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Administrative Law -- The Proper Case for Estoppel Against Federal Administrative Tendencies

Carl F. Eiberger

Joseph T. Helling

NOTES

Administrative Law

The Proper Case for Estoppel Against Federal Administrative Agencies

Before embarking upon a course of conduct, a "person" [1] may desire to learn whether or not his conduct will be affected by a federal statute, and if so, to what extent. It is quite likely that he will turn to some federal administrative agency in his search for the answers to those questions. Should he be successful in obtaining some form of representation from these agencies, he will quite likely guide his conduct accordingly. After he has placed reliance upon that representation, he may find that some entirely different result is imposed by the agency at a later date, generally to his detriment. His disappointment occasioned by such agency conduct, may be the result of a change in attitude on the part of the agency, a difference of opinion between officials within the agency, or even a change in the agency's personnel.

Considering such treatment wholly unjust and inequitable, he may turn to the courts in an effort to prevent the agency from changing its position in regard to him, on the ground of estoppel. When he does, it is very likely that he will encounter the statement, "there can be no estoppel against the government or its agencies." [2]

No one universally-propounded reason appears to lie behind the doctrine that estoppel will not operate against governmental agencies. Nevertheless, the most pervading consideration seems to be that there should be no interference with the sovereignty of the government,[3] for the reason

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1 As defined in Section 2(b) of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001b (1946): "'Person' includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies."

2 Spencer v. Railroad Retirement Board, 166 F.(2d) 342, 343 (3d Cir. 1948); United States v. Ohio Oil Co., 163 F.(2d) 633, 641 (10th Cir. 1947), *cert. denied,* 333 U.S. 833, 68 S.Ct. 459, 92 L.Ed. 1117 (1948); Walker-Hill Co. v. United States, 162 F.(2d) 259, 263 (7th Cir.), *cert. denied,* 332 U.S. 771, 68 S.Ct. 85, 92 L.Ed. 356 (1947); NLRB v. Phillips Gas & Oil Co., 141 F.(2d) 304, 305 (3d Cir. 1944); Brown v. United States, 102 F. Supp. 132, 133 (S.D. Mo. 1952); United States v. Leccony Smokeless Fuel Co., 64 F. Supp. 269, 270 (S.D. W. Va. 1946).

3 Elrod Slug Casting Mach. Co. v. O'Malley, 57 F. Supp. 915, 920 (D. Neb. 1944) (estoppel would interfere with the proper discharge of governmental duties, or curtail the exercise of its police power). The opinion in this case points up an important distinction in regard to estoppel against the government — whether the governmental function involved is proprietary or sovereign. In the case of proprietary functions, estoppel is more liberally applied against government agencies and officers. The relatively few instances in which federal administrative agencies are called upon to carry out proprietary functions renders this aspect of the problem

that the government's welfare, being of greater importance, outweighs individual injury in a particular case.[4] Ultimately, however, the basis for the doctrine of no estoppel against government agencies flows from the doctrine of non-suability of the sovereign, which may not be waived by administrative officials or lost through mere misrepresentation whether inadvertent or designed.[5]

The conclusiveness and apparent universality of this rule that estoppel will not operate against government agencies, as well as the frequency with which it has appeared in decided cases, might suggest that the matter was well settled and rarely raised in issue by litigating parties. The contrary is true, however. The reason for this lies in the fact that many courts qualify their statements of the rule to the effect that estoppel may operate against government agencies in a "proper" [6] or "extraordinary" [7] case. What is the "proper" case? What are its elements? Is there, or has there been, any situation or situations in which a party, having relied upon some agency's representation, has succeeded, or could succeed, in having the court prevent the agency from proceeding under an inconsistent position to his detriment? It has been suggested that the government should turn square corners in dealing with its citizens.[8] Under what circumstances does that principle become applicable? This is our problem, for in none of the cases examined, where the suggestion of the "proper" case was made, did the court attempt to define it or set out its elements.[9]

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insignificant as a guide to the "proper" case. American Surety Co. v. United States, 112 F.(2d) 903, 906 (10th Cir. 1940) (estoppel rejected where its application would frustrate the purpose of the laws of the United States or its public policy). Montana Power Co. v. FPC, 185 F.(2d) 491, 497 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 947, 71 S.Ct. 532, 95 L.Ed. 683 (1951); NLRB v. Baltimore Transit Co., 140 F.(2d) 51, 55 (4th Cir.), *cert. denied,* 321 U.S. 795, 64 S.Ct. 848, 88 L.Ed. 1084 (1944) (the public cannot be deprived of the protection of a statute because of the mistaken action or lack of action on the part of a public official). Also see, Manning, *The Applicaion of the Doctrine of Estoppel Against the Government in Federal Tax Cases,* 30 N.C.L. Rev. 356, 370 (1952).

4 Walker-Hill Co. v. United States, 162 F.(2d) 259, 263 (7th Cir.), *cert. denied,* 332 U.S. 771, 68 S.Ct. 85, 92 L.Ed. 356 (1947).

5 Coleman v. United States, 100 F.(2d) 903, 905 (6th Cir. 1939).

6 Vestal v. Commissioner, 152 F.(2d) 132, 136 (D.C. Cir. 1945); Knapp-Monarch Co. v. Commissioner, 139 F.(2d) 863, 864 (8th Cir. 1944); Ritter v. United States, 28 F.(2d) 265, 267 (3d Cir. 1928); Walker v. United States, 139 Fed. 409, 413 (C.C.M.D. Ala. 1905); Barnett Inv. Co. v. Nee, 72 F. Supp. 81, 82 (W.D. Mo. 1947); Elrod Slug Casting Mach. Co. v. O'Malley, 57 F. Supp. 915, 920 (D. Neb. 1944).

7 James Couzens v. Commissioner, 11 B.T.A. 1040, 1151 (1928).

8 Howbert v. Penrose, 38 F.(2d) 577, 581 (10th Cir. 1930). This is a turnabout of the original phrase of Mr. Justice Holmes: "Men must turn square corners when they deal with the Government." Rock Island, A. & L. R.R. v. United States, 254 U.S. 141, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920).

9 See note 6 *supra.*

The Doctrine of Estoppel

An attempt to find the answer to these questions through an examination of decided cases leads to several difficulties, not the least of which is the determination of the meaning of estoppel. The operation of the principle of estoppel as a bar to prevent a party from acting in a certain manner, or asserting certain statements, extends throughout nearly the entire field of law.[10] The generally accepted definition of estoppel, however, is "the commission of an act or the concealment of facts to one who is ignorant of the matter with the intent to induce and cause the other party to act upon it or change his position to his detriment or disadvantage." [11]

Nevertheless, in applying the doctrine, many courts have introduced liberalizing modifications, sometimes accompanying the modification with a name change, such as, "quasi estoppel," [12] "the duty of consistency," [13] or "estoppel by election." [14] As stated under the more liberal modifications,[15] the term estoppel implies that one who by his deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent attitude or course of conduct and thereby cause loss or injury to such other.[16] Some of the traditional elements of the generally accepted definition are eliminated: *e.g.*, intent that the representation be relied upon; necessity that the person making the representation have knowledge; requirement of diligent investigation on the part of the person invoking the doctrine.

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10 19 AM. JUR. *Estoppel* § 1 (1939). Brown v. Rosenbaum, 175 Misc. 295, 23 N.Y.S.(2d) 161, 171 (Sup. Ct. 1940) (stare decisis); Clark v. Baranowski, 111 Ohio St. 436, 145 N.E. 760, 761 (1924) (res judicata).

11 Olbert v. Key, 93 S.W.(2d) 1048, 1051 (Mo. 1936); 3 POMEROY, EQUITY JURISPRUDENCE 191-2 (5th ed., Symons, 1941).

12 Robbins v. United States, 21 F. Supp. 403, 407 (Ct. Cl. 1937); Mahoning Inv. Co. v. United States, 3 F. Supp. 622, 629 (Ct. Cl. 1933), *cert. denied,* 291 U.S. 675, 54 S.Ct. 526, 78 L.Ed. 1064 (1934); Atlas, *The Doctrine of Estoppel in Tax Cases,* 3 TAX L. REV. 71 (1947). In Sterns Co. v. United States, 291 U.S. 54, 61-2, 54 S.Ct. 325, 78 L.Ed. 647 (1934), Cardozo, speaking for the Court, observed: "Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle . . . that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. [Citation omitted]. A suit may not be built on an omission induced by him who sues."

13 Orange Securities Corp. v. Commissioner, 131 F.(2d) 662, 663 (5th Cir. 1942); Alamo Nat. Bank of San Antonio v. Commissioner, 95 F.(2d) 622, 623 (5th Cir.), *cert. denied,* 304 U.S. 577, 58 S.Ct. 1047, 82 L.Ed. 1541 (1938); 10A MERTENS, LAW OF FEDERAL INCOME TAXATION § 60.16 n. 77a (Supp. 1952).

14 Vestal v. Commissioner, 152 F.(2d) 132, 136 (D.C. Cir. 1945); Eichelberger & Co. v. Commissioner, 88 F.(2d) 874 (5th Cir. 1937); United States v. Brown, 86 F.(2d) 798, 799 (6th Cir. 1936).

15 See Horn v. Cole, 51 N.H. (3 Shirley) 287, 289 (1868); 3 POMEROY, *op. cit. supra* note 11, at 180.

16 See notes 12, 13 and 14 *supra.*

Four elements remain:

(a) There must be a representation in some form by the party to be estopped.

(b) There must be a reliance upon that representation by the party pleading estoppel.

(c) There must be an attempt by the party to be estopped to take an inconsistent position.

(d) There must be detriment, actual or threatened, to the party invoking the doctrine.

It was in this latter view of the term "estoppel" that the search involved in this article for the "proper" or "extraordinary" case was conducted.

Agency Representations

Although federal administrative agencies make a vast array of representations in a variety of forms, they can be divided into two general categories: (a) those which assert new law; and (b) those which apply existing law to factual situations. Agency statements propounding new law, or legislative rules, are generally issued under express and specific authority granted by some congressional enactment. On the other hand, statements or actions purporting to apply the existing law to factual situations, either real or hypothetical, referred to as interpretative rules, are issued under general grants of power to carry out congressional intent; they are seldom specific, and frequently implied rather than express.[17]

Where the agency pronouncement upon which the affected party relies is a legislative rule, the question of estoppel generally does not arise. New law expounded by the agency under specific grants of authority has the force of a statute, and the courts generally require obedience to such statutory law on the part of the agency as well as by other parties affected.[18] When the agency attempts to adopt a position inconsistent with its own legislative rule, the rule itself is generally invoked to prevent such conduct rather than the equitable appeal upon the grounds of estoppel.

Representations applying existing law can be divided roughly into two categories: (a) impersonal pronouncements made to others or to the public generally; and (b) those made to the party on a personal basis. The form of such representations varies considerably. They may occur in the form of interpretative regulations, bulletins, speeches, rulings, memoranda, letters, statements, releases, long-standing practices, inaction and possibly others.

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[17] DAVIS, ADMINISTRATIVE LAW § 55 (1951).

[18] Helvering v. Wilshire Oil Co., 308 U.S. 90, 60 S.Ct. 18, 84 L.Ed. 101 (1939); Schafer v. Helvering, 83 F.(2d) 317 (D.C. Cir.), *aff'd,* 299 U.S. 171, 57 S.Ct. 148, 81 L.Ed. 101 (1936).

Impersonal Representations

Where the representation relied upon was of an impersonal character, *i.e.*, not personally directed to the party seeking to invoke estoppel, the courts have consistently, with one notable exception,[19] rejected the doctrine.[20] In the majority of these cases, the representation relied upon was in interpretative regulation published by the agency. In rejecting estoppel, the courts frequently give as the reason the fact that the original regulation was erroneous and therefore a nullity, of no effect, or void.[21] Since the question of estoppel arises only when the original interpretation was erroneous,[22] it is somewhat difficult to see why that fact should prevent the operation of the principle.

Another reason advanced for rejecting estoppel in cases involving interpretative regulations has been that affected parties have no right to rely upon them. For example, it has been stated: [23]

> . . . if, under the law, the transfer did result in taxable income to the plaintiff, any erroneous interpretation of the act by the Treasury Depart-

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19 United Fruit Co. v. Hassett, 61 F. Supp. 1013 (D. Mass. 1945). The interpretative regulation relied upon in this case had remained static during three successive reenactments of the Revenue Act by Congress, and as such might have been considered binding under the "reenactment rule." The court chose, however, to rest its decision upon equitable grounds, observing: "The argument may be put still more strongly. A taxpayer, in computing his tax liability, follows the statutory provisions and the interpretative regulations issued pursuant thereto. When the amounts due are determined, provisions are made for payment. The taxpayer should then be able to plan the normal operations of his business without the risk of being subjected to additional tax demands based upon changes in administrative interpretation." *Id.* at 1019. The court continued: "The Government equally should be restrained here from taking an inconsistent position to the taxpayer's detriment. The virtues of certainty and predictability are too little apparent in the field of tax administration. Having followed scrupulously both legislative and administrative directions in filing its return, the plaintiff should be secure in its belief that its tax obligations have been met." *Ibid.* The comment of the dissenting judge in the case of Stockstrom v. Commissioner, 190 F.(2d) 283, 289 (D.C. Cir. 1951) seems especially appropriate to this decision: ". . . I wish the law were as the opinion of the court in this case holds it to be, but I am convinced that it is not."

20 FCC v. WOKO, 329 U.S. 223, 67 S.Ct. 213, 91 L.Ed. 204 (1946); Tonningsen v. Commissioner, 61 F.(2d) 199 (9th Cir. 1932); Langstaff v. Lucas, 9 F.(2d) 691 (W.D. Ky. 1925), *aff'd*, 13 F.(2d) 1022 (6th Cir. 1926), *cert. denied*, 273 U.S. 721, 47 S.Ct. 111, 71 L.Ed. 858 (1926); Stocker v. Commissioner, 12 B.T.A. 1348, 1351 (1928).

21 Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134, 56 S.Ct. 397, 80 L.Ed. 528 (1936); Stocker v. Commissioner, 12 B.T.A. 1348, 1351 (1928).

22 Where the original interpretation was correct and the agency attempts to supplant it with an erroneous one, the language of the applicable statute, rather than any equitable principle, prevents the change. In the case of Stocker v. Commissioner, 12 B.T.A. 1348, 1351 (1928), the court expressly refrained from stating an opinion as to the rights of the taxpayer where the regulation relied upon and subsequently changed was not erroneous.

23 Langstaff v. Lucas, 9 F.(2d) 691, 693 (W.D. Ky. 1925), *aff'd*, 13 F.(2d) 1022 (6th Cir. 1926), *cert. denied*, 273 U.S. 721, 47 S.Ct. 111, 71 L.Ed. 858 (1926).

> ment would not estop the government from asserting the tax, even though the taxpayer may have been misled by such interpretation. He must have known that his tax liability was determined by the law, and not by what some administrative official thought was the law.

While, under the maxim that "everyone is presumed to know the law," the actual lack of authority inherent in interpretative regulations would undoubtedly establish a lack of the essential element of reliance, published regulations formally issued by administrative agencies empowered by Congress to effectuate the law would seem to fall squarely within the situation outlined in the opinion of *Horn v. Cole*,[24] where the court said: [25]

> . . . where a man makes a statement . . . in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and, if they had an interest in the subject, would act on as true, and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false to the injury of the party who believed it to be true and acted on it as such. . . .

It would seem more logical that the real reason for rejecting a plea of estoppel in these decisions was the general considerations underlying the entire field of estoppel against administrative agencies.[26] However, whatever the real reason for judicial refusal to honor reliance upon agency regulations, the obvious inequity of the situation has prompted Congress in a few instances to remedy the situation by legislative enactment of the so-called "good faith" clauses.[27] Typical of such statutes are the provisions of the Securities Act of 1933, which provides: [28]

> No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Personal Representations

Where the controversy involves a representation made by the agency to the affected party on a personal basis, the form of the representation will affect its validity as the basis for estoppel.[29] Inaction is

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24 51 N.H. (3 Shirley) 287 (1868). See 3 POMEROY, *op. cit. supra* note 11 at 226.

25 51 N.H. (3 Shirley) 287, 300 (1868).

26 See notes 3-5 *supra.*

27 Securities Act of 1933, 48 STAT. 85 (1933), as amended, 48 STAT. 908 (1934), 15 U.S.C. § 77s(a) (1946); Trust Indenture Act of 1939, 53 STAT. 1174 (1939), 15 U.S.C. § 77sss(c) (1946); Portal-to-Portal Act of 1947, 61 STAT. 88-9 (1947), 29 U.S.C. § 258-9 (Supp. 1952). See Tyson, *The Good Faith Clauses of the Portal-to-Portal Act*, 22 TEMP. L.Q. 1 (1948), for similar citations and a general discussion of these clauses.

28 48 STAT. 85 (1933), as amended, 48 STAT. 908 (1934), 15 U.S.C. § 77s(a) (1946).

29 A form of agency representation that has frequently been relied upon by affected parties is the Board ruling or order, involving an actual adjudication of a

ineffective. The failure of a federal agency to take any action in regard to a particular situation, even though it had full knowledge of the facts involved at the time, will not operate as a bar under the doctrine of estoppel to prevent that same agency from later instituting proceedings.[30] The fact that the party invoking the doctrine changed his position because of the agency's inaction does not affect the validity of the estoppel.[31]

In the matter of personal representations, the advisory opinion is one of the most common upon which reliance is placed. Such advisory opinions have been the mainstay for supplying the demand for authoritative advice concerning contemplated transactions. Interpretative service occupies a large part of the work of many administrative agencies. If the problem upon which the advice is given is one over which the agency exercises exclusive jurisdiction, as a general rule it can be relied upon safely since "a reasonable Commission is not likely to prosecute for reliance in good faith upon an interpretation by the Commission's own staff."[32] Advisory opinions, however, are not binding upon the agency, and they have not been successfully used as a basis for estoppel against an administrative agency.[33]

Where the representation by the agency goes beyond inaction or the voicing of an opinion and involves some positive form of action, such as the collection of a tax,[34] the granting of a license,[35] the certification of a bargaining representative,[36] or similar conduct, a change in its position on the matter after reliance by the affected party may result in one

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specific problem on its merits. When agency officials subsequently attempt a proceeding which appears to be inconsistent with the Board ruling, a question arises regarding the application of the doctrine of "res judicata," if the same controversy is involved, and of "collateral estoppel" where a somewhat different situation has arisen. The application of these doctrines to administrative agency action is a field in and of itself worthy of a separate article and no attempt will be made in this Note to discuss the problem except as it may incidentally arise in cases where the problem of equitable estoppel is also involved.

30 NLRB v. Baltimore Transit Co. 140 F.(2d) 51 (4th Cir.), *cert. denied,* 321 U.S. 795, 64 S.Ct. 848, 88 L.Ed. 1084 (1944).

31 VOM BAUR, FEDERAL ADMINISTRATIVE LAW § 151A (Supp. 1947).

32 DAVIS, ADMINISTRATIVE LAW § 49 (1951).

33 Bowles v. Indianapolis Glove Co., 150 F.(2d) 597, 601 (7th Cir. 1945); Nichols & Co. v. Secretary of Agriculture, 131 F.(2d) 651, 658-9 (1st Cir. 1942), *rehearing,* 136 F.(2d) 503 (1st Cir. 1943); Burnham Chemical Co. v. Krug, 81 F. Supp. 911 (D.D.C. 1949), *aff'd sub nom.* Burnham Chemical Co. v. Chapman, 181 F.(2d) 288 (D.C. Cir.), *cert. denied,* 340 U.S. 826, 71 S.Ct. 60, 95 L.Ed. 606 (1950); Bowles v. Hansen Packing Co., 64 F. Supp. 131 (D. Mont. 1946); Fleming v. Miller, 47 F. Supp. 1004 (D. Minn. 1942), *rev'd on other grounds sub nom.* Walling v. Miller, 138 F.(2d) 629 (8th Cir. 1943), *cert. denied,* 321 U.S. 784, 64 S.Ct. 781, 88 L.Ed. 1076 (1944). See note 32 *supra.*

34 Schafer v. Helvering, 83 F.(2d) 317 (D.C. Cir.), *aff'd,* 299 U.S. 171, 57 S.Ct. 148, 81 L.Ed. 101 (1936).

35 Churchill Tabernacle v. FCC, 160 F.(2d) 244 (D.C. Cir. 1947).

36 Wallace Corp. v. NLRB, 323 U.S. 248, 65 S.Ct. 238, 89 L.Ed. 216 (1944).

of two situations which seem to call for the application of equitable estoppel. The first of these arises where the change is applied prospectively, resulting in an adverse effect upon the party because of his reliance upon the previous treatment of his case.

This situation is illustrated by *Churchill Tabernacle v. FCC*,[37] where the agency had granted a license to operate a radio station to a church. The license was renewed regularly for a period of over twelve years, during which time the church had made numerous changes in the administration and operation of the station at the request and direction of the agency.

Although the station continued to be operated according to the previous FCC requirements, the agency refused to renew the license in 1943 because of a change of policy. The church's attempt to have the license renewed on the grounds that the agency should be estopped from refusing to grant it met with failure before the court.

In another example,[38] a taxpayer had, with the full knowledge and approval of the Commissioner of Internal Revenue, filed his tax returns as a dealer in securities. During the four year period, 1924-1928, this method of filing had resulted in an increased tax. In 1929, the result would have been a reduced tax. In this year, the Commissioner, for the first time, adopted the position that the taxpayer was not entitled to file as a dealer. Despite the fact that the statute of limitations barred recovery of the previously paid taxes by the time the opinion was rendered, the court upheld the Commissioner's right to change his determination on the matter.

Where the change in position is applied to the future, the courts have consistently refused to estop the agency from changing its position, even though the representation consists of some form of positive action. The fact that affected parties have changed their positions in reliance thereon and will suffer some loss because of that reliance is of no avail. The reason underlying these decisions seems to be most accurately illustrated by the court in *Keystone Automobile Club v. Commissioner*: [39]

> The years . . . have seen the motor vehicle change from a means of amusement for the well-to-do to a practically universal means of transportation. If the Commissioner cannot change his mind about the relative place of automobile owners in the scheme of things during that period, he he is the only human being in America so precluded.

The second situation which may result from a change of position by the agency in regard to a matter where positive action has already been taken arises when the agency seeks to apply the change retroactively to the original transaction. Parties adversely affected by this retroactive

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37 160 F.(2d) 244 (D.C. Cir. 1947).

38 Schafer v. Helvering, 83 F.(2d) 317 (D.C. Cir.), *aff'd*, 299 U.S. 171, 57 S.Ct. 148, 81 L.Ed. 101 (1936).

39 181 F.(2d) 402, 406 (3d Cir. 1950).

change of position have frequently attempted, on the theory of estoppel, to prevent the agency from proceeding.[40] A few have been successful,[41] and it is in these cases that the interpretation of the "proper" case is to be found.

The Problem of Authority

Before proceeding to a discussion of these cases there is one aspect of the problem which requires consideration because of the frequency with which it appears in reported decisions. This is the question of the authority of administrative agencies and their officials, and the majority of reported cases in the field of estoppel make some comment upon it in one way or another. Frequently it is treated by the court as the deciding issue, and the whole question of estoppel is disposed of by an observation to the effect that in this case the official or the agency was acting outside the scope of his, or its, delegated authority.[42] Very infrequently is the actual authority set out and the departure shown; [43] rather, the age-old formula that ". . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement to do or cause to be done what the law does not sanction or permit. . . ." [44] is cited, and the question disposed of without further comment or discussion.[45]

This treatment of the problem has led to considerable speculation, some of it expressed in judicial opinions, that the "proper" case would be one in which the action taken by the agency was authorized.[46] An illustration of this is: [47]

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40 Okonite Co. v. Commissioner, 155 F.(2d) 248 (3d Cir.), *cert. denied*, 329 U.S. 764, 67 S.Ct. 125, 91 L.Ed. 658, (1946); United States v. La Societe Francaise De Bienfaisance Mutuelle, 152 F.(2d) 243 (9th Cir. 1945), *cert. denied,* 327 U.S. 793, 66 S.Ct. 820, 90 L.Ed. 1020 (1946); Knapp-Monarch Co. v. Commissioner, 139 F.(2d) 863 (8th Cir. 1944); Sweets Company of America v. Commissioner, 40 F.(2d) 436 (2d Cir. 1930.

41 See Heading, "The Cases," *infra.*

42 United States v. San Francisco, 310 U.S. 16, 31-2, 60 S.Ct. 749, 84 L.Ed. 1050 (1940); Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917); James v. United States, 185 F.(2d) 115 (4th Cir. 1950); United States v. Jones, 176 F.(2d) 278 (9th Cir. 1949); Bowles v. Indianapolis Glove Co., 150 F.(2d) 597 (7th Cir. 1945); Coleman v. United States, 100 F.(2d) 903 (6th Cir. 1939); Gudgel v. Iverson, 87 F. Supp. 834 (W.D. Ky. 1949).

43 Nichols & Co. v. Secretary of Agriculture, 131 F.(2d) 651 (1st Cir. 1942), *rehearing,* 136 F.(2d) 503 (1st Cir. 1943); Wells Lamont Corp. v. Bowles, 149 F.(2d) 364, 367 (Em. Ct. App.), *cert. denied,* 326 U.S. 730, 66 S.Ct. 37, 90 L.Ed. 434 (1945); Bowles v. Hansen Packing Co., 64 F. Supp. 131 (D. Mont. 1946).

44 Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 391, 61 L.Ed. 791 (1917).

45 See note 42 *supra.* If an agent acting without authority cannot bind the government in a specific determination, logically the person relying on this determination should not be bound either. However, this has been so held only in the unusual case of Staten Island Hygeia Ice and Cold Storage Co. v. United States, 85 F. (2d) 68 (2d Cir. 1936).

> The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority.

The observation is not entirely incorrect. Its value as a guide to the "proper" case, however, is somewhat lessened by an analysis of its use in decided cases. In several instances where the previous acts performed by the agency were authorized, the cases were decided without any reference to estoppel, the court finding that the authorized character of the acts made them final and binding.[48] Although none of these decisions expressly passes upon the point, it seems to be a fair inference from the reported opinions that reliance and detriment as a result of the reliance, or a lack of these essential elements of estoppel, would be immaterial to the decision of the case.

Another difficulty is to be found in determining just what authority an administrative agency has, and more particularly, where that authority lies within the agency. General statements regarding authority or lack of it add little or nothing to a definition of that quality, or to establishing who in the agency may exercise it. One commentator has analyzed the situation in a rather extreme manner: [49]

> "The agency is one great obscure organization with which the citizen has to deal. It is absolutely amorphous. He pokes it in one place and it comes out another. No one seems to have specific authority. There is someone called the commission, the authority; a metaphysical omniscient brooding thing which sort of floats around the air and is not a human being."

The very obscurity of this element must have led many to conclude that the courts were taking advantage of an easy solution to the estoppel problem by disposing of their cases on the basis of a statement that the agency lacked authority to take the action which it did.

Any implication drawn from these judicial pronouncements regarding authority that there is someone or some branch in administrative agen-

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46 Ritter v. United States, 28 F.(2d) 265, 267 (3d Cir. 1928); Walker v. United States, 139 Fed. 409 (C.C.M.D. Ala. 1905); Gudgel v. Iverson, 87 F. Supp. 834 (W.D. Ky. 1949); Barnett Inv. Co. v. Nee, 72 F. Supp. 81 (W.D. Mo. 1947); United States v. Big Bend Transit Co., 42 F. Supp. 459 (E.D. Wash. 1941).

47 Ritter v. United States, 28 F.(2d) 265, 267 (3d Cir. 1928).

48 H.S.D. Co. v. Kavanagh, 191 F.(2d) 831 (6th Cir. 1951); Woodworth v. Kales, 26 F.(2d) 178 (6th Cir. 1928); Boyne City Lumber Co. v. Doyle, 47 F.(2d) 772 (W.D. Mich. 1930); United States v. Detroit Steel Products Co., 20 F.(2d) 675 (E.D. Mich. 1927). Sometimes referred to as "statutory estoppel," this same reasoning, namely, that agency change of position is not permitted because of the binding effect of the authority contained in the statute itself rather than upon any equitable policy of fairness, is to be found in the case of legislative rules: see note 17 *supra* and accompanying text, and good-faith clauses: see note 27 *supra* and accompanying text.

49 *Hearings before Subcommittee of the Senate Committee on the Judiciary on S. 674, 675,* and *918,* 77th Cong., 1st Sess. 807 (1941), as quoted in, DAVIS, *op. cit. supra* note 17, § 106.

cies who, or which, could, for example, propound advisory opinions of a character that could be used as the basis for estoppel against the agency, would be very misleading. The courts have consistently rejected such opinions as the basis of estoppel.[50] That the courts might in the future recognize an advisory opinion in a form not yet involved in decided controversies as a basis for estoppel cannot be unequivocally denied. It can be stated, however, that the opinions advanced and rejected as a ground for estoppel have originated in a range of authority from the "horseback" or "curbstone" variety expressed by a local official, to a documentary pronouncement by the Commissioner himself.[51]

As a concluding comment upon this point, it might be asked why the question of authority should be the deciding issue in any case of estoppel. While it is true that the previous action was undertaken without lack of specific express authority in most of these decisions, the lack of actual authority is a rather standard characteristic of equitable estoppel controversies; [52] *e.g.*, the agent who acts beyond the express authority given him by his principal, but under color of having authority.[53] However, the fact remains that in so far as federal administrative agencies are concerned this factor is of vital significance. Standing alone, the presence of authority is not sufficient to bind the agency, but it is an essential element to the "proper" case.

The Cases

The other elements necessary to that *case,* as indicated previously, are to be found in the successful efforts of affected parties to estop the agencies from reversing their position in regard to matters where positive action has already been taken. Such cases are not numerous. In fact, there seems to be a greater paucity of actual cases where an administrative agency was estopped on equitable grounds of injustice to an affected party than a reference to cases cited in support of this proposition would indicate.[54] An actual reading of many such cases reveals that the ques-

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50 See note 33 *supra.*

51 Bowles v. Hansen Packing Co., 64 F. Supp. 131 (D. Mont. 1946), where a local official was called on the phone in regard to the ceiling prices on 4-H cattle, the court holding no estoppel in relying on such information; as contrasted with Couzens v. Commissioner, 11 B.T.A. 1040 (1928), where the Commissioner himself, following extensive investigation, issued a direct official ruling — the court again holding no estoppel.

52 3 POMEROY, *op. cit. supra* note 11, § 801.

53 Levi v. Booth, 58 Md. 305 (1882); Nixon v. Brown, 57 N.H. (2 Hall) 34 (1876). This principle is the basis for the present-day Factors Acts, Freudenheim v. Gutter, 201 N.Y. 94, 94 N.E. 640 (1911).

54 10A MERTENS, LAW OF FEDERAL INCOME TAXATION § 60.13 (1948); 1 PIKE AND FISHER, ADMINISTRATIVE LAW DIGEST (2d) § 2c.4, 8b.16 (1952); 1 VOM BAUR, FEDERAL ADMINISTRATIVE LAW § 252A (Supp. 1947). See cases cited in Stockstrom v. Commissioner, 190 F.(2d) 283 (D.C. Cir. 1951).

tion of equitable estoppel was not passed upon by the court,[55] or that that phase of the problem was treated by the courts in dicta.[56] There appear to be, however, at least three clear examples of the application of an estoppel on equitable grounds against administrative agencies.

United States v. Brown.[57] In 1922, the petitioner was a stockholder of a corporation which dissolved and distributed its assets. At the time of the dissolution, the corporation owed unpaid taxes. Since, upon its dissolution, all the assets of the corporation were distributed to the shareholders, the Commissioner of Internal Revenue initiated an equitable action to recover these unpaid taxes from the distributees on the theory of a trust.

At about the same time, the Commissioner also assessed a deficiency against the petitioner on the basis of his personal income tax, refusing to allow as a deduction the amount of the corporation taxes owing to the government. At one and the same time, the Commissioner was pressing before two separate courts two inconsistent theories — one that the distributed assets received by petitioner included corporation taxes impressed with a trust in favor of the government; and the other that everything which the taxpayer had received from this distribution was personal income to him.

It appears that the Commissioner, possibly in the interest of conserving his legal resources, chose that the equity case should slumber in the files, and pressed the personal assessment against the petitioner. Following his successful collection of the tax from petitioner on the theory that all distributed assets represented personal income, the Commissioner then took up the equity suit, arguing that part of the assets represented taxes owing to the government at the time of the dissolution. The court refused to entertain the second action on the grounds that: [58]

> The same amounts could not at once constitute income to the taxpayers and also be charged with a trust in favor of the Government. The Government could bring the transferee action on the theory of trust, or in the alternative, it could claim that all of the liquidating dividends constituted personal income to the taxpayers. It could not pursue both courses.

Eichelberger & Co. v. Commissioner.[59] In 1930, the petitioner transferred real estate from itself to another corporation owned entirely by the same stockholders, realizing a loss of $29,000 on the transaction. The Commissioner of Internal Revenue refused to allow the loss as a deduction in the petitioner's income tax for that year on the ground that

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55 Wurtsbaugh v. Commissioner, 187 F.(2d) 975 (5th Cir. 1951); Woodworth v. Kales, 26 F.(2d) 178 (6th Cir. 1928).

56 Howell v. Commissioner, 162 F.(2d) 316, 317 (5th Cir. 1947); Ford Motor Co. v. United States, 9 F. Supp. 590, 604 (Ct. Cl.), *cert. denied,* 296 U.S. 636, 56 S.Ct. 170, 80 L.Ed. 452 (1935).

57 86 F.(2d) 798 (6th Cir. 1936).

58 *Id.* at 799.

59 88 F.(2d) 874 (5th Cir. 1937).

the unity of ownership between the two corporations rendered the transaction non-deductible. The petitioners paid their tax accordingly.

Two years later, the property was sold to a third party at a price which was also about $29,000 less than its tax basis. When the petitioner deducted the loss from his 1932 tax return, it was again disallowed by the Commissioner. This time, the reason offered for disallowing the deduction was that the actual loss occurred during the 1930 transfer, and should have been taken then. The inference was that the Commissioner had improperly ruled upon the matter in 1930. Although not expressly stated in the opinion, it would appear from the dates involved that the Statute of Limitations barred the recovery of the original taxes paid. The court refused to allow the Commissioner to adopt this change of position to the detriment of the taxpayer, observing: [60]

> Whether that decision was right or wrong, the accredited officer of the United States made it. He cannot justly decide in 1930 that the sale did not realize the loss and thereby collect increased taxes, and in 1932 decide that it did realize the loss and collect taxes accordingly again.

Vestal v. Commissioner.[61] In June of 1937, the company petitioner in this case had dissolved its corporate status and reorganized as of the following date as a partnership. In October of 1938, certain real estate of the company was sold. The partners paid the income tax upon their respective shares of the income gained by this sale.

The Commissioner of Internal Revenue, upon examination of the returns, determined that the petitioner was actually an association taxable as a corporation and assessed a deficiency in regard to the tax paid on the real estate sale and other transactions of the company. The petitioner applied for a refund on the partnership taxes already paid. The claims for refund were denied, and on appeal the Board of Tax Appeals in 1942, held that petitioner was taxable as a partnership, expressly declining to pass upon the question of the real estate sale. Thereafter, the Commissioner, through his proper agent in that area, assessed additional taxes against the petitioner on the basis that it was a partnership. These taxes were also paid.

In 1943, the Commissioner again assessed a deficiency against the petitioner as a transferee of the assets of the dissolved corporation, reaffirming his original position that the real estate sale was that of the dissolved corporation. In the meantime, the Statute of Limitations had run, barring recovery of the previous taxes paid as a partnership. Since the Board of Tax Appeals in 1942 had specifically declined to pass upon the question of the real estate sale, res judicata could not bar the Commissioner's action. Nevertheless, the circuit court refused to permit the reassessment because: [62]

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60 *Id.* at 875.

61 152 F.(2d) 132 (D.C. Cir. 1945).

62 *Id.* at 135-6.

> The Commissioner chose to impose the tax upon the theory that the individuals were liable as partners. Having concluded that imposition, he cannot later assert that the tax is again due from these same individuals upon the theory that they are liable as transferees.

The Proper Case

Out of the analysis of these cases, together with a consideration of the many unsuccessful attempts to invoke an estoppel against federal administrative agencies, some relatively clear indications of the elements of the "proper" case can be gleaned. The conclusion seems inescapable that there is such a case — that its mention in the opinions of various courts who have passed upon the question is something more than a "Sirens' Song" to lure unsuspecting attorneys. There is no doubt, however, that its field of operation is extensively bounded by requirements of fact, and that the success of a party invoking estoppel against an administrative agency under any factual situation is in serious jeopardy from the established judicial policy of reluctance to grant it in this field.[63] It must be recognized, of course, that no estoppel will operate in situations where any of its essential elements are missing.

The first essential is that the representation by the agency must be in some positive form. Mere inaction,[64] or the furnishing of advice or opinions[65] is not sufficient.

Secondly, the acts which constitute the agency's representation must be recognized by the court as authorized. Not only must the act itself be authorized, but it must be carried into effect by an agency official actually empowered to perform it. As pointed out previously, although the fact that the representation was authorized is not, in and of itself, sufficient to effect an estoppel, it is an essential element of the "proper" case.[66]

Thirdly, the act involved must have been one which personally affected the party invoking the doctrine. What the agency did in regard to another party's case or as a general practice is not sufficient.[67]

Reliance on the part of the party invoking the doctrine is the fourth essential; thus, when the evidence before the court indicates that the affected party has not actually relied upon the previous action by the agency, estoppel will not be granted.[68]

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63 *Id.* at 136: "The doctrine of election and estoppel must be applied with great caution to the Government and its officials. But in proper circumstances it does apply." See Barnett Inv. Co. v. Nee, 72 F. Supp. 81, 82 (W.D. Mo. 1947).

64 See notes 30 and 31 *supra* and accompanying text.

65 See notes 32 and 33 *supra* and accompanying text.

66 See Heading, "The Problem of Authority," *supra*.

67 See note 20 *supra* and accompanying text.

68 Knapp-Monarch Co. v. Commissioner, 139 F.(2d) 863 (8th Cir. 1944); Parks-Chambers, Inc. v. Commissioner, 131 F.(2d) 65 (5th Cir. 1942); Couzens v. Commissioner, 11 B.T.A. 1040 (1928).

Detriment as a result of such reliance is likewise essential. As a consequence, the failure to show detriment to himself because of the agency's change in position will defeat the affected party's attempt to estop the agency.[69] The detriment envisioned must be of a real character, involving essential injustice to the affected party. The correction by the agency of a previous erroneous decision which has no other effect on the party than to leave him in the same position he would have been in had the first action been correctly taken will not qualify for such injustice.[70] Even where detriment is a possible result, no estoppel will be granted if the situation is such that the detriment can be avoided by timely action on the part of the party invoking the doctrine.[71]

As a sixth element, the changed position taken by the agency must be in direct contradiction to its original action. All the facts involved must have been known, or at least available, to the agency at the time of the first decision. The change in position must have been one which the agency had a choice to make.[72] Changes in position forced upon it by judicial decision or congressional enactment will not qualify.[73] To this extent, the "proper" case appears to lie more closely in the field of election than estoppel.[74]

There is one final aspect of the "proper" case not correctly includible as a legal concept, but one which probably has exerted considerable influence in the decision of cases in this field. This is the extent of the court's reliance upon "fair-play" on the part of the administrative agency to insure that no inequity is committed. In refusing to estop the Internal Revenue Bureau from collecting income tax from two individuals upon the same income, it has been observed: [75]

> That the sums in question have been returned and taxed . . . does not estop the government from assessing the taxes in question. No such contention is made. Doubtless the Commissioner will make a fair adjustment of this phase of the matter.

69 Spencer v. Railroad Retirement Board, 166 F.(2d) 342 (3d Cir. 1948); Knapp-Monarch Co. v. Commissioner, 139 F.(2d) 863 (8th Cir. 1944); Arkansas Power & Light Co. v. FPC, 125 F.(2d) 982 (8th Cir. 1942); Century Electric Co. v. United States, 75 F.(2d) 589 (8th Cir.), *cert. denied,* 295 U.S. 766, 55 S.Ct. 925, 79 L.Ed. 1708 (1935).

70 Knapp-Monarch Co. v. Commissioner, 139 F.(2d) 863 (8th Cir. 1944).

71 By negative implication it would appear that if the Statute of Limitations or other legal prohibition would not bar a refund, the taxpayer's failure to apply for it would be a detriment not attributable to the agency. See Vestal v. Commissioner, 152 F.(2d) 132, 135 (D.C. Cir. 1945).

72 See Heading, "The Cases," *supra.*

73 DAVIS, ADMINISTRATIVE LAW § 61 (1951).

74 In Ross v. Commissioner, 169 F.(2d) 483, 493 (1st Cir. 1948), the court made the distinction between these two doctrines: ". . . [Election] is applicable where a taxpayer [or Commissioner] has had a choice of two methods of computing his tax, both legal. . . . Estoppel, on the other hand, applies where there was only one lawful course open, which was not followed. . . ." See 10A MERTENS, *op. cit. supra* note 54, § 60.17.

75 Emery v. Commissioner, 78 F.(2d) 437, 438 (1st Cir. 1935).

In the *Vestal* case the Tax Court had rejected estoppel on the grounds that ". . . the Commissioner should, and no doubt will, take such administrative action as is necessary to conform to the decision and avoid any unconscionable double taxation." [76] The circuit court reversed the Tax Court's holding, estopping the agency from the collection of the second tax, because "The Commissioner has made no authoritative proposal that he would take such administrative action." [77]

Stockstrom v. Commissioner

In a class by itself stands *Stockstrom v. Commissioner*.[78] It apparently is a true case of estoppel as distinguished from election.[79] However, its validity as an indication of the "proper" case in this field is seriously impaired by its isolated character. As pointed out in the dissent: [80]

> I wish the law were as they find it to be, because it is my belief that the Government ought to set a high standard in its dealings and relationships with citizens and that the word of a duly authorized Government agent, acting within the scope of his authority, ought to be as good as a Government bond. But unfortunately, as I see it, a long line of cases almost without exception, beginning with the Couzens case in 1928 and running down through Schafer v. Helvering and beyond, establish the law otherwise.

The decision has also been unfavorably commented upon by most law reviews which have considered it.[81]

In 1938, Stockstrom made several gifts to trusts which he had previously established. He filed no gifts tax return in 1938 for these gifts on the basis of the ruling of the Commissioner of Internal Revenue, which was reaffirmed in 1941 by accredited agents of the Bureau, that no return was required. In 1948, the Commissioner changed his prior position in conformance with a 1941 Supreme Court decision,[82] and assessed a deficiency on the 1938 gifts made by Stockstrom. In order to prevent this reassessment, Stockstrom raised the defense of the Statute of Limitations.[83]

The decisive issue thus presented was whether, under the circumstances, the running of the Statute of Limitations had been suspended by the taxpayer's failure to file a return. The court found that the failure was occasioned by the Commissioner's own conduct on the part of his

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76 Chilhowee Mills v. Commissioner, 4 T.C. 558, 564, *rev'd sub nom.* Vestal v. Commissioner, 152 F.(2d) 132 (D.C. Cir. 1945).

77 Vestal v. Commissioner, 152 F.(2d) 132, 136 (D.C. Cir. 1945).

78 190 F.(2d) 283 (D.C. Cir. 1951).

79 See note 74 *supra* and accompanying text.

80 Stockstrom v. Commissioner, 190 F.(2d) 283, 289 (D.C. Cir. 1951).

81 Note, 61 YALE L.J. 1214 (1952); 27 NOTRE DAME LAW. 137 (1951); 36 MINN. L. REV. 428 (1952); 37 VA. L. REV. 1015 (1951).

82 Helvering v. Hutchings, 312 U.S. 393, 61 S.Ct. 653, 85 L.Ed. 909 (1941).

83 53 STAT. 153 (1939), 26 U.S.C. 1016 (1946).

accredited agents by assuring Stockstrom that no return need be filed, and refused to allow the reassessment on the equitable grounds of injustice to the taxpayer.

While the language used by the court in its opinion of this case leaves little doubt that it was decided upon equitable principles of estoppel, a close analysis of the situation reveals that the same decision could possibly have been reached by statutory interpretation of the pertinent provisions regarding failure to file a return. For example, in *Balkan Nat. Ins. Co. v. Commissioner*,[84] the Statute of Limitations was held to bar the action, without reference to estoppel, since the government's own action caused the failure to file a return. It was stated that: [85]

> While literally there has been "a failure to file a return," that phrase . . . cannot reasonably be interpreted to include a failure caused by the Government itself. . . . The obvious purpose of the section was to give the revenue officials unlimited time to assess and collect taxes in cases where the necessary data for determining the amount of the tax was lacking because of the taxpayer's fault in failing to supply it in the form of a return.

The main features which distinguish this case from those cited previously as probably the correct indicia of the "proper" case are: a) the main representation upon which reliance was placed was merely an opinion; [86] b) the opinion was that of a subordinate local official; [87] c) the opinion, when given, was erroneous as a matter of law; [88] and d) the previous action taken by the agency was not the result of a choice available to the agency at that time.[89]

But —

It is in this last point of distinction that perhaps the most significant feature of the entire problem is to be found. If a distinction is to be made between "election" and "estoppel" as is done in several courts, it might, in truth, be said that the "proper" case in this field is one of election rather than estoppel, and that the observation, "there is no estoppel against government agencies" [90] remains unchallenged except by a much criticized opinion.[91]

Carl F. Eiberger, Jr.

Joseph T. Helling

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84 Balkan Nat. Ins. Co. v. Commissioner, 101 F.(2d) 75 (2d Cir. 1939).
85 *Id.* at 78.
86 See note 33 *supra* and accompanying text.
87 See note 51 *supra* and accompanying text.
88 See notes 21 and 82 *supra* and accompanying text.
89 See note 74 *supra*.
90 See note 2 *supra*.
91 Stockstrom v. Commissioner, 190 F.(2d) 283 (D.C. Cir. 1951).