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Note of the Year: The Tax Ramifications of Catching Home Run Baseballs

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2008 NOTE OF THE YEAR

THE TAX RAMIFICATIONS OF CATCHING HOME RUN BASEBALLS

I. THE RECENT HISTORY OF HOME RUN BASEBALLS

The summer of 1998 marked the rebirth of America's pastime, Major League Baseball, following several years of stunted growth caused by 1994's player strike. The resurgence is attributed in large part to the general public's fascination with the summer-long chase of Roger Maris's single-season record of sixty-one home runs. The St. Louis Cardinals' Mark McGwire and his Popeye-esque forearms led the charge, blasting twenty-seven home runs before the end of May, putting him on pace to hit more than eighty home runs by season's end.¹ In June, the Chicago Cubs' "Slammin'" Sammy Sosa smashed twenty home runs to set the all-time single-month home run record and position himself just four home runs behind McGwire, thirty-seven to thirty-three, beginning the season-long race to sixty-one.²

On August 10, Sosa finally caught McGwire, hitting his forty-fifth and forty-sixth home runs. The two sluggers battled back and forth, tying for the lead several times over the remainder of the season—at forty-seven, fifty-five, sixty-two, sixty-three, sixty-five, and sixty-six.³ McGwire finished as the winner, hitting his seventieth home run on the final day of the season.⁴ However, on September 7, in the midst of the home run mania, *The New York Times* published an article discussing the potential tax ramifications of catching the

¹ Baseball-Almanac.com, Mark McGwire's Seventy Home Run Season, <http://www.baseball-almanac.com/feats/feats1.shtml> (last visited Aug. 9, 2008).

² Ira Berkow, *A Hacker Becomes a Hitter; Sosa Shows Patience at the Plate in His Finest Season*, N.Y. TIMES, July 1, 1998, at C1.

³ Baseball-Almanac.com, Sammy Sosa's 66 Home Run Season, <http://www.baseball-almanac.com/feats/feats12.shtml> (last visited Aug. 9, 2008).

⁴ See Mark McGwire's Seventy Home Run Season, *supra* note 1.

record-breaking sixty-second home run, creating a storm of controversy that rivaled the attention around the home run race.⁵

Bill Dedman's "Fan Snaring No. 62 Faces Big Tax Bite" outlined the basic gift tax structure, pointing out that a fan in a \$10 seat who chose to return the record-setting ball to McGwire could face over \$150,000 in gift taxes, while McGwire would owe nothing.⁶ In the article, Internal Revenue Service ("Service") spokesman Steven J. Pyrek confirmed that the person who caught the ball would face significant tax liability because, under federal law, "[t]he giver of the gift is required to file the gift tax return."⁷ Dedman went on to discuss several possibilities regarding the taxation of the record-setting ball, including how it could be taxed, when tax would accrue, the potential application of capital gains rates, and how giving the ball to a charity would affect taxation, but the national media immediately focused on the possibility that a well-meaning baseball fan trying to give the ball back to an American sports hero could be left with a six-figure tax bill.⁸ Nearly every major newspaper in the country derided the Service for even entertaining the possibility of taxing the fan that gave the ball back to McGwire. In *The New York Times* alone, the Service's stance was mentioned in each of the next two days' issues.⁹

On September 8, 1998, the Service issued News Release 98-56 ("IR-98-56"), explaining the basic income and gift tax principles that would apply to a baseball fan who catches a home run ball and immediately returns it.¹⁰ The release stated that "[i]n general, the fan in these circumstances would not have taxable income."¹¹ The Service's determination was "based on an analogy to principles of tax law that apply when someone immediately declines a prize or returns unsolicited merchandise."¹² The Service also specified that there would be no gift tax, but the results "may be different if the fan decided to sell the ball."¹³ The release concluded with a strange quote from Service Commissioner Charles O. Rossotti: "Sometimes pieces of the tax code can be as hard to understand as the infield fly rule. All

⁵ Bill Dedman, *Fan Snaring No. 62 Faces Big Tax Bite*, N.Y. TIMES, Sept. 7, 1998, at D1.

⁶ *Id.*

⁷ *Id.* (quoting Steven J. Pyrek).

⁸ *Id.*

⁹ George Vecsey, *Many Joys of a Home Run Lovefest*, N.Y. TIMES, Sept. 8, 1998, at D1; George Vecsey, *A MIGHTY SWING, A GRAND RECORD: After 37 Years, McGwire Passes Maris*, N.Y. TIMES, Sept. 9, 1998, at D1.

¹⁰ I.R.S. News Release IR-98-56 (Sept. 8, 1998) [hereinafter IR-98-56].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

I know is that the fan who gives back the home run ball deserves a round of applause, not a big tax bill.”¹⁴ For the public, this ended the controversy for nearly a decade. However, IR-98-56 itself turned out to be one of those hard-to-understand pieces of the tax code.

On August 21, 2007, the controversy was rekindled on a national scale when Matt Murphy, the New York Mets fan who caught Barry Bonds’ record-breaking 756th home run ball, announced that he was going to sell the ball due to the “financial incurrences [sic] that come with keeping this major part of history.”¹⁵ Murphy “decided to sell the ball because [he realized] it would cost [him] a lot more than [he had] to keep [it],” after advisers informed him that he could be taxed if he kept the ball.¹⁶

Murphy’s stated reason for selling the ball, true or not, sparked another short-lived media frenzy concerning taxation of home run baseballs. IR-98-56 did not apply to Murphy’s situation, which involved keeping the ball and concerned income tax, because IR-98-56 dealt only with the gift tax treatment of home run baseballs in the event the ball was returned to the player. Despite the subsequent intense media interest, Internet bulletin board buzz, rampant speculation by tax commentators and attorneys, various comments from Congressmen decrying the idea of taxing the Average Joe at a baseball game, and no clear answers in the Internal Revenue Code (“Code”), both Congress and the Service have remained silent on the issue. The result of this silence is that the situation Murphy found himself in—unsure if he would be taxed merely for keeping the ball—is not clearly addressed by current law. It is also unclear whether donating the ball could lead to any tax liability or tax benefit, or if anyone at all has to accept responsibility for tax liability under the specific facts outlined by IR-98-56.

Absent clarification from either Congress or the Service, the only way to find out how the Service would treat such a situation is to enter a course of action which could lead to enormous tax liability. Most baseball fans sitting in the outfield bleachers cannot afford to

¹⁴ *Id.* (quoting I.R.S. Commissioner Charles O. Rossotti).

¹⁵ *Lucky Fan to Auction Bonds’ 756 Ball*, ABC NEWS, Aug. 21, 2007, <http://abcnews.go.com/Sports/story?id=3507057&page=1>.

¹⁶ *Id.* (quoting Matt Murphy). The ball ultimately sold for \$752,467 to fashion designer Marc Ecko, who allowed the public to vote on the ball’s fate. Ultimately, it was decided that an asterisk would be branded on the ball, which would then be sent to the National Baseball Hall of Fame and Museum. Associated Press, *Bonds’ No. 756 Ball Generates More Than Initial Estimates*, ESPN.com, Sept. 16, 2007, <http://sports.espn.go.com/mlb/news/story?id=3022027>. The branded 756 ball was donated to the Hall of Fame on July 1, 2008, with an asterisk dye-cut into the leather. Associated Press, *Back-and-Forth Talks over Bonds HR Ball Ends with Ball in Hall of Fame*, ESPN.com, July 2, 2008, <http://sports.espn.go.com/mlb/news/story?id=3469308>.

take that chance, effectively resulting in only two choices for the lucky fan catching the ball: give the ball to the player that hit it or sell the ball before the end of the year. In order to resolve this legal ambiguity and give the lucky fan four true options without the fear of enormous tax liability, this Note proposes a rule, based on Major League Baseball's rulebook, which effectively deals with every possible situation involving a fan who catches a valuable home run baseball. The proposed rule would put off accrual of value in the ball until after the fan catches it—thereby eliminating any possible income tax—and allow the lucky fan to return the ball to the player that hit it or donate the ball to charity with no tax liability to any party.

This Note will also examine: a) how IR-98-56 and current law treat each situation; b) why they are inadequate for dealing with these situations; c) how the proposed rule would satisfactorily deal with every foreseeable situation involving a caught home run baseball; and d) why the results are consistent with the Code and beneficial to Congress, the Service, and the public.

II. CURRENT LAW AND IR-98-56

A. A Brief Overview of Gift and Income Taxation As They Affect Home Run Baseballs

Chapter 12 of the Code specifies that if anyone gives a gift, the giver must report the gift and pay the applicable gift tax, which can reach a total of nearly 50 percent of the gift's total value.¹⁷ A separate annual exclusion applies to each individual you make a gift to and excludes the first \$12,000 of any gift made to any individual in the year 2007.¹⁸ In addition, every individual has a lifetime gift tax credit of \$345,800 (offsetting \$1,000,000 in total gifts), which can be applied to negate the gift tax on any gifts made in excess of \$12,000 during the individual's lifetime.¹⁹

Absent IR-98-56, the law dictates that if a lucky fan gave away a home run baseball valued at \$1,000,000, the lucky fan could use his annual exclusion of \$12,000, plus \$988,000 of his \$1,000,000 lifetime exclusion, and owe no gift tax. However, the gift tax exclusion is

¹⁷ See I.R.C. § 2502(a) (2000 & Supp. 2005) (directing taxpayers to § 2001(c) for the current rate schedule); § 2001(c) (outlining the current rate schedule for gift and estate taxation).

¹⁸ I.R.S., U.S. DEP'T OF TREASURY, PUBL'N NO. 950, INTRODUCTION TO ESTATE AND GIFT TAXES 6 (rev. Sept. 2008). I.R.S. Publications are designed to assist taxpayers who prepare their own income tax returns, and they contain warnings against taxpayer reliance, noting that they cover only the most common tax situations. CCH TAX LAW EDITORS, UNDERSTANDING IRS COMMUNICATIONS ¶101 (3d ed. 1993).

¹⁹ See I.R.S., PUBL'N 950, *supra* note 18, at 5.

most often used to dispose of property towards the end (or after) one's lifetime in order to avoid estate taxes. If the lucky fan chose not to use his lifetime exclusion, he would owe approximately \$340,000 in gift tax.²⁰ The decision of the Service in IR-98-56 to liken this situation to a declined prize has solved this problem and eliminated the lucky fan's gift tax liability without having to use the lifetime gift tax credit.

However, the issue of income tax remains unaddressed. Normally, a taxpayer must report all income, currency or otherwise, on his income tax returns and pay the appropriate tax according to a scale based on gross income.²¹ IRS Publication 525 appears to include a home run baseball in such income: "If you find and keep property that does not belong to you that has been lost or abandoned . . . it is taxable to you at its fair market value in the first year it is [in] your undisputed possession."²² A very strong argument has been made by Professor Paul Finkelman that a home run baseball should be considered abandoned property, which then comes into the undisputed possession of the lucky fan who catches it.²³ Whether or not the Service shares this view, it would appear that a lucky fan doing anything other than giving the ball back to the player likely has taxable income of some sort.²⁴ IR-98-56 itself gives the impression that catching the ball is a taxable event by likening the ball to a prize or award.²⁵ Normally, anyone who keeps a prize or award must report its value as income.²⁶

As an example of what gift and income taxes could potentially mean to a lucky fan, consider this example: an unmarried lucky fan that caught a home run ball valued over \$250,000 would fall into the highest tax bracket and must pay income tax in the amount of \$75,528.50 plus 35 percent of the excess over \$250,000.²⁷ This,

²⁰ After the annual exclusion of \$12,000, the gift's value would be \$988,000. Based on the rate schedule of I.R.C. § 2001(c), the fan would owe \$248,300 on the first \$750,000, plus 39% of the remaining \$238,000.

²¹ See I.R.C. § 61(a) (2000) (defining gross income).

²² I.R.S., U.S. DEP'T OF TREASURY, PUBL'N NO. 525, TAXABLE AND NONTAXABLE INCOME 30 (2007).

²³ See Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609 (2002).

²⁴ For a more in-depth analysis of the theories behind taxation of found objects, including home run baseballs, see Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 4 FLA. TAX REV. 685 (2000).

²⁵ See IR-98-56, *supra* note 10.

²⁶ See I.R.C. § 74(a) (2000) ("[G]ross income includes amounts received as prizes and awards.").

²⁷ See I.R.C. § 1(c) (West 2002 & Supp. 2008) (explaining how to determine the taxable income of an unmarried individual).

combined with the applicable gift tax of \$340,000, would leave a fan who caught and gifted a home run baseball valued at \$1,000,000 with a tax liability of over \$650,000. IR-98-56 adequately eliminates the gift and income tax liability for a lucky fan giving the ball to the player, but if the lucky fan holds on to the ball, he still faces potential income tax liability approaching \$350,000. The reality of this income tax effectively forces any baseball fan who is not independently wealthy to sell the ball rather than keep it.

B. Problems with IR-98-56's Reasoning

When the Service issued IR-98-56, it was reacting to the media uproar over the potential gift tax liability for a fan that nobly returns the record-breaking home run ball to McGwire. It came just a day after Dedman's article created the uproar and does not appear to have received the care and attention that most Service press releases would. IR-98-56 likens a fan catching a home run baseball and returning it to the player to someone declining a prize or returning unsolicited merchandise.²⁸ In the event of a declined prize, there is neither income tax—because the receiver of the prize never established dominion over the property²⁹—nor gift tax—because the item was merely returned to its previous owner. While the result of such treatment is beneficial to both the player and the lucky fan, IR-98-56 leaves large gaps in the analysis and does not hold up to even the most cursory analysis.³⁰

The most glaring problem with the Service's analogy is the difference between declining a prize and giving the baseball back to the player who hit it. When a prize is declined, this functions as a refusal to accept property that belongs to another individual. The awarding individual thereby retains dominion over the prize and is free to do with it as he wishes. The awarding individual gains nothing through this transaction—he merely keeps what he already had. If he so chooses, the individual can select another winner, who then has the option of accepting or declining.

²⁸ See IR-98-56, *supra* note 10.

²⁹ See Rev. Rul. 57-374, 1957-2 C.B. 69 (explaining that a declined prize's fair market value is not includable in gross income for Federal income tax purposes). A Revenue Ruling is "an official interpretation by the [Service] of the internal revenue laws." CCH TAX LAW EDITORS, *supra* note 18, ¶ 74. They are published "to provide precedents to be used in the disposition of other cases and may be cited and relied upon for that purpose." *Id.*

³⁰ See Darren Heil, Comment, *The Tax Implications of Catching Mark McGwire's 62nd Home Run Ball*, 52 TAX LAW. 871 (1999), for a deeper analysis of IR-98-56 and some of the ideas presented in this section.

In the context of a home run baseball, however, there is no individual doing the awarding. At best, the home team would be the awarding organization, as it traditionally purchases and supplies the baseballs for the game. However, there is a long history that supports the idea that a baseball is abandoned whenever hit into the stands, via a home run, foul ball, or being tossed there by a player.³¹ If the home team has abandoned the ball, it does not make sense to then treat the abandoned ball as a prize. In addition, when the fan gives the player the ball, it is not being returned to an original owner; it is being transferred to a third party who never had any ownership interest.³²

Furthermore, while it is established that an individual may decline a prize without tax consequences³³ or assign certain prizes to a third party organization,³⁴ either action must be done “before the taxpayer uses the item that is awarded.”³⁵ This presents two problems. The first problem is that a transfer to a third party is allowed only in certain circumstances specified by Code § 74: the prize or award at issue *must be* “in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement.”³⁶ The lucky fan who catches a home run ball has not been rewarded for anything other than being in the right place at the right time and, therefore, should not fall into this exception.

The second major problem is that if the lucky fan receives anything at all for returning the ball, he has likely used the ball in a way that disqualifies him from receiving any kind of tax-free treatment.³⁷ While the lucky fan may not receive the full value of the ball, he will likely receive something of value from the player, the team, or both. For instance, Tim Forneris, who caught and returned McGwire’s sixty-second home run in 1998, got the chance to meet McGwire in a nationally televised ceremony, was given an array of baseball memorabilia, met with then-President Bill Clinton, appeared on nationally broadcast television shows, took a free trip to Disney World, and is forever known as the man who graciously returned the

³¹ See Finkelman, *supra* note 23, at 1621–24 (explaining the “Common Law of Baseball”).

³² Though an argument could be made that the player has some property right because the ball’s value is due to his effort, the long history of considering home run balls as belonging to the fans likely nullifies any such argument.

³³ See Heil, *supra* note 30, at 877.

³⁴ I.R.C. § 74(b) (2000).

³⁵ Rev. Proc. 87-54, 1987-2 C.B. 669, 670.

³⁶ I.R.C. § 74(b).

³⁷ See Rev. Proc. 87-54, 1987-2 C.B. at 670 (“[I]n order to qualify for the . . . exclusion . . . the designation must be made . . . before the taxpayer uses the item that is awarded.”); see also Heil, *supra* note 30, at 877 (discussing tax-free treatment).

record-breaking home run ball to McGwire.³⁸ It is difficult to say that Forneris received nothing for the return of the ball; therefore, he is likely disqualified from tax-free treatment.

The other half of the Service's analogy is equally tenuous: can it be said that the fan returned unsolicited merchandise? According to General Counsel Memorandum³⁹ 36,639, unsolicited goods are considered accepted when the recipient manifests intent to accept the property or exercises complete dominion over the property.⁴⁰ At the time McGwire hit the ball, Forneris and his brother, Tino, were working behind the outfield fence.⁴¹ Both "joined other members of the ground crew in a mad dash to where they thought it would land."⁴² It is difficult to say with a straight face that Forneris did not intend "to exercise complete dominion" over the ball.

Forneris clearly intended to get the ball and do with it what he believed was right—return the ball to McGwire. He joined in a "mad dash" for the ball with the intention of possessing it for himself, to do with as he wished. In addition, he competed with other members of the ground crew, denying them the right to claim the ball for themselves and do with it as they pleased. These facts clearly show Forneris's intent to exercise dominion over the ball. In light of this, it cannot be said that the "merchandise" was unsolicited or that Forneris did not have an intent to exercise dominion over the ball.

The next step in the analysis is to determine whether Forneris might have mitigated his intention to exercise complete dominion over the ball by returning it to a Cardinals representative to give to McGwire.⁴³ While it has not been established that you can mitigate an intention to exercise complete dominion, the situation will be analyzed for the sake of argument. General Counsel Memoranda advise that timing is essentially irrelevant in determining whether a person has exercised complete dominion over an object. The Service has said that intent to exercise complete dominion can be manifested

³⁸ Heil, *supra* note 30, at 877.

³⁹ General Counsel Memoranda are "legal analyses prepared by the Office of the Chief Counsel . . . [and] usually written in response to a formal request for legal advice in connection with some revenue rulings, private letter rulings, or technical advice memoranda." CCH TAX LAW EDITORS, *supra* note 18, ¶ 91 (citations omitted).

⁴⁰ I.R.S. Gen. Couns. Mem. 36,639 (Mar. 22, 1976) (explaining that a Congressman manifested intent to exercise dominion over property by donating it and claiming a charitable deduction, and the property's value must be counted in gross income).

⁴¹ Associated Press, *Finder: Groundskeeper: Crewman Returns No. 62; Bat, Uniform Also Headed to Cooperstown*, CNN/SPORTS ILLUSTRATED, Sept. 9, 1998, http://sportsillustrated.cnn.com/baseball/mlb/news/1998/09/08/the_ball/.

⁴² *Id.*

⁴³ See Heil, *supra* note 30, at 875 (noting that because Forneris relinquished possession of the ball quickly and gave the ball to the Cardinals, a likely agent of the former owner of the ball, he mitigated his intent to have complete dominion over the ball).

prior to actual receipt of an item, and that holding an item for months may not satisfy the intent requirement.⁴⁴ These two determinations show that the amount of time an object is held is irrelevant to whether a person has manifested intent to exercise complete dominion over an object; therefore, the small amount of time the baseball was held by Forneris is irrelevant in the determination of whether Forneris intended to exercise complete dominion over the ball. This precludes any argument that Forneris could not have incurred any tax liability because of how quickly he returned the ball.

Additionally, the fact that Forneris returned it to an agent of the St. Louis Cardinals, rather than McGwire himself, cannot establish that he returned the ball to the original owner, as his intent was that McGwire ultimately receive the ball.⁴⁵ Furthermore, due to his intention to give the ball to McGwire, rather than back to the team, any claim that Forneris did not intend to exercise dominion over the ball is likely faulty.⁴⁶ Both General Counsel Memorandum 36,639 and Technical Advice Memorandum 81-09-003 establish that a taxpayer demonstrates an intent to exercise complete dominion over an object by transferring it to a third party.⁴⁷ Had Forneris given it to a Cardinals agent with no intention of it ultimately reaching McGwire, the second prong of the analysis may support the comparison of his situation to a return of unsolicited merchandise; however, as mentioned above, it is inconclusive whether such action could mitigate an intent to exercise complete dominion.

Ultimately, IR-98-56 creates a legal fiction with no justification other than the end result. It takes a situation that should involve both income and gift tax consequences and, by application of a rule that neither applies nor fits the facts, transforms it into a situation with no tax whatsoever. IR-98-56 muddles up the law with respect to other

⁴⁴ See I.R.S. Gen. Couns. Mem. 36,865 (Sept. 29, 1976) (finding that a taxpayer had property rights in property for tax purposes at the time he requested the property from his employer); I.R.S. Gen. Couns. Mem. 36,639 (Mar. 22, 1976) (finding that although a Congressman had possession of books for a long period of time, he did not manifest the requisite intent to exercise dominion over the books until he donated them to charity and took a charitable deduction).

⁴⁵ See Heil, *supra* note 30, at 875–76.

⁴⁶ See *id.* for further discussion.

⁴⁷ See I.R.S. Gen. Couns. Mem. 36,639 (holding that the Congressman donated books to charity and therefore exercised dominion over them); I.R.S. Tech. Adv. Mem. 81-09-003 (Oct. 31, 1980) (finding a taxpayer intended to exert complete dominion over unsolicited tickets when he transferred the tickets to third parties). Technical Advice Memoranda (“TAM”) contain advice or guidance in response to any technical or procedural question that develops during any proceeding on the interpretation and application of tax law and other precedents to a specific set of facts. “The [Service] maintains that a taxpayer may not rely on a TAM issued to another taxpayer,” but a TAM does give insight as to how the Service may treat an issue. CCH TAX LAW EDITORS, *supra* note 18, ¶ 83.

scenarios, completely ignores the fact that the lucky fan has gained something, ignores the fact that the ball was not returned to its original owner, and appears to ignore the fact that the player has received something of value.

C. The Service Cannot Accurately Determine the Ball's Value Prior to Sale

If the Service's IR-98-56 analogy likening the home run ball to an award or prize is accepted, this leads to the conclusion that keeping the ball is analogous to keeping a prize.⁴⁸ The Code clearly states that "gross income includes amounts received as prizes and awards";⁴⁹ thus, catching the home run ball should be a taxable event. If catching a home run ball is viewed as a taxable event, there remains the task of attaching a value to the baseball. In the event of a normal sale, this is easy enough—the sale price is the value for income tax purposes. However, what happens if the lucky fan opts to keep the ball for himself or donate it to charity, two events not covered by IR-98-56?

The majority of tax law's valuation questions arise in the context of charitable donations—there often is no recent sale price, and Code § 170(f) specifically requires qualified appraisals for any contribution of property claimed to be worth more than \$5,000.⁵⁰ Federal courts have dealt with a host of issues involving claimed deductions and the methods of appraisal used by taxpayers and their agents, and it is likely that the same types of analyses would be used in coming to an appropriate value for a home run baseball for income tax purposes.

However, several obstacles stand in the way of accurate appraisal of home run baseballs. The first major obstacle is that home run baseballs are one-of-a-kind. While there may be five or six new high-value home run balls each year, they all have different numbers attached to them, or are hit by different players or in different seasons when fans have different outlooks on the game as a whole. McGwire's seventieth home run ball sold for over \$3,000,000, while Bonds' seventy-third home run ball sold for \$517,500.⁵¹ Considering this disparity, how can anyone accurately predict what value to attach to a certain ball hit by a certain player at a certain time? While there is a market for record-setting home run balls, there is no market for any

⁴⁸ See IR-98-56, *supra* note 10.

⁴⁹ I.R.C. § 74(a) (2000).

⁵⁰ I.R.C. § 170(f) (West 2002 & Supp. 2008).

⁵¹ Matt Bean, 'Million-Dollar' Bonds Ball Sells for \$450,000, COURT TV NEWS, June 25, 2003, http://www.courtvtv.com/trials/baseball/ballsold_ctv.html.

one particular record-setting ball, which makes estimating value little more than guess work.

A second obstacle is the timing of the appraisal. Generally, the value of found property for income tax purposes is the property's value at the time it came into the undisputed possession of the taxpayer. If a ball is estimated to be worth \$500,000 at the time of the catch (with income tax liability of over \$150,000) but quickly drops in value over the following months to less than \$100,000,⁵² the Service should give the ball a value of \$500,000 for income tax purposes. One could argue that the lucky fan should sell the ball and realize his loss by the end of the year, thus eliminating any excess tax liability; but what if there is a strong feeling the ball will be worth more in ten years? At best, the lucky fan could pay \$150,000 in taxes on a ball worth less than \$100,000 in the hope that the ball's value increases in the future. The ball, obviously, would be a better investment for a person who bought the ball at its reduced value from the lucky fan—she would have less money invested in it. This line of reasoning also shows that the lucky fan is effectively forced to sell the ball.

The unreliability of the estimated values of sports memorabilia is another huge obstacle for correct valuation of home run balls. As an extreme example, Bonds' single-season record-setting seventy-third home run ball of 2001 was estimated to be worth around \$1,500,000 at the time it was hit and \$1,000,000 immediately prior to sale, but ultimately sold for only \$517,500 at auction—less than the income tax bill of a \$1,500,000 ball.⁵³ In 1998, McGwire's single-season record-setting seventieth home run (later surpassed by Bonds in 2001) was expected to sell for approximately \$1,000,000 and ended up selling for \$3,200,000 at auction.⁵⁴ Bonds' seventieth home run ball (hit in the 2001 season) recently sold for just \$14,400 after being originally valued at \$30,000 and originally sold for \$60,000.⁵⁵

In addition, one man likely pulled up the market for all record-setting balls by offering extraordinarily high prices in order to augment his collection. Todd McFarlane, a noted comic book artist, toy maker, and baseball fan, has a collection of McGwire, Sosa, and Bonds home run balls (including the two record-setters mentioned above), most bought at a value considerably above the original

⁵² This could occur for any number of reasons, such as the player being associated with performance enhancing drugs.

⁵³ See Bean, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ Associated Press, *Bonds' 70th Home Run Ball Fetches Meager \$14K at Auction*, ESPN.com, Aug. 4, 2007, <http://sports.espn.go.com/mlb/news/story?id=2961188>.

estimated value.⁵⁶ The balls are worth more to McFarlane than to almost anyone else on the planet because they complete a set when in his possession, evidenced by his willingness to pay far more than estimated value. Thus, when he is thought to be interested in a ball, the estimated value will likely go up for that reason alone. This raises a related issue as to whether the collection alone distorts a ball's value, since, absent McFarlane's collection, the ball is possibly worth far less.

When there is such disparity between estimated values and auction prices, and the ability for one person to so drastically alter the market, is there any way for the Service to accurately value any one ball? Does the estimated value go up if McFarlane is known to be interested, or down if he is not? Such unanswered questions strongly support deferring any tax until the ball is sold.

The first step in claiming the ball as income would be for the lucky fan to immediately have a qualified appraiser estimate the ball's value. Unfortunately, this is where the above-mentioned obstacles come into play, and where the lack of a true market makes such an appraisal little more than speculation. Unlike with gemstones, there are no like objects with which to compare under a microscope—indeed, it is not the physical properties of a ball that determine its worth at all, but its social and historical significance.

Also, unlike with a variety of antiques, there are no previous sales of a Barry Bonds seventy-third home run ball or a Mark McGwire seventieth home run ball. These are events that happen only once, ever, and can never be reproduced. In fact, the market is so unpredictable that even standard-issue sports memorabilia pieces that do not have such modern cultural relevance are virtually impossible to estimate properly. In 1999, Barry Halper auctioned off what was then recognized as the largest and finest private collection of baseball memorabilia in the world for a total of nearly \$22,000,000.⁵⁷ High estimates prior to the auction valued the entire collection at about \$10,000,000, and reports show that 85 percent of the items actually sold for more than their highest previous estimated values.⁵⁸

⁵⁶ See Spawn.com, The McFarlane Collection, <http://www.spawn.com/collection/intro.html> (last visited Aug. 9, 2008), and accompanying web pages, for information on McFarlane's personal collection.

⁵⁷ See Professional Sports Authenticator, Sotheby's Wins World Series of Sports Auctions: Barry Halper Collection Totals \$21,812,577, <http://www.psacard.com/articles/article1511.shtml> (last visited Aug. 9, 2008). Halper was a world famous memorabilia collector, a "one-man Smithsonian" that once owned more than 80,000 individual baseball items. Richard Goldstein, *Barry Halper, 66; Once Owned Many Historic Baseball Items*, N.Y. TIMES, Dec. 20, 2005, at A29.

⁵⁸ Professional Sports Authenticator, *supra* note 57.

As demonstrated above by the disparity of estimated values and auction sale prices, estimating the value of home run baseballs is, at best, a game of guesswork founded on little more than base assumptions. An appraiser can have no idea how much McFarlane or the next Barry Halper may be willing to pay for any specific ball unless they say so, which they certainly will not.

Even if a reliable appraisal could be made, what if the lucky fan did not get an immediate appraisal? Would the Service accept an appraisal dated in December for a ball hit in August? It is quite possible that the ball's value could have changed by more than 100 percent by that time. Would the Service attempt to hire another appraiser and instruct him to give an estimated value of the ball as of the date of the catch? Would that even be possible?

The unreliability of sports memorabilia appraisals coupled with the volatile and unpredictable nature of the market show that the value is almost impossible to estimate with any accuracy. Therefore, the Service should look to adopt a rule that defers any taxation until there is a sale that sets an undisputed price for the home run ball.

III. POTENTIAL ACTIONS OF THE LUCKY FAN THAT CATCHES THE BALL AND THEIR TREATMENT UNDER CURRENT LAW

In the event a fan is lucky enough to catch a home run baseball, there are a few different things the lucky fan can do with his valuable new collectible. The lucky fan can: a) sell the ball before the end of the year; b) give the ball back to the player who hit the home run; c) donate the ball to the Hall of Fame or another charity; or d) keep it. Any rule the Service seeks to implement regarding the taxation of the home run ball should effectively address all four possibilities while remaining in relative harmony with current tax law.

Even if one were to accept the Service's analysis as set forth in IR-98-56,⁵⁹ it fails to offer clear guidance on three of the four issues—selling the ball, keeping the ball, or donating the ball to charity—and fails to state whether the receiving player has any tax liability if the lucky fan returns the ball. Therefore, to adequately analyze how the law should currently handle each of the four possible situations, it is necessary to supplement IR-98-56 with current tax law.

⁵⁹ See IR-98-56, *supra* note 10.

A. *The Lucky Fan Sells the Ball*

The simplest thing the lucky fan could do, from a tax perspective, is sell the ball in an auction that ends prior to the end of the year in which the ball is caught. This way, the fan's income is an exact amount determined by the sale price, which can then be reported accurately so the Service can get its share without controversy. The situation is the same as any sale made by an individual—if you sell an item for more than you paid for it, you must pay income tax on the profit. This analysis is clearly supported by Code § 61(a): “[G]ross income means all income from whatever source derived.”⁶⁰

B. *The Lucky Fan Gives the Ball to the Player*

A lucky fan can also give the ball back to the player. Currently, this appears to be a non-taxable event under IR-98-56.⁶¹ However, IR-98-56 is merely a notice—not controlling authority—and fails to resolve income tax issues concerning the specific situation that it covers.

Under IR-98-56, the lucky fan would have no taxable income to report and no gift tax to pay if he returned the ball to the player that hit the home run.⁶² However, IR-98-56 fails to cover other aspects of the situation. Does the lucky fan have to report the fair market value of his tertiary benefits, such as a free trip to Disney World or memorabilia or tickets, as income? Under established tax law the lucky fan should, but that is not expressly stated in IR-98-56. It does not appear that failing to report those amounts can be reconciled with the Code, which includes “all income from whatever source derived” in a taxpayer's gross income.⁶³ In addition, if you return a valuable prize in exchange for other, less valuable prizes, how can it be said that there was no transaction or that the item being exchanged (the ball) is not the property of the exchanging party (the lucky fan)?

Another important issue not addressed by IR-98-56 is the question of who, if anyone, will pay income tax on the ball. There are a few different ways to look at it. If it is established that there is an unbroken chain of ownership by the home team from the time the ball was put into play until the time it was returned to the player, an agent of the team, then there should be no tax consequences at that point. It is well established in tax law that if A owns something, and it

⁶⁰ I.R.C. § 61(a) (2000).

⁶¹ See IR-98-56, *supra* note 10.

⁶² See *id.*

⁶³ I.R.C. § 61(a) (2000).

increases or decreases in value during A's ownership, there is no recognition of gain or loss until such gain or loss is realized, usually through a sale.⁶⁴

However, if the ball is a prize owned by the home team and declined by the lucky fan, who then gives it to the player, then the player is the recipient of a prize and should be required to report its value as income. Even if the ball is considered as some type of performance bonus, the player would owe income tax based on its estimated value.⁶⁵

At best, IR-98-56 establishes that, in *Forneris's* specific situation, abandoned property found by a party, then transferred to a second party with no property right, gives rise to no tax consequences whatsoever as to the first party, and may have no tax consequences as to the second party. If this logic is extended to any other situation involving found property, it leads to absurd results.

As demonstrated above, IR-98-56 leaves too many situations unaddressed, leaves open too many possibilities for the situation it does address, and presents a lack of uniformity in the law. Therefore, it should be replaced by a better rule that addresses the very same situation in the same manner, while also addressing all other possible situations.

C. The Lucky Fan Donates the Ball to Charity

Donation to a charity falls outside the scope of both IR-98-56 and Code § 74, which governs the transfer of certain prizes and awards transferred to charities.⁶⁶ One could argue that the Code allows for an exception when transferring awards or prizes to charities, but the exception is a narrow one. Code § 74(b) allows for the awardee to avoid income tax on the award by transferring it to charity if it qualifies as an "amount[] received as [a] prize[] [or] award[] made primarily in recognition of religious, charitable, scientific,

⁶⁴ See *Eisner v. Macomber*, 252 U.S. 189, 195 (1920) ("It is of the essence of income that it should be realized [before it can be taxed]. Potentiality is not enough" in a situation where the taxpayer's property has increased in value, but has not been sold.)

⁶⁵ If this analysis is used when the team presents the item to the player, it should be considered either a gift, with no tax consequences to the player but applicable gift tax rates charged to the team, or a performance-based bonus, which would be taxable income to the player. See I.R.C. § 61(a)(1) (specifying that compensation for services, including "commissions, fringe benefits, and similar items" fall within the definition of gross income). If the characterization of the entire event is that the lucky fan "returned" the unsolicited merchandise or "declined" the prize through transfer to the player, then the player should be responsible for income tax on the ball's value. There is no evidence that McGwire paid any taxes on the baseball. The Service has made no public comment on the issue of whether the player receiving the ball must pay any tax on it.

⁶⁶ See I.R.C. § 74(b) (2000).

educational, artistic, literary, or civic achievement.”⁶⁷ Catching the home run ball certainly does not fall into any of these categories. In addition, § 74(b)(1) requires that “the recipient [be] selected without any action on his part to enter the contest or proceeding.”⁶⁸ In the event of a caught home run ball, the lucky fan purchased a ticket to the game. This could easily be considered an action to enter the “contest.” While it does happen on occasion, it is rare that a fan can catch a home run ball without being in the stadium.⁶⁹

Because donation to a charity falls outside the scope of IR-98-56 and Code § 74, a fan who catches the ball and donates it to charity would have to go through the normal process of claiming the ball’s value as income (under Code §§ 61(a) and/or 74) and deducting the maximum allowable amount as a charitable contribution.⁷⁰ The current maximum allowable deduction to a private foundation (such as the Major League Baseball Hall of Fame) is generally 50% of the donor’s adjusted gross income, which would include the income resulting from catching the home run ball.⁷¹

With the maximum allowable deduction at 50%, to deduct the entire income generated by catching a ball with an estimated value of \$1,000,000, the lucky fan would need to report other income in the amount of at least \$1,000,000. This would lead to a total adjusted gross income⁷² of \$2,000,000; the 50% maximum charitable contribution allowed would then be \$1,000,000—the estimated value of the ball. Thus, anyone with an adjusted gross income of *less than* \$1,000,000 would have to pay some income tax as a result of catching the ball and donating it to charity and would have to carry over the remaining balance and use it to offset income in subsequent years.⁷³ It could potentially take several years to offset the entire balance, and the lucky fan would lose a great deal due to the time value of money.⁷⁴

⁶⁷ *Id.*

⁶⁸ I.R.C. § 74(b)(1).

⁶⁹ Some baseball stadiums are designed to allow some home runs to go outside of the stadium on rare occasions, such as Fenway Park in Boston, Camden Yards in Baltimore, and, most notably, Monster Park in San Francisco.

⁷⁰ See I.R.C. § 61(a) (defining income); I.R.C. § 74 (governing treatment of awards and prizes); I.R.C. § 170 (West 2002 & Supp. 2008) (governing treatment of charitable contributions).

⁷¹ I.R.C. § 170(b)(1)(A).

⁷² This amount is referred to as “contribution base” by I.R.C. § 170(b)(1)(A), which is defined at I.R.C. § 170(b)(1)(G) as adjusted gross income.

⁷³ See I.R.C. § 170(d)(1), for an explanation of the carryover rules.

⁷⁴ At its simplest, the time value of money concept is that money now is worth more than money later. The lucky fan would end up paying the income tax now and recovering it over a period of years, so the time value of money would work against him.

It is unlikely that the Service intends to tax a lucky fan who catches the ball and donates it to a charitable foundation such as the National Baseball Hall of Fame and Museum while not taxing a fan who gives it back to the player who hit it. However, current tax law arguably leads to just that result. Though it could have, IR-98-56 contains no guidance as to whether its analysis applies to charitable donations or whether Code § 74(b) could or would be extended to cover such a situation. The current ambiguity in the law calls for a new rule that properly applies to this situation.

D. The Lucky Fan Keeps the Ball

Current tax law appears to dictate that the lucky fan who does not sell or “return” the ball is liable to pay taxes on the ball’s value, if the value can be determined.⁷⁵ Using IR-98-56’s analogy comparing returning the ball to declining a prize, it stands to reason that the Service views the ball as a prize or award. Therefore, not returning it immediately should lead to taxation under Code § 74.⁷⁶ However, as the situation has never come up, it is not clear exactly how it would be treated. This lack of clarity is why Matt Murphy claimed to have sold the Bonds 756 ball.⁷⁷ One thing introducing unnecessary ambiguity to the situation is a cryptic statement in IR-98-56: “The tax results may be different if the fan decided to sell the ball.”⁷⁸ This could, at a stretch, be read as “the tax results will be the same *unless* the fan decided to sell the ball.” Either way, both Congress and the Service have remained silent as to the treatment of a fan who decides to keep the ball.

A strange situation could arise if catching the ball creates tax liability for the estimated value at the time of the catch, but then the value drops considerably before the end of the year. It could be argued that the lucky fan owes taxes on the estimated value *at the time of the catch* and is able to realize his “loss” only upon sale of the ball. This outcome would likely force the lucky fan to sell the ball, as he or she would owe income tax that may be in excess of the ball’s deflated value.⁷⁹

Consider this scenario: Barry Bonds comes back to play in 2009, announces it will be his final season, and hits thirty-seven home runs. His 799th career home run comes in the ninth inning of the season’s

⁷⁵ See *supra* Part II.C.

⁷⁶ See *supra* Part II.A.; see also Dodge, *supra* note 24 (providing an in-depth analysis of the theories behind taxation of found objects, including home run baseballs).

⁷⁷ See *Lucky Fan to Auction Bonds’ 756 Ball*, *supra* note 15.

⁷⁸ IR-98-56, *supra* note 10.

⁷⁹ See *supra* Part II.C.

last game, winning the game for his team with the all-time record-setting home run ball, the last of his career. Immediately after the game, memorabilia experts value the ball at \$2,000,000. But then, two weeks later, Bonds recants his statement and signs a one-year deal to play in the 2010 season. Suddenly, the 799th home run is likely not the last of his career and thus not the all-time record-setter. The estimated value of the ball drops to around \$50,000.

If the lucky fan who caught the ball owes income tax based on the value of the ball at the time of the catch, he will owe nearly \$700,000 in income tax at the end of the year—he would belong to the 35% tax bracket because of the value of the ball, so all his normal income would be taxed at the highest rate possible.⁸⁰ Thus, the lucky fan would owe nearly \$700,000 to the Service for a ball that is now worth around \$50,000. Only if he sells the ball will he be able to claim a loss and avoid this enormous tax burden.

While this situation is a bit extreme, there is the potential for similar situations involving a drop in price; for instance, if Alex Rodriguez's name comes up in a steroids investigation, it is likely the value of his 500th home run (and likely all others, as well) would go down, much as the value of the Bonds and McGwire home run balls have gone down since the players were associated with performance enhancing drugs. The memorabilia market is highly volatile and can change based on any of a number of factors completely out of the hands of anyone, and the rule utilized in taxing home run baseballs should take this volatility into account.

Current law, coupled with IR-98-56, appears to create income at the time of the catch, rather than at the time of the sale,⁸¹ if there is any reliable method of valuation.⁸² Such treatment leads to the problems outlined above and should be avoided if at all possible. A strict rule determining if and exactly when the lucky fan's tax liability arises is necessary in order to clarify any fact scenario involving taxation based on any valuation method.

Current tax law leads to confusion and uncertainty in almost every situation. Either Congress or the Service should resolve this confusion by enacting or interpreting law in a way that will clarify an individual's tax liability in all home run ball situations. Any adopted rule or interpretation should offer guidance for any set of facts and offer fair treatment to the individuals and organizations involved. It should be clear enough to cover a broad spectrum of potential events

⁸⁰ See I.R.C. § 1 (West 2002 & Supp. 2008), for the income tax rate schedule.

⁸¹ See *supra* Part II.A.

⁸² See *supra* Part II.C.

without the need for “stretching” the law. To reach this goal, any solution must be weighed against all four possible actions of the lucky fan.

IV. USING MAJOR LEAGUE BASEBALL’S RULEBOOK TO DEVELOP A RULE THAT RESOLVES ALL FOUR SITUATIONS

When a Major League Baseball player hits a ball with enough force to drive it over a wall in fair territory that sits more than 250 feet from home plate, he is entitled to run around all four bases and score a run, also scoring all other runners who were on base at the time. So, when Barry Bonds smashed a ball out of the park on August 7, 2007, he became the all-time Major League Baseball home run leader, right? Not quite.

A little-known caveat in Major League Baseball Official Rule 6.09(d) makes clear that a home run is official only “when [the batter] shall have touched all bases legally.”⁸³ Therefore, home run number 756 was not actually home run number 756 until Barry Bonds jogged around the diamond, touching first, second, and third bases while staying in the baseline, then touched home plate. Then, and only then, did the ball in the stands become the 756th home run ball of Barry Bonds’ career.

This rule is very important to the analysis of tax liability because it establishes that, while the ball was *almost* a certainty to become the 756th home run of Barry Bonds’ career, breaking Henry “Hammerin’ Hank” Aaron’s thirty-three-year-old record, it was not—yet. There have been several incidents where the home run that almost was, was not. In fact, the last time a situation like this happened—or did not happen—was not too long ago.

It was the night of October 17, 1999, and the game was an important one: Game Five of the National League Championship Series between the New York Mets and the Atlanta Braves, with the Mets trailing in the game, 3–2, and in the best-of-seven series, 3–1.⁸⁴ The game’s fame was already assured; it was the longest post-season game in Major League Baseball history, over five-and-a-half hours long.⁸⁵ The Braves had taken the lead in the top of the fifteenth inning, and the Mets had tied it in the bottom of that inning when

⁸³ PLAYING RULES COMMITTEE, MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 58 (amended by teleconference Feb. 5, 2008), *available at* http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp (follow “6.00 – The Batter” hyperlink).

⁸⁴ Associated Press, *What Was It?*, CNN/SPORTS ILLUSTRATED, Oct. 18, 1999, http://sportsillustrated.cnn.com/baseball/mlb/1999/postseason/championship_series/nlcs/news/1999/10/17/scoring_ap/.

⁸⁵ *Id.*

Robin Ventura, one of baseball's all-time greatest grand slam hitters,⁸⁶ strode to the plate with the bases loaded and one out.⁸⁷ Ventura launched a rocket over the right-center field wall, hitting one of the most dramatic home runs in playoff history, capping off the longest game in playoff history, and giving the Mets what appeared to be a 7–3 win.⁸⁸

Or so everyone thought. Roger Cedeno, who had been on third base, ran to home plate and scored.⁸⁹ Todd Pratt, who had been on first base, stopped before he got to third base and ran back towards Ventura. Their teammates poured onto the field and mobbed Ventura as he was rounding second base. Ventura never got to third base, let alone home plate.⁹⁰ While this did not affect the outcome of the game, it did change the official score and statistics.

About ten minutes after the game ended, official scorer Red Foley changed the score from 7–3 to 4–3 and changed Ventura's home run into a single.⁹¹ The explanation?

“The game ends in sudden death when the winning run scores,” said Elias [Sports Bureau]⁹² spokesman Steve Hirdt, who according to the [National League] made the official ruling in conjunction with Foley. “The only exception is on a home run, assuming the player rounds all the bases. (Ventura) never rounded the bases.”⁹³

The ball in the stands, while it was certainly the game-winning ball and probably has retained some value, was no longer a game-winning grand slam ball. There have been many other instances of home runs being “taken away” from players because they failed to round all four bases; each of these instances shows that the ball in the stands is not necessarily a home run ball until the player touches home plate.⁹⁴

⁸⁶ Ventura is tied for the all-time fourth place spot with eighteen career grand slams. Baseball-Almanac.com, Grand Slams All-Time Leaders, <http://www.baseball-almanac.com/hitting/higs1.shtml> (last visited Aug. 9, 2008).

⁸⁷ Associated Press, *What Was It?*, *supra* note 84.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² The Elias Sports Bureau is the Official Statistician for Major League Baseball, the National Football League, the National Basketball Association, the National Hockey League, Major League Soccer, the Women's National Basketball Association, and the Arena Football League. See Elias Sports Bureau, <http://www.esb.com> (last visited Aug. 9, 2008), for more information.

⁹³ Associated Press, *What Was It?*, *supra* note 84 (footnote added) (quoting Steve Hirdt, Elias spokesman).

⁹⁴ On July 9, 1970, Dalton Jones of the Detroit Tigers hit what appeared to be a grand slam, but he passed a teammate on the base paths, resulting in his being called out and the hit

The Official Rules of Major League Baseball also dictate that:

[T]he official scorer shall prepare a report ... listing the date of the game, where it was played, the names of the competing clubs and the umpires, the full score of the game and all records of individual players compiled according to the system specific in this Rule 10 [collectively the 'official score report']. The official scorer shall forward this report to the league office as soon as practicable after the game ends.⁹⁵

In addition,

[a] player or club may request that the League President review a judgment call . . . made in a game . . . within 24 hours of the conclusion or suspension of such game The League President shall not consider any evidence submitted after the time for submission set forth in this Rule 10.01(a).⁹⁶

Therefore, at the very least, the scoring of a Major League Baseball game does not become official until the official scorer submits the official score report after the game, or possibly until twenty-four hours later when the time limit on objections expires.

Based on the Official Rules, as stated above, a home run is not a home run until certain events have occurred. Clearly, a ball is not a home run until the batter has rounded the bases and touched home plate. An argument can be made that, even then, the statistic does not become official until the official score report is filed. Another argument, though less persuasive, can be made that the official score report is not actually official until twenty-four hours after the game has ended.⁹⁷ Any one of these explanations can be used to clarify tax liability in the event a lucky fan catches a valuable home run baseball.

being ruled a three-run single. On July 4, 1976, the same exact situation occurred after Tim McCarver hit what appeared to be a grand slam. See Rich Marazzi, *Baseball Rules Corner: Passing a Preceding Runner on the Base Paths Can Be Costly*, *BASEBALL DIG.*, Dec. 1, 2002, at 86; Ken Hambleton, *Ken's Corner*, *LINCOLN J. STAR* (Lincoln, NE), May 27, 2007, at C2; see also *Baseball-Reference.com*, Grand Slam Single, http://www.baseball-reference.com/bullpen/Grand_Slam_Single (last visited Aug. 9, 2008).

⁹⁵ PLAYING RULES COMMITTEE, MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 90 (amended by teleconference Feb. 5, 2008), available at http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp (follow "10.00 – The Official Scorer" hyperlink) (part of Rule 10.01(a)).

⁹⁶ *Id.*

⁹⁷ The reason this argument is less persuasive is because the umpires' rulings on the field cannot be overturned by the Official Scorer in any situation. PLAYING RULES COMMITTEE, MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 91 (amended by teleconference Feb. 5, 2008), available at http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp (follow

A well-known principle of tax law is that when an asset increases in value while in someone's possession, the increase in value is not recognized for tax purposes until the occurrence of a realization event—most commonly, a sale.⁹⁸ If the Service accepts that the home run ball was not actually a home run ball—and therefore did not have any definitive value—until the player rounded the bases and touched home plate, then the ball was worthless for tax purposes when it was caught (unless the player is very, very fast, or hit the ball very, very high). Its value did not accrue until the home run became official through whichever of the following events the Service adopts: the player touching home plate; the official score report being submitted; or dispute period expiring. Regardless of which event establishes the ball's value, the ball's value will have increased while in the lucky fan's possession. Under well-established tax principles, this increase in value cannot be taxed until the occurrence of a realization event, and the lucky fan has no immediate tax liability.⁹⁹

Accepting this characterization of events leads to clearer tax liability if the lucky fan keeps the ball. In addition, adopting a rule that establishes the ball gains value only after the twenty-four-hour objection window closes would solve the issue of liability for each of the lucky fan's four possible actions.

A. The Lucky Fan Sells the Ball

A sale would qualify as a realization event. The lucky fan would then realize his gain, which would be the amount of the sale price, report it on his income tax return, and pay income tax on that amount.¹⁰⁰

B. The Lucky Fan Gives the Ball to the Player

This is where the exact time that the ball became a home run ball is important. To mimic the effect of IR-98-56, the Service should adopt a rule which establishes that the ball becomes a home run ball when the dispute window closes—twenty-four hours after the game ends.

If the lucky fan catches the ball during the game, but the ball does not become the home run ball (and therefore does not have definitive value) until the next afternoon or night, the lucky fan can use that

⁹⁸ "10.00 – The Official Scorer" hyperlink) (part of Rule 10.01(b)(1)).

⁹⁹ I.R.C. § 1001(a) (2000).

⁹⁹ *Id.*

¹⁰⁰ See *supra* Part II.A.

window of time to transfer the “valueless” property to the player. Because the ball is without value at this point, there is no gift tax liability for the lucky fan and no income tax liability for the player. This mimics exactly the apparent effect of IR-98-56 without resting upon tenuous analogies to awards and prizes that lead to other difficulties.

C. The Lucky Fan Donates the Ball to Charity

If the Service were to adopt a rule stating that the ball did not increase in value until the objection window closes, it would be much easier to donate to charity without raising any issues of tax liability. However, the lucky fan potentially would be able to later donate the ball to a charity and claim a charitable deduction for its worth, thus cancelling out ordinary income; this would leave the Service short tax revenue to which it is certainly entitled. To counter this, as part of its adoption of the proposed rule, the Service should make clear that a lucky fan taking advantage of the positive aspects of the proposed rule will not be able to claim any charitable deduction if the ball is later donated to charity.

D. The Lucky Fan Keeps the Ball

Thanks to the principle that an increase in an object’s value is not realized for tax purposes until a realization event takes place, the lucky fan who opts to keep the ball will face no tax consequences.¹⁰¹ If the Service adopts any of the three choices leading to later realization (either when the player touches home plate, the official score report is submitted, or the dispute window has closed), then the ball’s value is non-existent until the occurrence of the adopted event. Therefore, the ball would be valueless from a tax perspective at the time the lucky fan catches it. When the value increases at the time of the adopted event, it cannot be taxed because the increase in value occurred while in possession of the lucky fan and no realization event has occurred. This leaves the lucky fan with no staggering tax liability until he sells the ball, at which point he can afford to pay the tax.

In addition, adoption of such a rule would allow the sale of the home run ball to be treated in accordance with the sale of all other types of collectibles. If treated as income at the time of the catch, the ball’s value would be taxed in accordance with the lucky fan’s tax bracket. If treated as valueless at the time of the catch, the ball’s ultimate sale would be taxed in accordance with any other type of

¹⁰¹ See *supra* Part II.A.

collectible, as determined by Congress: If sold within one year of the catch, the sale price would be taxed as ordinary income, but if sold more than one year after the catch, the sale would be treated as a capital gain, under the collectible exception.¹⁰²

The collectible exception provides for a 28% tax on the sale of collectibles held for more than one year, rather than the normal 15% tax on most types of capital gains.¹⁰³ Because the home run ball fits into this exception, the Service does not lose an extraordinary amount of money by taxing the ball later, rather than as ordinary income at the time of the catch. Were the ultimate sale taxed at only the normal capital gains rate of 15%, the Service would stand to lose more than half of the revenue it would gain by effectively forcing an immediate sale at a tax rate of 35% (15% vs. 35%).¹⁰⁴ The collectible exception to capital gains cuts that potential revenue loss to less than a third, a much more palatable number (28% vs. 35%). If the Service were to adopt a rule delaying any tax liability until after a sale, the Service would be giving up far less than it seems, while avoiding a public relations nightmare and possibly garnering some much-needed good will from the public.

V. THE SERVICE SHOULD TAKE ACTION TO CLARIFY THE LAW

The easiest and most obvious solution to all of the tax problems would be for Congress to create a statutory exemption for baseballs caught by people in the stands. This would allow a fan to either keep the ball, return the ball to the player, or give the ball to charity without any fear of tax liability.

Indeed, in the wake of Dedman's article,¹⁰⁵ former Senate Finance Committee Chairman William V. Roth complained that "the fact that there was ever even the possibility of Mark McGwire's 62nd home run being taxed is a prime example of what's wrong with our tax system."¹⁰⁶ Then-House Democratic Leader Richard A. Gephardt also commented, "Only the [Service] could turn a once-in-a-lifetime catch into a once-in-a-lifetime Catch-22."¹⁰⁷ Former California Representative William Thomas, who served as Chairman of the

¹⁰² See I.R.C. § 1(h)(4) (West 2002 & Supp. 2008) (stating that collectibles held for over one year before sale are taxed at a rate of 28%).

¹⁰³ *Id.*

¹⁰⁴ The "forced sale" is the apparent effect of current law. See *supra* Part II.A.

¹⁰⁵ See Dedman, *supra* note 5.

¹⁰⁶ Stephen Moore, *The Gift Tax: It's Going, Going, Gone*, CATO DAILY COMMENTARY (Cato Institute), Sept. 16, 1998, <https://www.cato.org/dailys/9-16-98.html> (last visited Aug. 9, 2008) (quoting William V. Roth, former Senate Finance Committee chairman).

¹⁰⁷ David L. Greene, *Ball Tax Foes Deduct IRS' Plan for '62' Fan*, THE BALTIMORE SUN, Sept. 9, 1998, at 6D (quoting Richard A. Gephardt).

House Ways and Means Committee from 2001 through 2006, said “that he would introduce a bill ensuring fans they could catch the home run balls . . . and return them with tax-free impunity.”¹⁰⁸ Former spokesman for President Bill Clinton, Mike McCurry, ridiculed the original Service assessment as ““about the dumbest thing I’ve ever heard in my life.””¹⁰⁹ Yet, in the ten years since the uproar over McGwire’s record-breaking sixty-second home run, and even with the few dozen valuable baseballs that have been hit since, Congress has yet to take any action.

The Service has also opted not to address any tax ramifications beyond what it said in IR-98-56. This leaves open the possibility that a fan who chooses to keep a milestone baseball will have income tax liability based on the estimated value of the ball.¹¹⁰ The issue has obvious potential to recur in the future, and taxpayers should not be left with no idea what tax liability may ensue.

In 2007, five major milestones were reached, with Sammy Sosa hitting his six-hundredth home run; Frank Thomas, Jim Thome and Alex Rodriguez hitting their five-hundredth home runs; and Ryan Howard hitting his one-hundredth home run.¹¹¹ During the 2008 season, five more significant milestones were reached: Ken Griffey, Jr. hit his six-hundredth home run, Manny Ramirez hit his five-hundredth, Chipper Jones hit his four-hundredth, and Albert Pujols hit his three-hundredth.¹¹² In addition to the fact that an analogous situation is likely to come up at least a few times each year, the publicity of such events—the reaching of home run milestones is covered on a national scale—seems to cry out for clarification. So why has the Service not acted to clarify the situation?

There are a few potential reasons. First, the catching of a home run baseball is likely a taxable event under the Code,¹¹³ so if the Service publicly rules on it without a novel solution, it would likely have to announce that it is a taxable event—a very unpopular ruling. Under normal tax rules, anything valuable of which a person takes undisputed possession is considered income, must be included in the individual’s income on his tax form, and will give rise to income tax.¹¹⁴ If your employer pays you in goldfish, you must report the fair

¹⁰⁸ *Id.*

¹⁰⁹ Moore, *supra* note 106 (quoting Mike McCurry, President Clinton’s spokesman).

¹¹⁰ See *supra* Part II.A.

¹¹¹ Jayson Stark, *Awards, Milestones, Amazing Feats and More*, ESPN.com, Sept. 30, 2007, http://sports.espn.go.com/mlb/columns/story?columnist=stark_jayson&id=3041066.

¹¹² MLB.com, Historical Player Stats, http://mlb.mlb.com/stats/historical/player_stats.jsp (choose “Career: Active Leaders” radio button; then click “GO”) (last visited Sept. 13, 2008).

¹¹³ See *supra* Part II.A.

¹¹⁴ See I.R.C. § 61(a) (2000) (general definition of gross income).

market value of the goldfish on your income tax return. The same principle holds true with a home run baseball—it has value and that value can be determined.¹¹⁵ Therefore, it must be included in the lucky fan's gross income under normal circumstances. In order to alter this normal tax treatment, the Service must identify some reason to treat a home run ball differently than any other property. Thus far, the Service has apparently not come up with a satisfactory reason.

A second explanation for the Service's inaction can be seen in the recent situation involving Bonds' 756th home run ball. The potential threat of taxation caused by the state of current law is claimed to have been the reason for its sale.¹¹⁶ This is beneficial for the Service in two ways. First, the Service does not have to make an unpopular ruling that the event is taxable because the mere threat of taxation is enough to cause action, as evidenced by Murphy's sale of the Bonds 756 ball. Second, the Service will likely get the full income tax revenue in the year the home run is hit rather than down the line. The Service's current silence avoids the various problems facing current valuation of the baseball if the lucky fan were to keep it and provides incentive for lucky fans to either sell the ball or give it back to the player immediately. If the mere threat of taxation leads a lucky fan to take a route with definitive tax liability, it puts off resolving situations with less definitive outcomes.

A third explanation is the lack of guidance from Congress. Congress has thus far taken no steps to clarify the situation, choosing instead to leave things as they stand. The Service, while it has the power to interpret Congress's laws,¹¹⁷ does not have the power to force Congress into action or to create exceptions where none reasonably exist. The questionable reasoning in IR-98-56 may be as far as the Service is willing to go in addressing home run ball situations. However, because of the constant recurrence of the situation and the ambiguity of the law, the Service should seek to clarify the situation as best it can without Congress's guidance. As Mitchell Rogovin, former Commissioner of Internal Revenue, put it, "[p]roper tax administration requires that the Service provide reliable and timely information to aid taxpayers in interpreting [complex tax statutes]."¹¹⁸

¹¹⁵ How accurately it can be determined is another issue. See discussion *supra* Part II.C.

¹¹⁶ "It wasn't hard [to decide to sell the ball]. It was simple math," said Matt Murphy, who caught the Bonds' 756 home run ball and sold it due to potential income tax liability. Becky Regan, *Bonds Ball No. 756 Going to Auction*, MLB.com, Aug. 21, 2007, <http://www.mlb.com> (search "Matt Murphy").

¹¹⁷ See, e.g., 26 C.F.R. § 601.201(a) (2002) (explaining that the Service's general practice in answering taxpayer inquiries involves interpreting and applying tax law to specific facts).

¹¹⁸ Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43

Because the Service cannot force Congress to act, it should adopt its own solution to the issue. This would effectively force Congress to make a decision covering all aspects—either acquiesce to the Service’s position by silence or by amending the Code to reflect the Service’s position, or amend the Code to make catching a valuable home run ball a taxable event.

VI. CONCLUSION

As the above analysis shows, the combination of current tax law and IR-98-56 is either suspect, unjustifiable, or unfair to the lucky fan that catches the ball, and is definitely unpopular. IR-98-56 creates controversies where none should exist, such as whether to tax the lucky fan that keeps the ball or to tax the player to whom the lucky fan returned the ball.

Congress has not resolved the issue. The Service has remained silent. This has led to rampant speculation as to how the Service would deal with these situations if they occurred and has forced fans to act without the benefit of certainty in the law. If the Service adopts a rule establishing that the ball does not become the official home run ball until the official score report’s dispute window has closed, every situation will be adequately and fairly covered for all parties involved. The lucky fan could then make his choice as to what to do with the ball without the fear of being caught underneath staggering tax liability.

The proposed rule’s adoption would create stability and definitively answer all questions concerning the tax liabilities of the parties involved. The firm establishment of when the value and liability accrue allows all parties to go into any transaction with full knowledge of how the Service would treat any of the four situations, and can easily be applied into any other situation that may occur. It would make the rules clear and easily enforceable with a minimum of confusion—the ultimate goal of the law.

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