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COMMENTS

IS SECTION 6861 THE SOURCE OF AUTHORITY FOR SHORT-YEAR JEOPARDY ASSESSMENTS UNDER THE INTERNAL REVENUE CODE?

INTRODUCTION

Section 6851 of the Internal Revenue Code of 1954 provides for the premature termination of the taxpayer's taxable year if the "Secretary or his delegate finds that a taxpayer designs quickly to depart the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice" the collection of taxes.[1] This section was long mired in obscurity, receiving little or no attention from either the courts or tax scholars.[2] However, beginning in 1969 with the decision of the Maryland District Court in *Schreck v. United States*,[3] there has been a proliferation of litigation[4] concerning the exact meaning of § 6851 and the procedures which must be followed in order to implement it.

The main issue in each of the § 6851 cases is the source of authority under which the Internal Revenue Service (I.R.S.), having prematurely terminated the taxpayer's taxable year, may make an assessment to collect the tax declared due. Three alternative sources of authority have been advanced. The I.R.S. has argued both that § 6851 contains its own assessment authority[5] and that § 6851 assessments are issued under the

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[1] INT. REV. CODE OF 1954 § 6851 [hereinafter cited as I.R.C.].

[2] Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969) was the first of the recent cases to rule on § 6851 assessments. In the course of its extensive review of the history of the section, the court could only find eight cases since 1926 dealing with § 6851.

[3] *Id.*

[4] Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973), strongly hints that this great increase in § 6851 litigation is due to an effort by the I.R.S. to use the provision as a weapon to combat organized crime, especially narcotics dealing. This observation is supported by the fact that a majority of the cases concerning this section involve taxpayers who have been or are being prosecuted for narcotics crimes.

[5] *See, e.g.*, Williamson v. United States, 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1973).

Code's general assessment authority contained in § 6201.[6] Taxpayers have contended that the short-year assessment power is derived from § 6861, which controls assessments in all other situations where the collection of the tax would be jeopardized by delay.[7] At least one federal circuit court of appeals has adopted each of the three conflicting arguments. As a consequence of the different approaches adopted by the circuit courts, short-year taxpayers are afforded greater procedural safeguards in some circuits than in others.

I. THE SIGNIFICANCE OF THE SOURCE OF AUTHORITY

The procedure which the Internal Revenue Service must follow to collect a short-year jeopardy assessment is determined by the Code section providing the assessment authority. In order to fully understand the significance of the collection procedure to the taxpayer, a brief overview of the statutory scheme concerning assessments, collections, and the judicial process is required.

An assessment is defined in the Code as the "recording [of] the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate."[8] The I.R.S. is given the authority to assess "all taxes . . . which have not been duly paid."[9] A duly imposed assessment "supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment."[10] If the taxpayer fails to pay the amount assessed, the I.R.S. may seize and sell his property.[11] Obviously, the authority to make assessments places enormous power in the hands of the I.R.S. In recognition of this fact, Congress has placed various limitations on the assessment power.

The chief limitations on the assessment power are the requirement of a notice of deficiency and the right of the taxpayer

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[6] *See, e.g.*, Irving v. Gray, 479 F.2d 20 (2d Cir. 1973).

[7] *See, e.g.*, Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974).

[8] I.R.C. § 6203.

[9] I.R.C. § 6201(a).

[10] Bull v. United States, 295 U.S. 247, 260 (1935).

[11] *Id.*

to a judicial determination of the proper amount of tax due. To illustrate the importance of these limitations, it is necessary to divide taxpayers into two groups: (1) normal taxpayers, average individuals who regularly file their returns at the end of the taxable year, and (2) jeopardy taxpayers, those individuals, as determined by the I.R.S., from whom collection would be jeopardized by delay. If the I.R.S. finds that a normal taxpayer has underpaid his taxes, a notice of deficiency must be issued.[12] Upon receipt of this notice, the taxpayer has two options: he may pay the tax declared due and sue for a refund in federal district court,[13] or he may file a petition in Tax Court for an adjudication of the deficiency before payment.[14] The I.R.S. is prohibited from making an assessment for 90 days after issuing the notice of deficiency.[15] However, if the taxpayer files a petition with the Tax Court during this period, no assessment may issue until that court's decision becomes final.[16] If the I.R.S. makes an assessment during these waiting periods, it may be enjoined from collection of the tax, notwithstanding the general prohibition against injunctions to prevent the collection of taxes provided in § 7421 of the Code.[17]

The sole exception to this procedure is the jeopardy assessment under § 6861.[18] If it is determined that collection of the tax due would be jeopardized by delay, the tax may be immediately assessed and action taken to secure payment, without the issuance of a deficiency notice or a waiting period.[19] However, § 6861 does require that a notice of deficiency be mailed within 60 days following the jeopardy assessment.[20]

The requirement of a deficiency notice *after* the jeopardy assessment highlights the importance of the notice procedure.

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[12] I.R.C. § 6212.

[13] Flora v. United States, 362 U.S. 145 (1960).

[14] I.R.C. § 6213(a).

[15] *Id.*

[16] *Id.*

[17] *Id.* It is through this provision that the cases concerning short-year jeopardy assessments have reached the courts. Since no deficiency notice was sent in these cases, the I.R.S. did not fulfill the 90-day waiting period.

[18] *Id.*

[19] I.R.C. § 6861(a).

[20] I.R.C. § 6861(b).

The notice of deficiency is an absolute jurisdictional requirement of the Tax Court.[21] This court is the only prepayment forum available to the taxpayer and access to it is a closely guarded right.

Thus, in applying the statutory scheme to the short-year assessment situation, the source of the assessment authority is crucial. The very nature of the assessment necessitates that it be classified as a jeopardy assessment and renders the procedures for normal taxpayers inapplicable. Nevertheless, if, as the taxpayers have argued, the authority for the short-year assessment is derived from § 6861, the short-year taxpayer, like all other jeopardy taxpayers, is entitled to a notice of deficiency and access to the Tax Court. If, however, the authority for the assessment flows either from § 6851 itself or from the general assessment authority of § 6201 and the tax assessed is not a deficiency, as the I.R.S. contends, the taxpayer is not entitled to the protection of the statutory procedure. He must pay the tax and sue for a refund in district court.[22]

At this point, the obvious question must be raised: If the short-year assessment is a jeopardy assessment, which it is regardless of the source of authority, and if the I.R.S. is therefore allowed to disregard the waiting periods and immediately levy upon the taxpayer's property, why is access to the Tax Court important? Clearly, the advantage of the Tax Court as a prepayment forum is reduced. Nevertheless, the importance of access to the Tax Court in § 6851 cases lies in the fact that, within 60 days of the assessment, the taxpayer can sue for a

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[21] *See* I.R.C. § 6213(a) which provides:

> Restrictions Applicable to Deficiencies; Petition to Tax Court. (a) Time for Filing Petition and Restriction on Assessment—Within 90 days . . . after the notice of deficiency authorized in section 6212 is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency . . . .

In Mason v. Commissioner, 210 F.2d 388 (5th Cir. 1954), the Fifth Circuit interpreted this statute as establishing the notice of deficiency as a jurisdictional prerequisite of the Tax Court. This interpretation has been universally adopted.

[22] It must be noted at this point that both § 6861 (by reference to § 6863) and § 6851 contain provisions which would allow the taxpayer to stay collection of the assessment by posting an adequate bond. The bond, however, is only a protection for the taxpayer if he has assets exceeding the jeopardy assessment and if his assets have not been placed beyond his control by attachment by the I.R.S.

redetermination of the tax due. If access to the Tax Court is denied, as the I.R.S. has consistently urged, the delay before the taxpayer could obtain a judicial determination would be much longer. In fact, it is conceivable that the courts would never have an opportunity to rule on the issue. Under the procedure established by the I.R.S., the premature termination of the taxable year has no effect upon the taxpayer's normal taxable year. Therefore, the taxpayer must wait until the end of his normal taxable year (usually the calendar year) and then file his tax return.[23] If the taxpayer's assets seized under the short-year assessment were insufficient to satisfy the assessment or if the return states the tax due as less than that imposed, the I.R.S. *may* then issue a notice of deficiency, but the statute of limitations allows three years from the filing of the return in which to do so.[24] Until this determination, the taxpayer is without access to the Tax Court. Furthermore, if, under a short-year jeopardy assessment, the I.R.S. levies upon all of the taxpayer's property, but it is insufficient to satisfy the assessment or is not applied to the tax allegedly due for some reason (*e.g.*, because the property may be subject to a forfeiture proceeding), the taxpayer may be barred from ever suing in district court for a refund.[25] The taxpayer would be barred in such situation under a Supreme Court ruling that a suit for refund of federal taxes may not be entertained by federal courts unless the tax imposed has been fully paid.[26]

This brief discussion demonstrates that the desire of the taxpayer to find the authority for the short-year jeopardy assessment under § 6861 and to receive a notice of deficiency is not merely a technical argument. The taxpayer is seeking the only safeguard available against the deprivation of his property

[23] Treas. Reg. § 1.6851-1(c) (1959).

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

[25] *Id.* at 1281.

[26] Flora v. United States, 362 U.S. 145 (1960). It has been suggested that the full-payment principles set out in *Flora* would not be persuasive in a case in which the Tax Court was unable to provide relief. *See* Comment, *Code Section 6851—"Termination of Taxable Year"—Application and Function Within the Internal Revenue Code of 1954*, 9 WAKE FOREST L. REV. 381, 391 (1972-73). This is a highly speculative suggestion which has never been tested in court. It is the opinion of this writer that the taxpayer would face great difficulty convincing a court to accept this theory.

for months, or perhaps years, before having an opportunity to litigate the merits of the assessment. Thus, the issue is a very real and vital one, balancing the power of the I.R.S. and the rights of the taxpayer.[27]

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[27] The procedure advocated by the I.R.S. also seems to raise constitutional questions, none of which have yet been passed upon in any of the cases dealing with § 6851. In Laing v. United States, 496 F.2d 853 (2d Cir.), *cert. granted*, 419 U.S. 824 (1974), a per curiam reaffirmance of *Irving*, the constitutional issue was raised but summarily dismissed by the Second Circuit. The Sixth Circuit acknowledged that the I.R.S. interpretation could present due process problems, but it did not actually reach the issue because it decided the case through statutory interpretation. Rambo v. United States, 492 F.2d 1060, 1065 (6th Cir. 1974). Nevertheless, the potential impact of this problem is so great that it warrants a brief discussion.

Under the procedure advocated by the I.R.S., a taxpayer's property could be seized prior to either the issuance of a deficiency notice or an opportunity to petition the Tax Court. Such a procedure would appear to violate the due process principle, enunciated by the Supreme Court in Fuentes v. Shevin, 407 U.S. 67 (1972), that there may be no government sanctioned seizure of a debtor's property unless prior notice and an opportunity to be heard have been provided. However, the Court reserved an exception to this general rule for "extraordinary situations." *Id.* at 91. To qualify as an "extraordinary situation," justifying the postponement of notice and a hearing, three tests must be met: First, the seizure must be directly necessary to secure an important governmental or general public interest; second, there must be a special need for prompt action; and third, the state must have kept strict control over its monopoly on legitimate force, and the person initiating the seizure must be a government official responsible for determining, under the standards of a narrowly drawn statute, that the seizure was necessary and justified. *Id.* Given the context in which the short-year assessment is utilized, the I.R.S. procedure would appear to be permissible under the "extraordinary situation" exception. It was, in fact, this exception which the Second Circuit cited as the basis for its summary dismissal of the constitutional claim. Laing v. United States, *supra* at 854.

There is, however, some question as to the applicability of the "extraordinary situation" exception to the short-year assessment procedure. In *Fuentes*, the only tax case cited by the Court in support of the "extraordinary situation" exception was Phillips v. Commissioner, 283 U.S. 589 (1931), in which Mr. Justice Brandeis stated: "Where only property rights are involved, mere postponement of judicial enquiry is not a denial of due process, if the opportunity for the ultimate judicial determination of the liability is adequate." *Id.* at 596. In *Phillips* the Court found that the § 6861 jeopardy assessment procedure satisfies due process "because two alternative methods of judicial review are available." *Id.* at 597. The alternative forums referred to are the Tax Court before payment and the district court after payment of the tax. Thus, *Fuentes'* reliance upon this case arguably limits the "extraordinary situation" exception to those cases in which speedy review by the Tax Court is available. As noted in the text, this may not always be the case under the I.R.S. procedure.

In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Supreme Court apparently modified the *Fuentes* rule, but reaffirmed the "extraordinary situation" exception. In doing so, however, the Court reemphasized that the post-seizure hearing must be both prompt and adequate. The Court's attitude seems to lend support to the contention

II. THE CONFLICT AMONG THE COURTS

Three circuit courts of appeal have considered the question of what constitutes the source of authority for the short-year assessment. Each court has interpreted the same statutory provisions and each has reached a different conclusion.

The Seventh Circuit decided the issue collaterally[28] in *Williamson v. United States*,[29] a case in which the plaintiff sought to enjoin the enforcement of a short-year jeopardy assessment on the ground that a notice of deficiency had not been issued. He argued that although § 6851 does not expressly require the issuance of a deficiency notice, the procedure should be implied because it is required for all other jeopardy assessments under the Code. The court rejected this contention, adopting the I.R.S. argument that § 6851 provides its own assessment authority and can only be controlled by its express language. In explanation of its holding, the court stated:

> We believe, however, that the deficiency notice requirement cannot be read into § 6851 because the assessment made under that section is not a deficiency as defined in § 6211. That section defines a deficiency as the amount by which the "tax imposed" exceeds the amount shown on the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable.[30]

Shortly after the *Williamson* decision, the Second Circuit addressed the short-year assessment question directly in *Irving*

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that access to the Tax Court is constitutionally required.

The constitutionality of the procedure advocated by the I.R.S. remains an open question. It is a question which could, however, be rendered moot by the Supreme Court's pending decisions on the source of authority issue. *See* text accompanying notes 83 and 84 *infra*.

[28] The main issue in this case was whether the plaintiff could plead the fifth amendment in a civil suit to recover a refund from the Internal Revenue Service when also facing criminal prosecution on the narcotics charges which led to the determination of jeopardy.

[29] 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1973).

[30] *Id.*, *quoting* Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840, 843 (1938).

v. Gray.[31] In this case the Internal Revenue Service terminated the plaintiffs' taxable years pursuant to § 6851 and immediately issued a jeopardy assessment against them for $512,111. On the same day, levy notices were served on the taxpayers' stockbroker, demanding payment of the full amount in their security accounts. The Irvings then sued in federal district court for injunctive relief delaying enforcement of the assessment until they received deficiency notices.

The arguments of both the taxpayers and the I.R.S. differed sharply from those advanced in *Williamson*. The plaintiffs argued that § 6851 contains no assessment authority and is dependent for that authority upon § 6861, which provides that "[i]f the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency."[32] This section further provides that a notice of deficiency must be mailed to the taxpayer within 60 days of the assessment.[33] Thus, they asserted that the failure to issue the deficiency notice was a violation of the Code and collection should be enjoined until such notice was issued.

The I.R.S., abandoning the successful *Williamson* argument, agreed that § 6851 did not contain an independent assessment authority. The Service contended, however, that the tax imposed under § 6851 was not a deficiency and therefore could not be governed by § 6861. Instead, the assessment authority for § 6851 should be found in § 6201 of the Code,[34] which provides a general assessment authority, without reference to the term "deficiency."

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[31] 479 F.2d 20 (2d Cir. 1973). The plaintiffs were Clifford and Edith Irving and Richard Suskind of Howard Hughes biography hoax fame.

[32] I.R.C. § 6861(a).

[33] I.R.C. § 6861(b).

[34] I.R.C. § 6201(a) reads as follows:

> Assessment authority.
>
> (a) Authority of Secretary or delegate.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law . . . .

The court, relying heavily upon *Williamson*, accepted the I.R.S. position and determined that the tax imposed by the short-year assessment was not a "deficiency" as defined by the Code in § 6211.[35] Since no deficiency existed, the assessment could not be accomplished pursuant to § 6861 because this section refers specifically to the jeopardy assessment of deficiencies. Therefore, the court held that the tax must necessarily be assessed under the general authority of § 6201.

The Sixth Circuit decided the source of authority issue in *Rambo v. United States*.[36] In this case the I.R.S. had terminated the plaintiff-taxpayer's taxable year following his arrest on a narcotics charge. The same procedure was followed as in *Irving*; the assessment and the notices of levy upon the taxpayer's bank account and automobiles were issued simultaneously. After the bank turned over the money in his account and the date was set for the sale of his automobiles, the taxpayer filed a suit for injunctive relief in the United States District Court for the Western District of Kentucky.[37] This court rejected the arguments of the Second and Seventh Circuits and granted relief to the taxpayer.

On appeal to the Sixth Circuit, the arguments on both sides were identical to those put forward in *Irving*. Relying upon the same Code sections, this court decided that a deficiency does exist in the short-year situation. The court explained:

Clearly, the I.R.S. has imposed a tax and just as clearly the

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[35] I.R.C. § 6211(a) provides:

Definition of a deficiency.

(a) In general.—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebate, as defined in subsection (b)(2), made.

[36] 492 F.2d 1060 (6th Cir. 1974).

[37] Rambo v. United States, 353 F. Supp. 1021 (W.D. Ky. 1972).

> taxpayer has denied that he owes that amount by refusing either to pay the imposed tax or to file a return. Consequently, the tax imposed, $28,446.88, became the deficiency . . . . The statute itself [§ 6211] in no way limits the definition of a deficiency to a determination made only at the end of the taxable year.[38]

The court concluded that, because a deficiency existed, the authority for the short-year assessment is provided by § 6861 rather than § 6201. Consequently, it ruled that the taxpayer was entitled to a notice of deficiency and that injunctive relief was proper if that notice had not been issued.

These three opinions illustrate the conflict among the three circuit courts which have passed upon this issue. The Seventh and Second Circuits have denied the taxpayer's right to a notice of deficiency, whereas the Sixth Circuit has upheld that right. Since *Rambo*, both the Second Circuit and the Sixth Circuit have had an opportunity to moderate their positions, but each has steadfastly refused to do so. In *Laing v. United States*,[39] the Second Circuit reaffirmed *Irving* in a per curiam opinion which characterized the reasoning of the Sixth Circuit as erroneous. In *Hall v. United States*,[40] the Sixth Circuit issued a per curiam reaffirmance of *Rambo*, again rejecting the rationale of the *Irving* decision.

III. ANALYSIS OF THE ARGUMENTS IN THE § 6851 CASES

Section 6861 of the Code empowers the I.R.S. to make a jeopardy assessment whenever it "believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay."[41] In each of the short-year jeopardy assessment cases discussed above, the I.R.S., even though inconsistent in its designation of the true source of the assessment authority, has consistently argued that the tax assessed under § 6851 is not a deficiency and that therefore § 6861 cannot be the authority for the assessment because it deals only with deficiencies. The taxpayers, on the other hand, have asserted

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[38] Rambo v. United States, 492 F.2d 1060, 1064 (6th Cir. 1974).

[39] 496 F.2d 853 (2d Cir. 1974), *cert. granted*, 419 U.S. 824 (1974).

[40] 493 F.2d 1211 (6th Cir. 1974), *cert. granted*, 419 U.S. 824 (1974).

[41] I.R.C. § 6861(a).

that any tax which has been declared due and which has not been paid is a deficiency. Based upon this broader definition of "deficiency," they have maintained that the short-year assessment is governed by the provisions of § 6861. The courts have employed varying lines of reasoning to formulate a definition of the word "deficiency" and have, as the preceding cases demonstrate, reached conflicting conclusions.

A. *The Statutory Definition*

The obvious first step in ascertaining the meaning of "deficiency" is an attempt to apply the definition given in the Code itself. Section 6211 of the Code defines a "deficiency" as the amount by which the tax imposed exceeds the tax shown on the taxpayer's return (if a return was filed) plus the amounts previously assessed, minus the amount of any rebates.[42] This definition may be mathematically expressed as:

> Deficiency = correct tax − (tax on return + prior assessments − rebates) or, Deficiency = correct tax − tax on return − prior assessments + rebates.[43]

Both the Second Circuit in *Irving* and the Seventh Circuit in *Williamson* felt that the statutory definition was sufficient to dispose of the matter. The reasoning utilized by these courts was promulgated by the Board of Tax Appeals in *Ludwig Littauer & Co. v. Commissioner*[44] and has been followed without elaboration in a series of cases.[45] Essentially, these courts point to the wording of § 6211(a) and identify two criteria for the existence of a tax deficiency. First, there must be a "tax imposed." Second, the taxpayer must file a tax return. In each of these cases, the courts decided that the amount assessed under the short-year procedure was not a "tax imposed" but merely "a provisional statement of the amount that must be presently

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[42] I.R.C. § 6211(a). The exact wording of this statute is set out in note 34 *supra*.

[43] 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 49.128 (1971 Revision).

[44] 37 B.T.A. 840 (1938).

[45] *See, e.g.*, DaBoul v. Commissioner, 429 F.2d 38 (9th Cir. 1970) (affirming the order of the Tax Court dismissing the taxpayer's petition); Parrish v. Daly, 350 F. Supp. 735 (S.D. Ind. 1972); Puritan Church—The Church of America v. Commissioner, 10 CCH Tax Ct. Mem. 485 (1951), *aff'd per curiam*, 209 F.2d 306 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 975 (1954).

paid or a protection against the impossibility of collection at some future date."[46] This logic can be easily attacked through the wording of § 6851, which states that upon the sending of the assessment notice, "such taxes . . . shall become immediately due and payable."[47] Clearly, there is nothing provisional about the statement, nor is there any doubt that the amount due is a tax. The fact that the taxes are "immediately due and payable" makes it difficult to dispute that such taxes have been imposed on the taxpayer.[48]

The inherent weakness of the theory that a short-year assessment is not a "tax imposed" apparently led the courts in *Williamson* and *Irving* to rely more heavily upon their second criterion of a deficiency: the filing of a return. The return requirement has been found essential to the § 6211 deficiency definition based on the fact that the tax reported in the return is one of the elements to be subtracted in determining the deficiency. Thus, until a return is filed, stating a tax less than the amount determined to be correct by the I.R.S., no deficiency can exist.[49] In the short-year jeopardy assessment situation, the deficiency cannot exist until the taxpayer files his tax return at the end of the normal taxable year. Only then can the correct tax liability be computed and the deficiency determined.[50] This conclusion appears to ignore the explanatory regulations promulgated by the I.R.S. These regulations provide that if the taxpayer does not file a return, the amount shown on his return shall be considered zero.[51] Accordingly, if no return is filed, "the deficiency is the amount of the tax imposed by" the income tax provisions of the Code.[52]

Thus, there are adequate rebutting arguments to each of the requirements for a "deficiency" which the courts favoring the I.R.S. have found lacking in § 6851 cases. It is on the basis of these rebutting arguments that the Sixth Circuit concluded in *Rambo* that the statutory definition of deficiency *could be*

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[46] Parrish v. Daly, 350 F. Supp. 735, 736 (S.D. Ind. 1972).

[47] I.R.C. § 6851(a).

[48] Rambo v. United States, 492 F.2d 1060, 1064 (6th Cir. 1974).

[49] Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840, 842-43 (1938).

[50] *Id.*

[51] Treas. Reg. § 301.6211-1(a) (1965).

[52] *Id.*

interpreted to encompass the short-year assessment situation. The court noted, however, that the statute's lack of clarity on this point rendered it an insufficient ground, standing alone, on which to base the ultimate decision of the case.[53]

B. *Statutory History*

The courts which have found the statutory definition of "deficiency" contained in § 6211 insufficient to determine whether Congress intended the use of that term in § 6861 to include the taxes declared due and payable under § 6851[54] have resorted to other methods of discerning the legislative intent. The most common approach is to trace the histories of §§ 6861 and 6851. The direct ancestor of § 6851 was first enacted in 1918 and contained essentially the same language as the present version.[55] At this time there was no means by which the taxpayer could challenge any assessment made by the I.R.S. prior to payment.[56] The harshness of this procedure was mitigated in 1924 with the establishment of the Board of Tax Appeals[57] (now the Tax Court) and the introduction of the notice of deficiency.[58] The notice of deficiency provided essentially the same safeguards for the normal taxpayer as it does today. All jeopardy taxpayers, however, were excluded from receiving the notice.[59]

The Revenue Act of 1926 gave the tax system its present basic structure. The rights of jeopardy taxpayers were greatly expanded by this revision, which added the antecedent of § 6861[60] in substantially its present form. If the collection of the tax was in jeopardy, the I.R.S. could immediately assess it, but the Service was required to send a notice of deficiency within 60 days, thus allowing the jeopardy taxpayer a pre-payment

[53] Rambo v. United States, 492 F.2d 1060, 1064 (6th Cir. 1974).

[54] This category includes the Sixth Circuit and numerous district courts. Invariably, if the courts reach this conclusion, through various arguments they have eventually held that § 6861 is the authority for the § 6851 assessment.

[55] INT. REV. ACT OF 1918 § 250(g).

[56] Schreck v. United States, 301 F. Supp. 1265, 1268 (D. Md. 1969).

[57] *Id.* at 1269.

[58] INT. REV. ACT OF 1924 § 274(a).

[59] Schreck v. United States, 301 F. Supp. 1265, 1270 (D. Md. 1969).

[60] INT. REV. ACT OF 1926 § 279.

forum. It should be noted that the predecessor of § 6851 never contained an express independent assessment authority. From 1916 to 1926 it clearly relied upon the general assessment provision for its authority. The position of § 6851 in 1926, when the predecessor of § 6861 was enacted, was no clearer than it is today. The forerunner of §§ 6212(a) and 6213(a)[61] provided:

> Except as otherwise provided in subdivision (d) or (f) of this section or in sections 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice [of deficiency] has been mailed to the taxpayer . . . .[62]

The Maryland District Court in *Schreck v. United States*[63] emphasized that the predecessor of § 6851 [§ 250(g)] was not listed as one of the exceptions from the general requirement of the notice of deficiency[64] and apparently drew the inference that therefore the notice was required. Such an inference may have been improper, however, because this section again deals with the "assessment of a *deficiency*," which seems to lead directly back to the problem of defining the term "deficiency." The majority of courts have concluded that an examination of the histories of § 6851 and § 6861 offers no help in determining whether Congress intended § 6851 assessments to be governed by § 6861. The only significant point is that, historically, § 6851 depended upon the general assessment provision and did not contain an independent assessment authority.

C. *The Code Structure Theory*

Unable to ascertain the intent of Congress concerning the assessment authority of § 6851 through either the wording of the Code or the history of the various sections, the courts have been forced to rely upon less conventional interpretive aids. One approach is the "code structure" theory. Under this

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[61] INT. REV. ACT OF 1926 § 274(a). This section is the common ancestor §§ 6212(a) and 6213(a).

[62] *Id.*

[63] 301 F. Supp. 1265 (D. Md. 1969).

[64] *Id.* at 1272-73.

theory, the source of authority issue is resolved within the confines of "the harmony of our carefully structured twentieth century system of tax litigation."[65] The Arizona District Court has apparently been the leading proponent of the code structure theory. In *Lisner v. McCanless*,[66] that court stated that the Internal Revenue Code was intended to be a true code presenting a "comprehensive, cross-related scheme of laws."[67] All sections of the Code must therefore be interpreted with a view toward their place in the general scheme.[68] According to *Lisner*, failure to recognize this principle will lead the courts "on a path of convolutions and strained interpretation, instead of an attempt to find order in a highly structured code."[69]

The *Lisner* court found two bases in the code structure theory to support its decision that § 6851 assessments were authorized and governed by § 6861. First, the Code provides for only two types of assessments: the normal, nonjeopardy assessment and the jeopardy assessment. The Code carefully sets forth rules and procedures to be followed in each of these situations.[70] If the Government's contention that the short-year assessment is yet a third category, separable from the other two, then all rules governing assessments are waived and the I.R.S. possesses an uncontrolled authority in these cases.[71] This absence of control is obviously not compatible with the carefully regulated, general scheme of the Code.

The second ground which the *Lisner* court found for its decision was the very arrangement of the sections within the Code. Sections 6851 and 6861 appear one after the other under the general heading "Subchapter A—Jeopardy." This arrangement indicated to the court that the two sections were meant to be applied in harmony. The idea that § 6851 can be used as a wild card "without reference to [the Code's] carefully con-

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[65] Flora v. United States, 362 U.S. 145, 176 (1960) (opinion of Warren, C.J.).

[66] 356 F. Supp. 398 (D. Ariz. 1973).

[67] *Id.* at 402.

[68] Peale, *Termination of Taxable Year*, 52 TAXES 305, 309 (1974).

[69] Lisner v. McCanless, 356 F. Supp. 398, 403 (D. Ariz. 1973).

[70] Normal assessments are governed by I.R.C. § 6213. Jeopardy assessments are controlled by I.R.C. § 6861.

[71] Lisner v. McCanless, 356 F. Supp. 398, 402 (D. Ariz. 1973).

structed scheme, is to ignore plain English."[72] The Sixth Circuit, though not citing *Lisner*, found the same reasoning persuasive.[73]

The code structure theory provides a very logical method of resolving the source of authority issue. Nevertheless, this analysis, particularly that based upon the organization of the code sections, remains questionable because of § 7806, which provides that "[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title."[74] Section 7806 deprives the code structure theory of much of its persuasiveness, forcing the courts to seek yet another rationale with which to locate the source of the short-year assessment authority.

D. *The Comparable Taxpayers Theory*

Some courts have attempted to decide § 6851 cases by comparing the status and rights of the full-year jeopardy taxpayer with those of the short-year taxpayer. The full-year taxpayer is definitely covered by § 6861 and is entitled to access to the Tax Court as well as all other procedural safeguards of that provision.[75] Under the I.R.S. view, the short-year taxpayer has no such rights until the end of his normal taxable year.[76] Thus the full-year jeopardy taxpayer has the right, within 60 days of the assessment, to take his case before the Tax Court. The short-year taxpayer must wait until the end of his regular tax year to seek relief either in a refund suit or before the Tax Court, if he is able to reach either of these forums.[77] Both are jeopardy taxpayers subject to the same standard for making a jeopardy assessment. The only difference is the timing of the assessment. The *Rambo* court recognized this inequity between

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[72] *Id.*

[73] Rambo v. United States, 492 F.2d 1060, 1064 (6th Cir. 1974).

[74] I.R.C. § 7806(b).

[75] The major safeguard available under § 6861 but absent from § 6851 is the express power granted the I.R.S. to abate the jeopardy assessment if it finds that jeopardy no longer exists. I.R.C. § 6861(g).

[76] Treas. Reg. § 1.6851-1(c) (1959).

[77] *See* notes 24-26 and accompanying text *supra*.

taxpayers of the same category and determined that it is inconceivable "that Congress could have intended to have given this minimal procedural protection to jeopardy taxpayers against whom a deficiency is assessed at the end of the taxable year, but not to taxpayers whose year is terminated under Section 6851."[78] This reasoning was extremely influential in the court's decision that "deficiency," as used in § 6861, included § 6851 amounts.

In rebuttal to the argument that Congress could not have intended to create inequities between comparable taxpayers, it has been observed that the I.R.S. is not dealing with comparable taxpayers. As noted by both the Board of Tax Appeals in *Ludwig Littauer* and the Second Circuit in *Irving*, the I.R.S. is faced with more exigent circumstances in the short-year situation than in the full-year jeopardy assessment.[79] According to these courts there is an added degree of jeopardy under § 6851 which justifies more stringent procedures than those of § 6861. This analysis is reinforced by a comparison of the short-year taxpayer with the taxpayer who overpays his estimated tax.[80] Under the I.R.S. view, neither is allowed to begin court action before the close of the normal taxable year. Like a short-year taxpayer who has been overassessed, one who overpays estimated tax is forced to leave an excessive amount of property under the control of the I.R.S. until the end of the year. The fact that the overpayer of estimated tax has placed himself in this predicament, whereas the short-year taxpayer has been involuntarily assessed, would seem to be counterbalanced by the excessive jeopardy involved in the latter case. At the close of the normal taxable year, the short-year taxpayer's year is reopened[81] and he is then in the same position as the full-year jeopardy taxpayer. Admittedly, this analysis is neither flawless nor all-encompassing on the issue, but it is sufficient to cast doubt upon the *Rambo* reasoning.

As this discussion of the arguments presented in § 6851

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[78] Rambo v. United States, 492 F.2d 1060, 1064 (6th Cir. 1974).

[79] *See* Irving v. Gray, 479 F.2d 20 (2d Cir. 1973); Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840, 842 (1938).

[80] *See* Peale, *supra* note 68, at 313.

[81] I.R.C. § 6851(b).

cases illustrates, there is no simple approach to the definition of "deficiency." For each argument there is a plausible counterargument. Courts opting for the I.R.S. position have decided the issue on the basis of the Code's wording, finding much significance in the reference to the tax return contained in § 6211. In contrast, those courts favoring the taxpayer have found the statutory definition inconclusive and have employed either the code structure theory or the comparable taxpayers theory in an attempt to identify the scope of the term "deficiency" as used in § 6861. All of these arguments are subject to direct attack.

IV. CONCLUSION

Section 6851 has presented difficult problems of statutory interpretation. Although the courts have tried to identify the source of authority and the procedures which must be followed under § 6851 short-year assessments, these efforts have apparently failed to satisfactorily resolve the issue. A short-year assessment is obviously a jeopardy assessment, yet § 6861, which deals with jeopardy assessments, refers only to the assessment of deficiencies. The definition of that term therefore becomes the crucial interpretive problem. The Second and Sixth Circuits have rendered directly conflicting decisions on the issue in cases presenting basically identical facts and arguments. The difficulty of the problem is further emphasized by the fact that each of the rationales used by the various courts for their decisions is susceptible to plausible rebutting arguments.

It is the opinion of this writer that the short-year jeopardy assessment is authorized by § 6861. This conclusion is influenced by the comparative persuasiveness of the arguments described above and by the possible inability of the taxpayer to obtain judicial relief if he is not given access to the Tax Court. The true basis for this opinion, however, lies in the practicalities of the issue. The purpose of the jeopardy assessment is "to assure that the interests of the Government are protected."[82] The provisions of § 6861 would serve this purpose just as well as the procedure advocated by the I.R.S. Under this section,

[82] Clark v. Campbell, 341 F. Supp. 171, 176 (N.D. Tex. 1972).

the I.R.S. would not be placed in a less advantageous position. If jeopardy is determined and the tax year terminated under § 6851, no delay would be experienced in applying the § 6861 procedure for making the assessment. Under this section, the I.R.S. would still have full authority to seize, levy, and collect the amount assessed. The only variation from the I.R.S. procedure would be the right of the taxpayer to a notice of deficiency, giving him access to the Tax Court. This change would diminish neither the power nor effectiveness of the I.R.S. Thus, if the assessment authority were found under § 6861, the I.R.S. would lose little or nothing and the taxpayer would be granted the right to a speedy judicial determination of his tax.

As the matter now stands, taxpayers from the Sixth Circuit are given substantially greater procedural safeguards in the short-year assessment situation than are short-year taxpayers in the Second and Seventh Circuits. The rights of similar taxpayers in other circuits are dependent upon the dictates of the individual district courts. The Supreme Court's pending decisions in *United States v. Hall*[83] and *Laing v. United States*[84] should settle the issue, thereby eliminating the obvious inequities which currently exist.

Steven D. Gold

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[83] 493 F.2d 1211 (6th Cir.), *cert. granted*, 419 U.S. 824 (1974).

[84] 496 F.2d 853 (2d Cir.), *cert. granted*, 419 U.S. 824 (1974).

The Supreme Court heard the oral arguments in *Hall* and *Laing* in tandem on January 21, 1975. 43 U.S.L.W. 3414. No opinion had been issued when the Court adjourned for its summer recess on June 30, 1975.