the Tax Court must endeavor to make its decision uniform for all taxpayers within the United States, we cannot discharge that duty by following a circuit court's decision in a subsequent case by a different taxpayer if we think it is wrong, even though it would go to the same circuit in which we were reversed, and even though the facts are the same as the case in which we were reversed. If we did so, it would only result in confusion and unequal treatment of taxpayers merely because they live in different circuits. Therefore, when, as here, we have been reversed we
This "heresy in the hierarchy" has revived interest in the previously raised but largely ignored suggestion that Congress create one over-all Appellate Court for review in all tax cases, presumably to be called the Court of Tax Appeals, which would replace the Courts of Appeals for the ten judicial circuits, as the repository for appeals from the Tax Court and the District Courts.

There are logical pros and cons to this suggestion. It is time that this suggestion be re-evaluated from the point of view of whether such a Court of Tax Appeals would afford the tax-paying public: (a) easier and quicker access for review, and (b) a more effective basis for projecting the potential tax impact on proposed personal and business transactions and activities.

In conclusion, as to the process of judicial review, what we are suggesting is that access to the courts for review of taxpayer grievances should not be stifled either by (a) a dogmatic, and sometimes exaggerated, confidence in the intrinsic "fairness" of decisions and actions of the administrative agency, or (b) the seemingly inherent "distaste" by the judiciary to pass on tax controversies no more often than absolutely necessary to settle problems of major concern.

The courts have an important role to play, not only in assuring the specific taxpayer his "day in court" when he is not satisfied with in-

must examine carefully the reversal to see whether or not we will follow the court in its reversal, not only in cases which lie within the jurisdiction of that particular circuit, but all other circuits as well. This we have done in the instant case. We have carefully read and considered the majority opinion of the Second Circuit in the Strauss case and have decided to follow it.

This position of the Tax Court has been criticized by the Court of Appeals for the Seventh Circuit [Sullivan v. Commissioner, 41 F. (2d) 46 (7th Cir. 1957)], and by the Court of Appeals for the Sixth Circuit [Stacey Mfg. Co. v. Commissioner, 237 F. (2d) 605 (6th Cir. 1956)]; followed in Wexler v. Commissioner, 241 F. (2d) 304 (6th Cir. 1957). See Tax Note: The Finality of the Court of Appeals Decisions in the Tax Court, 43 A.B.A.J. 945 (1957); Comment: Heresy in the Hierarchy: The Tax Court Rejection of Courts of Appeals and Pyramiding Judicial Review, 9 Stan. L. Rev. 827 (1957).

ternal "reviews" within the Internal Revenue Service itself, but of equal importance, in helping to sustain in the public mind the image of fairness and equity in the administration of the revenue laws.

B. Within the Administrative Agency Itself.

Conceding that when headed by dedicated and knowledgeable Commissioners, there is a sincere and continuous impetus for bettering the quality and fairness of the administration of the revenue laws, there is still room for substantial improvements.

Three specific areas for further exploration are suggested:

1. Improving Conference and Review Procedures in the Office of the District Director.

Dissatisfaction persists with the efficacy of "conferences" and "reviews" for settlement purposes, at the lower echelons, that is, in the District Director's office. Though improved over previous procedures, the present "informal conference" with the Revenue Agent's Group Chief or other Conferees appointed by the "Conference Coordinator," still leaves much to be desired. Succinctly stated, the limitations to the extensive use of this settlement technique may be listed as:

a) If the issue is one which is either currently being litigated by the Commissioner or where an adverse position has been indicated by internal "directives" or published "non-acquiescence" with respect to favorable court decisions, the Conferee would have no authority to make any settlement contrary to this "internal" position.

b) Lack of authority of the Conferee to compromise on the basis of a doubtful legal liability on the part of the taxpayer on a particular issue, or on the basis of an appraisal of the strength of legal argument on a given point, thus limiting the area for settlement negotiations principally to "fact" issues.

c) Danger to the taxpayer that new issues will be raised by the Government as the result of an unsuccessful informal conference, thus adding to the taxpayer's "burden of proof" problem in the event of litigation.107

d) Finally, reluctance on the part of the Conferee at the informal conference level to take the responsibility for the settlement of larger and more complex cases.108

Knowledgeable observers have concluded that the informal conference procedure is advantageous mainly to the small taxpayer, since it

107 Taylor, in *Tax Controversies: Some Administrative and Litigative Aspects*, 1962 So. CALIF. TAX INST., p. 262, points out that:

"Although the policy of the Internal Revenue Service as announced in Rev. Rul. 53-266 is not to raise new issues in defense or settlement negotiations 'unless the ground for such action is a substantial one and the potential effect upon tax liability is material,' as a matter of practice, new issues are frequently raised."

permits him to present his case orally and without the necessity of employing counsel; that the procedure also permits the quick and economical disposition of cases in which the Revenue Agent is clearly wrong on the law; and that beyond this, however, the procedure is of doubtful value.\textsuperscript{109}

At the higher levels, namely, in the Appellate Division of the office of the Regional Commissioner, the quality of review, both in the pre-90 day and post-90 day stages, generally is good; settlement authority is broad and on the whole, is fairly, though "toughly," exercised.

2. Establishing Procedures for "Trials" by "Hearing Officers" or "Examiners" in Cases Involving Limited Amounts.

We must not forget that in pre-Board of Tax Appeals days, there were procedures within the Internal Revenue Service itself for determining controversies between the "aggrieved" taxpayer and the Commissioner.\textsuperscript{110}

The system proved to be inadequate for two main reasons: (a) after an adverse decision, the taxpayer had no recourse but to pay the tax and then sue for a refund; in other words, there was no court review without prepayment of the proposed deficiency, and (b) the suspicion that decisions by employees of the Internal Revenue Service itself could not be "fair" to the taxpayer.

It is suggested that one of the most serious gaps in the entire procedural machinery within the Internal Revenue Service is the failure to provide a quick and fair forum for the disposition of disputes before an assessment is proposed, other than on the basis of a negotiated settlement. The Tax Court dockets are replete with contested cases involving small sums of money, usually relating to (a) travel and entertainment expense items; (b) other "ordinary and necessary" business items; (c) dependency exemptions; (d) depreciation issues, etc.

It would seem that taxpayers feeling "aggrieved," and unable to settle these cases for a multiplicity of reasons within the framework of the Internal Revenue Service settlement machinery, should not be compelled to incur the expense and delays necessitated by a proceeding in the Tax Court.

The lessons of other administrative agencies, both federal and state, are clear. Hearings or trials by "hearing officers" or "examiners," as they are variously called, with full power to decide issues of fact under adequate "due-process" safeguards, with finality in effect except for limited right to "review" or to "de novo" proceedings in courts of law,

\textsuperscript{109} The Mills Sub-Committee Advisory Group, which had studied this problem, concluded that "the informal conference procedure is apparently working satisfactorily in the handling of smaller cases and less complex cases but, in the view of the Advisory Group, it is of small value when applied to the larger or more complex cases." (Mills Sub-Committee Report, p. 45).

\textsuperscript{110} MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 50.02; 1 CASEY, FEDERAL TAX PRACTICE, Sec. 6.1.
are well-established, and generally have been acknowledged as a necessary feature in this age of multiplying administrative agencies.\footnote{Kuckman, \textit{The Role of the Hearing Officer: A Private Practitioner's Point of View}, 44 \textit{CALIF. L. REV.} 212 (1956); Fuchs, \textit{The Hearing Officer Problem — Symptom and Symbol}, 40 \textit{CORNELL L. Q.} 281 (1955); Rutledge, \textit{Administrative Trial Examiners: The Anonymous "Masters"}, 30 \textit{WASH. L. REV.} 26 (1955).} There would seem to be no valid reasons why a similar machinery cannot and should not be established within the framework of the Internal Revenue Service.

By way of suggestion only, certainly subject to refinement and improvement, the outline of such a system could be:

a) Hearing officers, though employed by the Internal Revenue Service, would be especially trained for the exercise of judicial functions, would be engaged full-time in this work, would be well paid so as to indicate a superior status in training and quality of the work expected, and should develop within a short span of time, if so directed, attitudes of independence and detachment from the primary functions of other personnel in the Internal Revenue Service, so as to guarantee fairness in their decisions.\footnote{See authorities \textit{op. cit.}, fn. 111, \textit{supra}.}

b) One or more full-time hearing officers, depending on the volume of litigation in that area, would be installed in the offices of each District Director.

c) Recruiting, training, and supervision of the activities of the hearing officers would emanate from the National Office of one of the Assistant Commissioners, but through him would be de-centralized in the office of one of the Assistant Regional Commissioners within which is the jurisdiction of the particular District Director.

d) Jurisdiction will be vested in the hearing officer by written consent on the part of the taxpayer at the pre-90 day letter stage.

e) Controversies would be limited to cases or issues where the proposed deficiency assessment, excluding penalties and interest regardless of what type of taxes are involved, does not exceed $1,000.00 per tax year.

f) Decisions of the hearing officer would be final, would be recorded in the form of a written “opinion,” and if adverse to the taxpayer, to that extent, assessment would immediately be made without opportunity for further “conferences” and “protests” within the Internal Revenue Service.

It is believed that a system substantially as indicated: (a) would do a great deal to eliminate resentment by many taxpayers at “unfair” settlements or at “unfair” assessments made without reaching settlements; and (b) taxpayers, not willing to avail themselves of this “hearing” procedure, would in no way be prejudiced since they would
retain their rights to Tax Court, District Court, or Court of Claims review.

3. Decentralizing Action Where "Consent" of the Commissioner is Required.

We have previously seen that an area of potential abuse exists where the Commissioner's consent is required by the taxpayer in various situations such as: (a) change of accounting method; (b) change of bad debt method; (c) change in method of depreciation, etc. As the law now stands, there is no internal administrative review available to the taxpayer in these situations, since the taxpayer's application for the Commissioner's consent is initially made "at the top," that is, directly to the "National Office" in Washington. Request for the Commissioner's consent could be made directly to the local District Director in the same manner as a request for a letter of determination. A review of the Director's action could also be provided at the level of the Regional Commissioner.113

4. Stricter Inspection Service Needed to Eliminate the "Fixing" Image.

Realizing that "pay-offs" and "fixing" are "dirty" words, candor nevertheless compels some discussion on this distasteful subject.

Strict enforcement activities conducted by the Government, often resulting in painful sanctions against the very small segment of "cheating" taxpayers, are justified, in spite of the fact that the great majority of taxpayers do their best to be honest in their dealings with the Internal Revenue Service. Otherwise, it is feared that the honest taxpayer would become turgid in his enthusiasm for honesty, if he thought that the dishonest taxpayer was not vigorously pursued and punished.

In the same frame of reference, as long as some taxpayers, no matter how few, are able to insist, and in some cases even boastfully, that they "did not get hurt" because they were able to "fix" or have someone else "fix" a potentially dangerous or expensive situation, the morale of the entire tax-gathering system is weakened. In some areas of this country, "fixing" activities are rumored to be widespread and even endemic. This is a cancer which, if it spreads, would eat away at the entire self-assessment system. It is not a sufficient answer for responsible Government representatives to claim that it is impossible to eradicate these malfeasors. An enlarged and improved Internal Security Division within the Internal Revenue Service with the active assistance of the Department of Justice should be able to eliminate these offenders,

113 For example, Regs. 1.446-1(3) (change in method of accounting) and Regs. 1.442-1(b) (change of accounting period) provide that in order to obtain the consent of the Commissioner to the requested changes, the taxpayer must file a petition in Washington, D.C.; nothing is said about pre-Washington procedures or about reviews from the Commissioner's action after filing the petition in Washington.
particularly if severe punishment is meted out both to the "fixer" and to the "fixee."\textsuperscript{114}

V

CONCLUSION

1. If "abuse" of administrative "discretion" is properly defined, its existence is not wide-spread.

2. There is room for additional statutory "relief" which would tend to reduce situations where "abuses" may occur at the administrative level.

3. The processes of review and interference by courts should be unfettered from some of the present restraints.

4. There is room for improved procedures within the administrative agency itself which would afford the "aggrieved" taxpayer speedy and fair disposition of his controversy, and which in turn would in itself constitute for him "relief" from what he would have considered an "abuse" of administrative discretion.

\textsuperscript{114} "The IRS has initiated a new campaign aimed at weeding out and prosecuting those taxpayers, and a few unscrupulous practitioners, who offer bribes to Service personnel in return for favorable tax treatment. The Service has recognized that such conduct threatens to undermine the entire tax structure and it is determined to stamp it out at its roots. Commissioner Caplin has urged Agents to report all bribery offers. The campaign has already brought excellent results. Over 60 suspected bribery offers were reported in the twelve month period ended August 31, 1962. This compares with the 14 reported bribe offers for an entire two-and-one-half year period ending in 1960. Convictions have already been obtained in several of the newly reported cases. The Treasury is considering asking for legislation to eradicate another pernicious practice with which the Department has been unable to cope. This is the practice, by some preparers of tax returns, of falsely representing to a client that they require a sum of money to 'bribe' an Agent, and then pocketing the money themselves." 17 J. Taxation 384 (1962).