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A Tax Formula to Restore the Historical Effects of the antitrust Treble Damage Provisions (An Open Letter to the Senate Antitrust and Monopoly Committee)

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A TAX FORMULA TO RESTORE THE HISTORICAL EFFECTS OF THE ANTITRUST TREBLE DAMAGE PROVISIONS

(An Open Letter to The Senate Antitrust and Monopoly Subcommittee)

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I. Currently Proposed Legislation

Following the well-publicized criminal conviction of a major segment of our electrical equipment industry for conspiring to fix and maintain prices, terms, and conditions of sales made to both private industry and the government, almost 2,000 private antitrust treble damage suits were brought against those convicted. In July, 1964, when at least 1,500 of these suits were still pending,[1] the Commissioner of Internal Revenue publicly announced that amounts paid or "incurred" by the defendants in those actions to *private* plaintiffs, either pursuant to judgment or by way of settlement, together with legal expenses pertaining thereto, were deductible as ordinary and necessary business expenses under section 162(a) of the Code.[2] In his ruling, the Commissioner construed the treble damage provision to be nothing more than a formula seized upon by Congress to assure plaintiffs of complete recovery for all injury suffered, not as a means of meting out punishment *qua* punishment to wrongdoers. Amounts paid in response to civil damage suits brought by the United States, however, were ruled not deductible. Although bearing a resemblance to restitution, these amounts, because paid over to the public's own representative, were deemed more closely akin to another class of payments—namely, fines or penalties—which the Supreme Court specifically had held to be nondeductible.[3]

That part of the ruling allowing a deduction for amounts paid to private litigants drew immediate and sharp criticism from the chairmen of the antitrust subcommittees of both houses of Congress, Senator Hart and Representative Celler. The deduction, they ar-

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1. Indeed, 1,453 cases were still pending on January 1, 1965. See 1965 Report of the Proceedings of the Judicial Conference of the United States 87, 119, summarized in 5 Trade Reg. Rep. ¶ 50125 (1965). The Annual Reports of the Director of the Administrative Office are bound, and paginated, as part of the Judicial Conference Reports.

2. Rev. Rul. 64-224, 1964-2 Cum. Bull. 52.

3. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

gued, resulted in passing a substantial part of a defendant's treble damage costs to the federal treasury. This, it was thought, "would lessen the treble damage penalty Congress had established . . ." and would thereby "hamper effective antitrust enforcement . . . ."[4] At the behest of these two critics, the chairmen of the tax committees of the two chambers agreed to initiate a study of the whole matter, utilizing the staff of the Joint Committee on Internal Revenue Taxation.[5]

Before that study was completed, however, Senator Hart, along with Senator Burdick, introduced S. 2479[6] as an amendment to the Clayton Act. The obvious purpose of this bill is to deny a deduction for any part of treble damages paid under sections 4 or 4A of the Clayton Act[7] if these damages are paid pursuant to a judgment or in settlement of any action previously brought, whether or not the defendant previously had been convicted of a criminal violation. The bill seeks to accomplish this result by treating all such amounts, for purposes "of any statute of the United States . . . ," as a "penalty imposed upon such defendant by the United States . . ." itself.[8]

Two months after the Hart-Burdick bill was introduced, the staff of the Joint Committee on Internal Revenue Taxation published its own study.[9] As to amounts paid to private litigants in antitrust treble damage actions, the staff proposed a tax limitation which, on two principal counts, is much less sweeping than that contained in

4. Joint Committee on Internal Revenue Taxation, Press Release, Aug. 21, 1964, republished in STAFF OF JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, STUDY OF INCOME TAX TREATMENT OF TREBLE DAMAGE PAYMENTS UNDER THE ANTITRUST LAWS 44 (1965) [hereinafter cited as STAFF STUDY].

5. Joint Committee on Internal Revenue Taxation, Press Release, Nov. 18, 1964, republished in STAFF STUDY, at 45.

6. The bill was introduced on August 30, 1965.

7. 38 Stat. 731 (1914), as amended, 15 U.S.C. §§ 15, 15(a) (1964).

8. The sponsors obviously assumed this classification would be enough to bring the payments within the rule of Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958). Literally speaking, however, to pin the mere label "penalty" on such payments would leave open the issue whether a deduction for this particular type of "penalty" would so frustrate sharply defined national policies proscribing particular forms of conduct as to bring the penalty within the *Tank Truck Rentals* principle. But to conclude from this, as did former Commissioner Caplin, that "no one can provide a definitive answer to whether S. 2479 would accomplish its purpose . . . ," is to make a mountain out of a molehill, for Mr. Caplin's conclusion completely ignores the decisive role that S. 2479's legislative history would play in the interpretative process. See statement of Mortimer M. Caplin, before the Senate Antitrust and Monopoly Subcommittee of the Committee on the Judiciary, in Hearings on S. 2479, 89th Cong., 2d Sess., July 29, 1966 (copy on file with the *Michigan Law Review*). If S. 2479 is passed, its single purpose will be so sharply identified in legislative history as to preclude the Court from reaching a result at odds with that purpose. Under standards of interpretation too well established to justify citation, the very fact that *Tank Truck Rentals* had been decided before S. 2479 was passed would itself be enough to force the Court to go behind the literal language of the provision and to examine the statute's legislative history.

9. STAFF STUDY.

S. 2479. The proposal would deny a deduction only as to two-thirds of the amount paid, the remaining one-third being left deductible because it is deemed to constitute payment for the actual provable damage suffered.[10] Further, even the prohibition of deductibility as to the two-thirds would apply *only* in the case of "hard core violations,"[11] where intent to violate had been clearly proved on the basis of the most demanding evidentiary standard. In short, the prohibition would be triggered only if the violation alleged in the civil suit also had led to a criminal conviction, or was a related violation which had occurred prior to the actual date of the conviction.[12] Just two days before the Senate Antitrust and Monopoly Subcommittee, of which Senator Hart is chairman, was to begin hearings on the Hart-Burdick bill, a competing bill which would implement the proposal made by the staff of the Joint Committee was introduced by Senator Russell Long as an amendment to the Internal Revenue Code and was referred to the Senate Finance Committee, of which Senator Long is chairman.[13]

II. The Historical Effectiveness of The Treble Damage Provision Has Been Reduced on Two Counts, Not Just One

Before examining the merits of these competing legislative proposals, it is important to note that the recent date of the Commissioner's ruling, combined with the fact that the ruling was debatable, had an unfortunate effect. It led both the sponsors of S. 2479 and the staff of the Joint Committee to focus exclusively on the *deduction* side of the treble damage tax question. Both completely neglected the *income* side although, in terms of effective enforcement of our antitrust laws, the income question may pose the more serious problem. The treble damage provision was enacted, at least in part, to stimulate privately injured parties to complement the limited capability of the Justice Department in enforcing the nation's antitrust policies.[14] For a long period prior to 1955, the incen-

10. *Id.* at 13.

11. *Id.* at 15.

12. The inclusion of "related" violations was intended to cover the "type of situation where only a few out of a series of related actions give rise to specific indictments." *Id.* at 15.

13. S. 3650, 89th Cong., 2d Sess. (1966).

14. The Attorney General recently said:

> In addition, a great number of cases make it clear that the primary purpose of Congress in providing a private treble damage remedy was to harness private interests as an aid to the Government in antitrust law enforcement and thus to further the public interest in deterring antitrust violations.

E.g., Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52, 757 (1947); Olympic Refining Co. v. Carter, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964);

tive for the private litigant included the prospect, according to that era's most closely related *judicial* precedents, that a recipient of treble damages could exclude from his gross income that portion of the amount recovered (two-thirds) which some have characterized as "punitive"[15] damages.[16] Indeed, as late as the early 1950's, the Tax Court thought the principle on which an exclusion for two-thirds rested had so "long been established" that the court used only one short paragraph to justify the exclusion.[17] Not until 1955 did the Supreme Court eliminate this prospect by denying such an exclusion.[18] That event, if realistically appraised, did reduce the

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Osborn v. Sinclair Refining Co., 324 F.2d 566, 572 (4th Cir. 1963); Quemos Theater Co. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949, 950 (D.N.J. 1940). Congress itself has made this clear: "The damages of 'persons' are trebled so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws." S. REP. No. 619, 84th Cong., 1st Sess. 3 (1955); Letter From Nicholas deB. Katzenbach to Mr. Laurence N. Woodworth, Chief of Staff, Joint Committee on Internal Revenue Taxation, Feb. 8, 1965, republished in STAFF STUDY at 60-62.

The then Attorney General also might have added that Senator Sherman himself had commented as follows:

> The measure of damages, whether merely compensatory, putative, or vindictive, is a matter of detail depending upon the judgment of Congress. My own opinion is that the damages should be commensurate with the difficulty of maintaining a private suit against a combination such as is described.
>
> . . .
>
> I think myself the rule of damages is too small. It provides double the damages [changed to treble damages prior to passage] and reasonable attorneys' fees. Very few actions will probably be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations.

21 CONG. REC. 2456, 2569 (1890).

Even the most outspoken critic of the Commissioner's ruling on the deduction question, Representative Emanuel Celler, Chairman of the House Committee on the Judiciary and of its Antitrust Subcommittee, acknowledges that the treble damage provision does reflect a policy "'to encourage effective private antitrust enforcement . . . .'" He argued, however, in the words of Justice Cardozo, that "'the same provision may be penal as to the offender and remedial as to the sufferer.'" See Statement of Representative Emanuel Celler to Joint Committee on Internal Revenue Taxation, STAFF STUDY 46, 54.

15. Even the Supreme Court has so characterized it. Glenshaw Glass Co. v. Commissioner, 348 U.S. 426, 427 (1955). *But cf.* Huntington v. Attrill, 146 U.S. 657 (1892).

16. This prospect was ultimately traceable to the conclusion in the early case of Eisner v. Macomber, 252 U.S. 189, 207 (1920), "that income included only the . . . gain derived from capital, from labor, or from both combined." *Cf.* Central R. R. v. Commissioner, 79 F.2d 697 (3d Cir. 1935); Highland Farms Corp. v. Commissioner, 42 B.T.A. 1314 (1940). The prospect was not neutralized in 1941 when the Service published its non-acquiescence to the Board of Tax Appeals' decision in *Highland Farms Corp.*, which accorded immunity to punitive damages. The Service's non-acquiescence indicated only that a plaintiff in a treble damage action (1) would have to litigate the tax issue if he hoped to realize upon the "prospect" that the judiciary would treat the entire two-thirds as excludable, or (2) would have to yield immunity as to part of the two-thirds if he hoped to arrive at an administrative "settlement" of the issue with a field office empowered with complete settlement authority.

17. Glenshaw Glass Co. v. Commissioner, 18 T.C. 860, 868 (1952), *aff'd*, 211 F.2d 928 (3d Cir. 1954), *rev'd*, 348 U.S. 426 (1955).

18. Glenshaw Glass Co. v. Commissioner, *supra* note 17. However, the Service has

incentive-to-sue purpose historically associated with the treble damage provision. Until 1955, potential plaintiffs, before deciding whether to sue, could anticipate, by reference to prior judicial authority, at least a fifty-fifty chance of enjoying tax immunity as to two-thirds of any treble damages recovered. That stimulating possibility was reduced to zero by the High Court's 1955 decision.

In consequence, if the Senate Antitrust and Monopoly Subcommittee, to which S. 2479 has been referred, is really interested in restoring the effect historically associated with the treble damage provision, the scope of its study regarding S. 2479 should be enlarged to include the stimulant side of the treble damage provision. This "stimulant" becomes particularly significant in cases where the potential plaintiff has to "go it alone," without the benefit of a prima facie case supplied by a decision previously obtained in an action brought by the government. Also relevant is the fact that not once in its 1955 decision did the Supreme Court refer to the potential adverse effect of its decision on the nation's antitrust policies; the decision was bottomed solely on technical tax considerations. Further, although the treble damage provision has made the private action what one very knowledgeable person, Mr. Lee Loevinger, has described as "the strongest pillar of antitrust,"[19] nevertheless, that same person, shortly before becoming Assistant Attorney General in charge of the Antitrust Division, indicated that all was far from well with respect to antitrust enforcement. He observed:

> [T]he burden of antitrust litigation is so great that *private parties are often unable or unwilling to undertake such lawsuits regardless of the violations involved or the injuries suffered.* Congress and the country have heard many articulate spokesmen for antitrust defendants complain of the heavy burden of defending antitrust prosecution, because of the mass of evidence involved, the length of the trial, the complexity of the issues, and the time required of the businessman involved. But it should be apparent that this burden is even greater for a plaintiff in such case than for the defendant. It is greater for the plaintiff because the plaintiff has the burden of proof, the burden of discovering and presenting evidence—and evidence which is usually in the possession of the defendants—and the burden of initiating and going forward with the case which the defendant is later called upon to answer . . . . As a practical matter, a business victim of antitrust violation cannot undertake any

not yet published a ruling and the courts have not yet passed on the question of whether any part of the treble damages received by a buyer, because of a violation in the nature of price fixing, can be treated instead as a reduction in the purchase price of the equipment acquired by the buyer from the wrongdoer.

19. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 172 (1958).

> action for vindication of his rights unless he is willing and able to wait at least two or three years—and often longer—for the decision of his case, is able to advance at least several thousand dollars in probable costs of preparing and presenting his case, and is prepared to withstand the social and economic pressures and the threat of reprisal and retaliation that not infrequently are the lot of the antitrust plaintiff.[20]

Compared with the proposal made by the staff of the Joint Committee, S. 2479 would provide greater assurance—if such assurance is needed—of voluntary compliance with the nation's antitrust laws, but even its more sweeping penalty will not deter offenses unless potential antitrust violators anticipate rigorous enforcement, much of which must come from the private sector. But, according to the previously quoted Mr. Loevinger, treble damages—as an incentive to induce private parties to assume the inescapably heavy burdens of otherwise justified antitrust litigation—are actually not as stimulating as they may appear to be at first blush:

> The treble damage recovery is sometimes referred to as something of a windfall for plaintiffs. In actual practice this is not the case. It is virtually never possible for a plaintiff to show by tangible evidence of the kind demanded by courts the full amount of his damages. Further, the deprivation of business and profits over a long period of time always involves a business handicap that is never taken into account or compensated. The unrecoverable expenses of litigation are always very substantial. The time and trouble of the plaintiff in pursuing his lawsuit are never considered. Finally, it is almost always necessary for a plaintiff to pay a substantial part of any recovery for legal expenses and attorneys' fees which are not fully compensated by any court award. *When all these factors are taken into account, it would be a rare and fortunate plaintiff who came out of an antitrust suit with a net recovery amounting to full compensation for his actual damages.*[21]

Finally, in cases where a plaintiff must "go it alone," without benefit of a prior adjudication by the Justice Department, S. 2479, by disallowing a deduction for any amount paid by the defendant, may actually induce the latter to make the plaintiff's demanding and not so rewarding task even more burdensome than now, for this bill would increase the stakes of antitrust litigation only in the eyes of the defendant and would provide no commensurate advantage to potential plaintiffs, who are the potential private enforcement agents of the nation's antitrust policies. Ironically enough, on the other hand, the proposal made by the staff of the Joint Committee, which would restrict the disallowance of a deduction by the

20. *Id.* at 169. (Emphasis added.)
21. *Id.* at 173. (Emphasis added.)

wrongdoer to those private cases in which a criminal conviction had been obtained previously by the Justice Department, applies a relatively more severe punishment in the very situation where the Justice Department has done much of the private plaintiff's work for him by providing him with a prima facie case of violation.

The foregoing is not intended to suggest, however, that the deduction question does not deserve congressional attention. Given the Commissioner's *technical* interpretation allowing such a deduction, given the fact that he is not likely to change that interpretative position, *and given the further fact that his decision, whether right or wrong, did in fact reduce the threat historically associated with the treble damage provision,* Congress at least should consider the policy question of whether the historic threat associated with the treble damage provision needs to be maintained.

In one sense, of course, the Commissioner's ruling, now water over the dam, is a debating point to which some might attribute mere tactical significance. At the least, it has that significance: those who do favor a statutory amendment to reverse or modify the ruling's effect would enjoy some tactical advantage if they could demonstrate that the amendment would merely correct an administrative error and would not change the law. Others who claim that the Commissioner's administrative ruling reached the right result cannot also argue with equal persuasion that the ruling left unchanged the historic threat previously associated with the treble damage provision. The fact is that the ruling reduced the apprehension of potential violators by making certain what for decades had been quite uncertain. The substantial *in terrorem* effect of the previous uncertainty regarding the deduction question was thereby neutralized. Proof that, prior to the recent ruling, the technical answer to the deduction question was "by no means clear" can be found in the well-documented technical study published by the staff of the Joint Committee on Internal Revenue Taxation.[22] Indeed, on the basis of the analysis contained in that study, it is easy to conclude that, at least as to two-thirds of any treble damages paid, the Commissioner could not have reached the result which he did if, preliminarily, he had chosen to approach the substantive issue from the posture of an *advocate* who is willing to litigate an important matter although he may tend to believe the odds are somewhat against him. Had he viewed the matter solely from the standpoint of an advocate, the Commissioner no doubt also could have anticipated the subsequently articulated view of the Attorney General, who informed the Joint Committee on Internal Revenue Tax-

22. See STAFF STUDY.

ation that the Justice Department "would have been prepared to defend in court a rule of complete nondeductibility."[23] However, there are substantial reasons for believing that the Commissioner in fact, and with propriety in this particular instance, chose to resolve the debatable substantive issue, not by reference to the standards of an advocate, but rather by reference to a standard closely resembling impartiality,[24] that is, on the basis of an impartial appraisal of competing precedents[25] read in the context of competing bits of legislative history.[26] Appraised in this light and viewed as a purely technical matter, the consequent ruling clearly was not unreasonable. Nevertheless, that other conscientious, able, and legally

23. See STAFF STUDY 61.

24. When the author first asserted, in hearings before the Senate Antitrust and Monopoly Subcommittee, that the Commissioner chose to pursue a posture of impartiality rather than that of an advocate, reliance was placed on a fairly intimate acquaintance with the person who then served as Commissioner, attributing to him not only intellectual integrity but also exceptional ability. The latter quality was deemed relevant because only on the basis of an "impartial" stance did the ruling tend to make sense. Subsequently, in the same hearings, that individual stated that he had tried to view the question impartially and justified the choice of this posture by referring to Rev. Proc. 64-22, 1964-1 CUM. BULL. 689, which calls upon Service personnel to resolve questions "in a fair and impartial manner, with neither a government nor a taxpayer point of view." See Statement of Mortimer M. Caplin, *supra* note 8.

While this writer believes that there are circumstances where Commissioners have and should adopt the role of an advocate who is willing to litigate an important matter even though *he* may tend to believe the odds on which side would prevail in court were a bit against him, the mere fact that some doubt exists in the Commissioner's own mind regarding the "correct" technical answer cannot always be an adequate justification for his ruling adversely to the taxpayer. In our complex society, there are transactions which vary one from another in every shade of degree. Add to that the further fact that every word which Congress uses in the tax code—and that code has more words than any other statute known to the civilized world—is more likely than not to have diverse shades of meaning. These factors react upon each other to produce, as a cumulative result, a potentially enormous number of cases involving diverse degrees of doubt. In fiscal 1965, the Commissioner's rulings personnel received over 20,000 requests for *substantive* rulings. Many involved one degree of doubt or another. To rule adversely in every case just because the case involves some doubt would be both unjust and certain to inundate the judiciary. Indeed, even now, of the 6,852 tax cases petitioned to the Tax Court in fiscal 1965, most of which had not even been the subject of a prior National Office ruling, at least 85%, or 5,800, will have to be settled administratively, for that court has a yearly capacity of not over 1,000 cases.

Further, the cumulative impact of four considerations suggests that it surely was not unreasonable for the Commissioner to conclude in this particular case that our legal order would be better served if he approached this issue as impartially as possible: (1) both the judiciary and the Justice Department had expressed alarm at the court congestion caused by the unprecedented mass of antitrust litigation then pending; (2) an administrative tax ruling based on the stance of a mere advocate was almost certain to be adverse to the interested taxpayers; (3) the degree to which mere advocacy supports an administrative ruling can be readily detected by knowledgeable outside tax lawyers; and (4) there was a significant possibility—in the light of a 48% tax rate—that a ruling predicated on mere advocacy might well have postponed settlement of a significant part of the private antitrust litigation then congesting the courts until the tax ruling could be tested in court.

25. These are adequately marshalled in the *Staff Study*.

26. *Ibid.*

trained persons may have tended to disagree with the ruling[27] suggests that lawyers who had been counseling potential antitrust violators over the many years *prior* to that ruling could *not* have given anything like complete assurance that damages awarded as the result of a possible violation would be deductible. The ruling, therefore, did reduce the previously prevailing degree of apprehension associated with the potential cost of an antitrust violation. This reduction of apprehension caused by the Commissioner's 1964 ruling had existed for almost two years when the Supreme Court, in a decision relating to a quite different matter, refined its ideas in such a way as to increase the likelihood that the Court would have reached the same conclusion as did the Commissioner, namely, that treble damage payments are deductible.[28] Although the Court's reasoning undoubtedly comforted the now departed Commissioner who was responsible for the administrative ruling discussed here,[29] the direction which the Supreme Court took, like the direction of the Commissioner's own ruling, was something for which, during the many years preceding this decision, apprehensive potential violators could only hope.

III. A Tax Formula To Restore The Historic Balance

Ultimately, we shall find that the principal sponsor of S. 2479 went too far on the deterrence side and not far enough on the stimulant side if the bill was intended to be responsive only to his asserted concern over the recent tendency to *"lessen"*[30] the historical thrust and effectiveness of the treble damage provision. Resort to a *tax* formula as a means of restoring the stimulant and deterrence historically associated with the treble damage provision is certain to draw fire, however, not just from the front, but also from both flanks.

From one side will come the type of argument which is reflected in a recent report of the Tax Section of the American Bar Associ-

27. See the conclusion of the staff of the Joint Committee and that contained in a brief filed by Representative Celler, in Staff Study at 9, 47.

28. Commissioner v. Tellier, 383 U.S. 687 (1966). While the precise subject matter of that decision (allowance of a deduction for attorney's fees incurred in an unsuccessful defense of a criminal prosecution for illegal business activities) is beyond the scope of this discussion, it should be noted that Congress, in dealing with proposed legislation, should not assume that the public policy considerations associated with a deduction for treble damages are identical to those bearing on a deduction for the above attorney's fees. Indeed, as the Court itself put the latter matter: "No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense. That is not 'proscribed conduct.' It is his constitutional right." *Id.* at 694.

29. That it did, see Statement of Mortimer M. Caplin, *supra* note 8.

30. Staff Study 47. (Emphasis added.)

ation, opposing S. 2479: "Moreover, the Section does not believe it is wise tax policy to attempt to achieve social goals in other areas by manipulation of tax provisions."[31] It would be one thing if this meant only that a Commissioner, in discharging his *interpretative* function, should not torture statutory tax language in order to achieve non-tax social goals. But it is quite another thing to so limit Congress even should it contemplate the adoption of a completely *new* tax effect to accomplish that same end. A more appropriate guideline for congressional action even in that circumstance is to ask, as another has put it, "whether or not it is possible to achieve that goal more efficiently, directly, and fairly through other measures which lie outside the realm of the tax system."[32] Further, if the sponsors of S. 2479 actually had intended to propose the adoption of a *new* tax effect, thus making the foregoing standard relevant here, it would be appropriate to acknowledge the possibility that the treble damage provision itself could be changed so as to compensate roughly for the extent to which its historic thrust has been reduced by the fairly recent events previously described. But to expect resort to this latter approach by those whose only aim is to *restore* the *historic* contribution of *tax* effects to antitrust enforcement is to expect them to shoulder a substantial diversionary tactical burden. Argument on the real issue, in itself quite complicated, necessarily must center in the first instance on whether a realistic appraisal of *tax* history indicates that two fairly recent *tax* events did in fact reduce the overall thrust of the treble damage provision. To expect the sponsors of S. 2479 also to assume the additional and diversionary chore of translating the demonstrated reduction in tax effects into a quantum of damages is to ask them to complicate further the already complicated, and to pay a tactically high price merely to satisfy puritans who, ignoring history, argue only that the end sought relates to a non-tax social goal. The choice of the particular USCA volume into which the remedial provision should be fitted is just not that important. Even if the end sought is deemed non-tax in character, the bill would not be plowing new ground. The instances in which Congress has used a tax effect to accomplish non-tax societal purposes are too numerous to recount here, ranging as they do, for example, from our longstanding percentage deple-

31. American Bar Ass'n, Bull. Sec. Tax., April 1966 (No. 3), p. 32.

32. Remarks by the Honorable Stanley S. Surrey, Assistant Secretary of the Treasury, before the Tax Executives Institute, March 7, 1966 (copy on file with the *Michigan Law Review*); *cf.* Lindsay, *Tax Deductions and Public Policy*, 41 TAXES 711 (1963); Paul, *The Use of Public Policy by the Commissioner in Disallowing Deductions*, U. SO. CAL. 1954 TAX INST. 715.

tion arrangement,[33] through the relatively recent investment credit provision,[34] to the quite recent interest equalization tax[35] which was enacted only because it would contribute to the solution of our balance-of-payments problem.

From the other flank comes the charge that S. 2479 should be put aside because it represents only a "piecemeal solution to one small problem in this area."[36] The staff of the Joint Committee —understandably interested in preserving the tax logic and tax symmetry of the tax code—shares this view, arguing that it would be "inappropriate" to adopt a bill limiting deductions for treble damages if the bill fails also to deal with the non-deductibility of payments arising out of other types of improper conduct, such as fines, bribes, and illegal kickbacks.[37]

While Senator Long did deal with fines, bribes, and kickbacks in the bill (S. 3650) which he introduced to implement the staff's proposed treatment of treble damages, there are two reasons which indicate that careful consideration of the competing Hart-Burdick bill (S. 2479) should not hinge on its failure to consider these related problems. First, but perhaps least important, isolation of the treble damage provision can be justified on the ground that the Judiciary Committees—charged as they are with the duty of fostering effective antitrust laws—provide a more appropriate forum than do the tax committees for the initial reconsideration of the desired overall impact of the treble damage provisions. Second, the magnitude of the immediate policy concerns stemming from one type of improper conduct easily may dwarf those associated with another. For example, as the staff of the Joint Committee acknowledges, we know that even now the courts will not permit a deduction for fines and penalties[38] and no serious policy concern has been manifested with respect to that substantive result. The same rule appears to apply to bribes paid to public officials.[39] While one procedural question bearing on the disallowance of deductions for bribes does merit attention,[40] Congress is not remiss when it puts first things first. The imminence and magnitude of legitimate policy concerns re-

33. INT. REV. CODE OF 1954, § 613.
34. INT. REV. CODE OF 1954, § 38.
35. INT. REV. CODE OF 1954, §§ 4911-20.
36. See note 31 *supra*.
37. See STAFF STUDY 14.
38. See *id.* at 16; Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).
39. *Cf.* Rugel v. Commissioner, 127 F.2d 393 (8th Cir. 1942); Samuel Guralnick v. Commissioner, 14 P-H Tax Ct. Mem. ¶ 90 (1955).
40. The question is whether, absent a criminal conviction, the Commissioner or the alleged wrongdoer should carry the burden of proof.

garding the overall tax treatment of these other related payments[41] is dwarfed by the need for an immediate re-appraisal of the treble damage provision in terms of the ultimate effects desired by the Congress. For, as previously explained, two fairly recent events have operated in significant ways to reduce what historically were the stimulating and deterring effects of the provision.

The only remaining real issue is whether these two events, taken together and in the context of what normally will be a 48% tax rate, reduced those effects below the level required for effective enforcement of the nation's antitrust policies. Since the proper resolution of that issue requires both expertise in the antitrust field and scientific, objectively oriented data which even antitrust experts probably lack, this writer, a mere student of taxation, cannot do more than suggest a tax formula which would roughly restore the stimulating and deterring effects of the treble damage provision to the level which existed before the 1955 Supreme Court decision and the Commissioner's 1964 ruling.

On the stimulant side, the prime problem relates to those plaintiffs who must "go it alone," not having been furnished a prima facie case through prior adjudication by the Justice Department. But, even in this situation, to reverse *Glenshaw Glass* by statutory amendment and thereby immunize from tax two-thirds of any treble damages received would do more than restore the quality of the stimulant which existed prior to that decision. Until that event, potential plaintiffs no doubt thought they would have at least a fifty-fifty chance of enjoying complete tax immunity as to two-thirds of the damages recovered. To restore the historic balance, it would be enough, roughly speaking, to assure them an exclusion as to one-third of an award. Or, to satisfy tax logicians who insist that the entire two-thirds either does or does not constitute "income," the historic effect could be restored by according capital gain treatment (with its ceiling rate of 25%) to the two-thirds. Neither arrangement would involve a greater distortion of basic tax principles in the interest of a non-tax social purpose than is found in the percentage depletion or investment credit provisions. Indeed, it would not even be the first time we have distorted the capital gain concept in order to achieve social goals. For example, professional inventors can receive capital gain benefits on the sale or exchange of their patent rights,[42] whereas similar benefits are not allowed artists

41. This is so although the substantive tax effect of kickbacks also warrants attention. See STAFF STUDY 14-17.

42. INT. REV. CODE OF 1954, § 1235.

and others, the obvious purpose being to stimulate technological progress.

To permit the plaintiff who had to "go it alone" either an exclusion for one-third or capital gain treatment for two-thirds of the treble damages received would mean that the Treasury would absorb in each year a dollar amount equal approximately to one-sixth of the treble damages received during that year. A rough way to make the defendant in a treble damage action absorb the cost of restoring this stimulating bonus would be to disallow a deduction for one-third of the treble damages paid. On the one hand, this limitation on the deduction is less sweeping than that contained in S. 2479, which would deny a deduction for any part of the damages. However, the denial of a deduction only as to one-third of any treble damages paid by a defendant who is *not* subjected to a criminal sanction more closely approximates the risk value, before the Commissioner's recent ruling, of that type of potential violator's tax apprehensions,[43] and, therefore, would come closer to restoring the historic balance than would S. 2479. On the other hand, this proposed arrangement would go beyond the suggestion made by the staff of the Joint Committee, which would have restricted disallowance of a deduction to those perhaps morally more culpable defendants who also were convicted, on the basis of a higher evidentiary standard, of a criminal violation, although disallowance as to these defendants would extend, under the staff's proposal, to two-thirds of the treble damages paid in response either to a judgment or any settlement reached after an action had been filed. The staff's suggestion could be used, however, to complement the arrangement proposed herein, which bears primarily upon cases in which the plaintiff had to "go it alone," although it should be acknowledged that, before the Commissioner's recent ruling, the risk

43. At best this is only a rough approximation. Indeed, historically speaking, the odds or degree of risk bearing on the deduction question necessarily have changed from time to time, concurrently with nice changes in the total legal climate. Further, the degree of risk prevailing at any one point of time has never been exactly the same even among all situations otherwise falling within this particular category (no criminal conviction). For example, among antitrust cases which did reach final judgment, the odds that the judiciary would permit a deduction were greater if the judgment in the antitrust case rested on a decision which, although theoretically only interpretative in character, actually developed a new antitrust norm. In this circumstance, the defendant would be favored with the additional argument that, when the violation occurred, the national antitrust policy in question was not "sharply defined." *Cf.* Lilly v. Commissioner, 343 U.S. 90 (1952). At one point in history, the Service itself was attracted to this distinction, although its view was not then published. STAFF STUDY 28. Finally, the odds favoring a deduction also improved substantially if the payment to the private plaintiff was responsive, not to a judgment, but to a settlement in which the defendant expressly disclaimed any violation.

value of the tax apprehensions suffered by potential criminal violators of the antitrust laws was probably closer to 50% than to the staff's proposed 66%.

A final problem, not previously dealt with herein, involves the case where the Government, instead of trying to secure a criminal conviction, provides potential private plaintiffs with a prima facie case by having proceeded against the defendant in a civil suit. While the need, if any, to accord either a partial exclusion or a partial capital gain treatment to these potential private plaintiffs obviously is not as great as in the "go-it-alone" cases, the historical tax stimulant was the same in the two cases prior to the Supreme Court's 1955 decision. Further, the historical argument which was previously made for denying a deduction for one-third of the treble damages paid by a defendant not criminally convicted is equally applicable to a situation in which a civil judgment has been rendered against the defendant.

Both the more limited disallowance suggested herein and the Joint Committee staff's complementary proposal (that two-thirds of the damages paid be disallowed if the defendant also had been criminally convicted) can be synchronized adequately with existing tax principles. For Congress has the power to define exactly to what degree something frustrates national policy and, therefore, it may determine that, to the extent noted, the allowance of a deduction would involve just such a frustration of policy. More succinctly, as S. 2479 puts it, to this extent, those payments shall be equated with penalties otherwise payable to the United States itself.

IV. Conclusion

Two principal conclusions should be drawn from the discussion in this article. First, since both the stimulating and deterring effects of the treble damage provision have been reduced by two different events occurring in the last decade, the sponsors of S. 2479 should deal with both aspects if they are genuinely interested in restoring the historical effectiveness of that provision. Second, since the Commissioner is the Government's own agent, since the technical result he reached was not an unreasonable interpretation under existing law, and since subsequent private antitrust settlements undoubtedly were influenced by his ruling, any new legislation should not be made retroactive.