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Internal Revenue Code of 1954, Section 7421(a), The Anti-Injunction Act: Judicial Muzzle makes for Service Muscle

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rent vitality of the *Kimbell-Diamond* doctrine in situations where the parent fails to comply with the express statutory requirements. In one of the few reported cases that has directly confronted this "prime issue," the Court of Claims in *American Potash & Chemical Corp.* held that the judicial doctrine was not preempted by the enactment of section 334(b)(2). According to this view, the *Kimbell-Diamond* rule represents an alternative to the statute for attaining a cost basis in assets received on liquidation. Other courts, however, have reached the opposite conclusion.[183] In view of the resulting uncertainty, a parent corporation should employ competent tax counsel at the outset. In this way the acquisition-liquidation transaction can be arranged to yield desired results without resort to the *Kimbell-Diamond* rule and almost certain litigation.

Madison Square Garden Corp. illustrates another current problem in basis determination under section 334(b)(2). In that case the Tax Court denied the parent corporation a stepped-up basis in the liquidated assets attributable to the minority interest. Although the Second Circuit reversed this part of the decision, the case imports a sense of caution to tax practitioners in this unsettled area.

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INTERNAL REVENUE CODE OF 1954, SECTION 7421(a), THE ANTI-INJUNCTION ACT: JUDICIAL MUZZLE MAKES FOR SERVICE MUSCLE

There is one difference between a tax collector and a taxidermist—the taxidermist leaves the hide.

—Mortimer Caplan, former Commissioner of Internal Revenue

Essential to the effective functioning of any government is the generation and protection of revenue. The disparate components of American society, however, have frequently compelled federal legislators to recognize other, sometimes competing, goals. Through an integrated Internal Revenue Code, Congress has attempted to harmonize these divergent objectives.

In addition to the familiar graduated tax on income, the Code embraces other *revenue generating* measures. Among these is the Wagering Excise Tax,[1] which places a flat ten per cent assessment on wagers. Representative

183. *See* note 159 *supra.*

1. INT. REV. CODE OF 1954, §4401, reads in pertinent Part: "(a) *Wagers.*—There shall be imposed on wagers . . . an excise tax equal to 10 per cent of the amount thereof . . . . (c) *Persons liable for tax.*—Each person who is engaged in the business of accepting

of *revenue-protecting* measures are section 7421(a),[2] the "Anti-Injunction" Act, and the Jeopardy Assessment provisions.[3] Section 7421(a) effectively forestalls most pre-assessment and pre-collection litigation by prohibiting suits for the purpose of restraining the assessment or collection of taxes. The Jeopardy Assessment procedures allow immediate demand for payment where assessment or collection is imperiled by delay. But not all provisions of the Code are directed toward the generation or protection of revenue. Exemptions from the tax laws have been used to encourage the development and growth of a diversified social order. Illustrative of such provisions is section 501,[4] which grants preferred tax status to organizations whose purposes and operations satisfy its guidelines for socially desirable activities.

The Code is, of course, not self-executing, and this characteristic has permitted the Internal Revenue Service to employ Code provisions to effectuate its own objectives, thereby causing an imbalance in the political structure. For example, in the Wagering Tax and Jeopardy Assessment areas, Service zeal in constraining "undesirable" conduct such as gambling and drug-related activities has occasionally led to arbitrary assessments and other forms of harassment. Such acts, which often permit the Service to impose "administrative" sanctions where criminal prosecution is not sustainable, are unrelated to the congressional policies of revenue generation or protection.

Similar problems have occurred in the section 501(c)(3) area. Increased social awareness, with its resultant challenges to traditional concepts of charitable organizations, has proven the wisdom of adopting flexible definitional criteria for exempt organizations. But the effect of this approach has been to repose in the Service the authority to define the parameters of permissible activities, and this power has not been ignored. It has been used to impose the Service's interpretation of proper social policy and, more alarmingly, to achieve politically motivated objectives such as nullification of opposing views.

Within the familiar system of corrective justice, such abuses would not go unchecked. The aggrieved party could seek redress of preliminary administrative decisions in the courts. But through adept use of the protective shield of section 7421(a) in these areas, the Service has largely precluded judicial review. The result is that distorted administrative interpretations of congressional policy attain a privileged status similar to *res judicata.*

This note analyzes the applications of section 7421(a) in the three previously mentioned areas and attempts to delineate the power available to the

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wagers . . . [or] who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter. . . ."

2. INT. REV. CODE OF 1954, §7421(a) provides in part: "Except as provided in section 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . ."

3. INT. REV. CODE OF 1954, §§6861-64. These sections provide for immediate assessment if collection will be jeopardized by delay, as well as procedural provisions for implementation.

4. INT. REV. CODE OF 1954, §§501(a), (c)(3).

Service under present judicial interpretations of the statute's scope. An evaluation of the present state of the law is undertaken, and corrective measures are suggested.

HISTORY AND BACKGROUND OF SECTION 7421(a) OF THE INTERNAL REVENUE CODE OF 1954

Traditionally, courts of equity were unwilling to enjoin the assessment or collection of taxes merely upon a showing that the tax was illegal[5] or the assessment irregular.[6] They required the taxpayer to further establish that special circumstances made his legal remedy inadequate before an injunction would be issued.[7] Such judicial restraint was deemed necessary because a delay in the collection of revenue could prove detrimental to governmental operations.[8]

It was against this setting that the precursor of section 7421(a)[9] was enacted. Although its background is "shrouded in darkness,"[10] its sweeping prohibition of all suits "for the purpose of restraining the assessment or collection of any tax"[11] appeared to preclude judicial review of the revenue collection process. Judicial interpretation of this statute, however, belies

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5. *See, e.g.,* Hannewinkle v. Georgetown, 82 U.S. (15 Wall.) 547 (1873). *See generally* Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition,* 49 HARV. L. REV. 109 n.6 (1935).

6. *See, e.g.,* Dows v. City of Chicago, 78 U.S. (11 Wall.) 108 (1870); Note, *supra* note 5, at 109 n.7.

7. A clear showing of equitable jurisdiction was necessary. As stated in Magee v. Denton, 16 F. Cas. 382 (No. 8943), 2 A.F.T.R. 2065, 2066 (C.C.N.D.N.Y. 1863): "If this [assessment] has not been made in such form and mode as to give the legal right to levy and collect the tax therefor, that objection must be urged in a court of law and not in a court of equity." Special circumstances sufficient to invoke equity jurisdiction were found where irreparable harm or a multiplicity of lawsuits would result if the requested relief were denied. Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1870).

8. Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1870).

9. INT. REV. CODE OF 1954, §7421(a) was first enacted as Revenue Act of 1867 ch. 169, §10, 14 Stat. 475, *as amended,* REV. STAT. §3224 (1875). Int. Rev. Code of 1939, §3653 and the current provision are similar to the earlier codification except for the redetermination exceptions by right to petition the Tax Court. Section 7421(a) provides: "Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax was assessed." The word "any" before "tax" was added to the revised statutes version, REV. STAT. §3224 (1875). The phrase beginning "by any person" was added by §110(c) of the Federal Tax Lien Act of 1966. Act of 1966, Pub. L. No. 89-719, 80 Stat. 1126, 1144. For a discussion of the purpose of this addition, see Bob Jones Univ. v. Simon, 94 S. Ct. 2038, 2043, 1974-1 U.S.T.C. ¶9438, at 84,067 n.6 (1974). For a thorough discussion of the history and purpose of this Act, see Gorovitz, *Federal Tax Injunctions and the* Standard Nut *Cases,* 10 TAXES 446 (1932); Note, *supra* note 5. For consistency, the provision is cited as §7421(a) (or as the Anti-Injunction Act) throughout the text. *See generally* 9 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION §§49.210-.216 (1971). As explained in Note, *supra* note 5, at 109 n.9, there is almost no published legislative history on the Act.

10. Note, *supra* note 5, at 109 n.9.

11. INT. REV. CODE OF 1954, §7421(a).

its uncompromising language.[12] The history of its application is replete with factual circumvention, the boundaries of which have changed over time.[13]

For about sixty years the tendency of the courts was to deny injunctive relief.[14] The one case[15] on which the Supreme Court seemingly relied[16] to establish a permissive standard was speedily and severely restricted.[17] But in 1932 the Court's decision in *Miller v. Standard Nut Margarine Co.*[18] opened the door for lower courts to broaden the exceptions to the operational bar of section 7421(a). Despite precedent holding that an identical product was not taxable[19] under the Oleomargarine Tax Act,[20] the Service threatened to

12. *See* Pullan v. Kinsinger, 20 F. Cas. 44, 48 (No. 11,463) (C.C.S.D. Ohio 1870), where the court states: "[T]he statute [now §7421(a)] prohibiting an injunction in this case was wholly unnecessary, enacted only as a politic and kindly publication of an old and familiar rule. . . ."

13. *See, e.g.*, Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 1962-2 U.S.T.C. ¶9545 (1962); Miller v. Standard Nut Margarine Co., 284 U.S. 498, 3 U.S.T.C. ¶878 (1932). These cases are discussed in the text accompanying notes 18-34 *infra*.

14. Bailey v. George, 259 U.S. 16 (1922); Dodge v. Osborn, 240 U.S. 118, 1 U.S.T.C. ¶6 (1916); State R.R. Tax Cases, 92 U.S. 575, 2 A.F.T.R. 2367 (1876) (analogous treatment of a state tax). The assessment should, however, be made "under color . . . of office." *See* Synder v. Marks, 109 U.S. 189, 193, 3 A.F.T.R. 2460, 2463 (1883). Nor was allegation of an unjust assessment sufficient to avoid the bar imposed by §3224 [now §7421(a)]. *Id.* at 194, 3 A.F.T.R. at 2464. The Supreme Court, in Cheatham v. United States, 92 U.S. 85, 88, 2 A.F.T.R. 2365, 2366 (1876), discussed the necessity for "stringent measures for the collection of taxes . . . . These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose . . . . The United States . . . [has] enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete." Notable exceptions were suits between private parties, Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895), and situations where the exaction was held to be a penalty rather than a true tax. *See, e.g.*, Regal Drug Corp. v. Wardell, 260 U.S. 386, 1922 CCH ¶2074 (1922); Lipke v. Lederer, 259 U.S. 557, 1 U.S.T.C. ¶67 (1922); Hill v. Wallace, 259 U.S. 44, 1 U.S.T.C. ¶65 (1922).

15. Hill v. Wallace, 259 U.S. 44, 1 U.S.T.C. ¶65 (1922).

16. Dodge v. Brady, 240 U.S. 122, 126, 1 U.S.T.C. ¶7, at 1014 (1916) (dictum).

17. Graham v. Dupont, 262 U.S. 234, 1 U.S.T.C. ¶78 (1923). The Court distinguished the penalty cases cited in note 14 *supra* on the basis that they were not situations of enjoining taxes, but rather illegal penalties in the nature of punishment for a criminal offense. *Id.* at 257, 1 U.S.T.C. ¶78, at 1203. In discussing *Hill v. Wallace*, the Court stated: "Under these [blocking the entire future grain business of the country] extraordinary and most exceptional circumstances, it was held that section 3224 [now §7421(a)] was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional. *Hill v. Wallace* should, in fact, be classed with *Lipke v. Lederer* . . . as a penalty in the form of a tax." *Id.* at 257-58, 1 U.S.T.C. at 1203-04.

18. 284 U.S. 498, 3 U.S.T.C. ¶878 (1932).

19. Taxpayer's product had been held not to constitute oleomargarine, and not taxable as such. Higgins Mfg. Co. v. Page, 297 F. 644 (D.R.I. 1924). A letter from the Collector of Internal Revenue in answer to inquiry made by the company as to taxability of its product affirmed its nontaxable status. Additionally, a favorable Treasury decision had been rendered earlier. T.D. 3590, 1924-1 CUM. BULL. 507 (1924).

20. Oleomargarine Act of 1886, Act of Aug. 2, 1886, ch. 840, 24 Stat. 209, *as amended*, Act of May 9, 1902, ch. 786, 32 Stat. 193. The Court specifically distinguished the penalty situations of Lipke v. Lederer, 259 U.S. 557, 1 U.S.T.C. ¶67 (1922) and Regal Drug Corp.

make an assessment against respondent. When the company sued for injunctive relief, the Service asserted section 7421(a) as a defense, arguing that the provision barred an injunction even if the tax had been erroneously assessed.[21] Focusing on the arbitrariness of the Service's determination of the product's taxability,[22] the Supreme Court upheld an order granting the injunction.

The nebulous criteria[23] developed by the Court, however, offered little guidance to lower courts, and when forced to delimit the scope of the *Nut Margarine* exception they split drastically.[24] Although the Supreme Court appeared to revive the pre-section 7421(a) requirements in a subsequent case,[25] it was not until thirty years after *Nut Margarine* that the controversy was settled and the current interpretation announced. In *Enochs v. Williams Packing & Navigation Co.*,[26] the taxpayer sued to enjoin the Service from

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v. Wardell, 260 U.S. 386, CCH 1922 STAND. FED. TAX. REP. ¶2079 (1922). It is important to note at the outset that this was not treated as a collection of a penalty, for such an approach brings the case initially within the boundaries of §7421(a).

21. 284 U.S. at 506, 3 U.S.T.C. at 3140.

22. 284 U.S. at 506, 3 U.S.T.C. at 3140. The Court observed that an act in 1930 enlarged the definition to cover products such as Standard Nut Margarine's. However, under no interpretation could the original act, which was applicable to the taxpayer's product, include this product containing no animal fat.

23. The Court appeared to be confused as to the precedential value of Hill v. Wallace, 259 U.S. 44, 1 U.S.T.C. ¶65 (1922), when it cited that case in support of its contention that "extraordinary and exceptional circumstances render its [§7421(a)] provisions inapplicable." 284 U.S. at 510, 3 U.S.T.C. at 3141. See discussion of Graham v. Dupont, 262 U.S. 234, 1 U.S.T.C. ¶78 (1922), note 17 *supra*.

24. Commentators disagree on the exact nature of the divisions. *See generally* Note, *supra* note 5, at 113; Comment, *Federal Taxation: Section 7421(a) of Internal Revenue Code Literally Construed To Ban All Suits To Enjoin Assessment or Collection of Taxes*, 1963 DUKE L.J. 175, 178 [hereinafter cited as *Section 7421(a) Literally Construed*]; Comment, *Taxation—Federal Income Tax-Enjoining Collection*, 61 MICH. L. REV. 405, 408 (1962) [hereinafter cited as *Enjoining Collection*]. But at least two theories, representing endpoints of a continuum, are discernible. At one extreme are the courts that interpreted the opinion as reviving the pre-§7421(a) requirements for injunctive relief. *See, e.g.*, Lassoff v. Gray, 266 F.2d 745, 1959-1 U.S.T.C. ¶15,235 (6th Cir. 1959); Gold Medal Foods, Inc. v. Landy, 11 F. Supp. 65 (D. Minn. 1935). They premised their conclusion on the Supreme Court's assertion that the provision was merely declaratory of the common law rule. 284 U.S. at 509, 3 U.S.T.C. at 3141. In other jurisdictions this drastic departure from developing law was rejected. Pointing to the Supreme Court's statement that the "special and extraordinary circumstances" of *Nut Margarine* made "the reasons underlying §3224 [now §7421(a)] apply, if at all, with little force." *Id.* at 510, 3 U.S.T.C. at 3141, these courts concluded that the decision merely added one more exception to the Anti-Injunction Act's application. *See* Homan Mfg. Co. v. Long, 242 F.2d 645 (7th Cir. 1957). Such confusion is understandable because the *Nut Margarine* Court was rather adept at obfuscating its position. Only with the aid of hindsight in the analysis of more recent cases do the *Nut Margarine* facts appear to fully satisfy the modern requirement for an exception to §7421(a) discussed in text accompanying notes 39-40 *infra*. A short dissent in *Nut Margarine* asserted that the statute was an absolute bar. 284 U.S. at 511, 3 U.S.T.C. at 3141-42.

25. Allen v. Regents of Univ. Sys., 304 U.S. 439, 1938-2 U.S.T.C. ¶9321 (1939). The language of the opinion, however, suggests that the Court treated the imposition of the tax in this case as a penalty.

26. 370 U.S. 1, 1962-2 U.S.T.C. ¶9545 (1962).

assessing social security and unemployment taxes.[27] In rejecting the taxpayer's contention that the action was governed by *Nut Margarine,* the Court undertook an analysis of the scope of section 7421(a).[28] Pointing to the Tax Injunction Act of 1937,[29] which permitted federal injunctions of state tax assessments solely upon a showing of an inadequate legal remedy, the Court concluded that in order to avoid the more sweeping language of section 7421(a), a taxpayer would have to show more than merely an inadequate remedy at law.[30] Additionally, he must establish that on the facts of his case it is impossible for the Service to succeed in its claim:

> [I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case, the attempted collection may be enjoined if equity jurisdiction otherwise exists.[31]

Williams Packing thus established that a judicial exception to section 7421(a) would be made only where two elements existed: (1) Under the most liberal view of the law and the facts the government could not ultimately prevail,[32] and (2) equity jurisdiction otherwise exists.[33] Because these criteria

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27. The corporate taxpayer provided fishing boats to captains who employed their own crews. The Service contended that the members of such crews were employees of Williams Packing Co. The district court held for the taxpayer and granted an injunction, finding, *inter alia,* the lack of the requisite common law element of control, essential for an employment relationship. 176 F. Supp. 168 (S.D. Miss. 1959), *aff'd,* 291 F.2d 402, 1962-1 U.S.T.C. ¶9263 (5th Cir. 1961).

28. The Court pointed out that lower court decisions misinterpreting the thrust of *Nut Margarine* had turned on the absence of an adequate legal remedy. 370 U.S. at 6, 1962-2 U.S.T.C. at 85,289.

29. Act of Aug. 21, 1937, ch. 726, 50 Stat. 738, *as amended,* 28 U.S.C. §1341 (1970). This Act forbids federal courts from entertaining suits to enjoin collection of state taxes "where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State . . . ."

30. 370 U.S. at 6, 1962-2 U.S.T.C. at 85,289. The company had alleged that payment of the assessment would force it into bankruptcy, and thereby cause irreparable injury. The Court said that while such showing was not sufficient in itself to avoid the §7421(a) prohibition, proof of inadequate legal remedy was essential. A careful reading of the opinion suggests that the Court is equating irreparable harm with inadequacy of legal remedy. *But see* Alexander v. "Americans United" Inc., 94 S. Ct. 2053, 1974-2 U.S.T.C. ¶9439 (1974) (Blackmun, J., dissenting) (analysis of the elements of irreparable harm and inadequate legal remedy as separate factors); Comment, "Americans United" Inc. v. Walters *and* Bob Jones University v. Connally: *Revocation of Tax Exempt Status and §7421(a) of the IRC,* 46 TEMP. L.Q. 596, 600 (1973) (commentator derives a 3-pronged test from *Williams Packing,* with each of these factors as a separate prong).

31. 370 U.S. at 7, 1962-2 U.S.T.C. at 85,289.

32. The Court said: "We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of the suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Id.* The dissent by Judge Rives in the Fifth Circuit's opinion contains an analysis that appears to be of firmer logical foundation that the majority opinion. 291 F.2d 402. 1962-1 U.S.T.C. ¶9263, at 83,633. He points out that *Nut Margarine* was the only case not involving a penalty where the Supreme Court

were presaged in the *Nut Margarine* factual situation, *Williams Packing* appeared to limit the *Nut Margarine* exception to the facts of that case.[34] By requiring the taxpayer to prove certainty of success on the merits in order to satisfy the first prong of the test, the opinion seems to prescribe that section 7421(a) can never be avoided when a factual dispute exists.

In evaluating the import of *Williams Packing,* it is critical to realize that the factual dispute involved a taxpayer directly litigating his own tax liability. Therefore, the Court was not compelled to address the question of whether the suit was one "for the purpose of restraining the assessment or collection of any tax." Consequently, the case did not define the applicable scope of section 7421(a); it merely created a judicial exception for an action within the ambit of the Act.

JUDICIAL APPLICATION OF SECTION 7421(a) SUBSEQUENT TO *Williams Packing*

A taxpayer may circumvent the prohibition of section 7421(a) by satisfying either the statutory or judicially created exceptions. Successful use of the latter method requires, *inter alia,* that the taxpayer satisfy the rather stringent first prong of the *Williams Packing* test. In determining the range of parameters that permits a taxpayer to neutralize the government's use of section 7421(a), it is necessary to examine the functional utility of both the statutory exceptions and the *Williams Packing* exception.

Cases involving a wagering excise tax imposition or use of the jeopardy assessment procedure represent two areas of extensive section 7421(a) litigation in the years since *Williams Packing.* Moreover, they demonstrate typical instances in which the Service might be motivated by interests collateral to purely revenue protection or generation. In both areas the arbitrary assessments and other questionable tactics indicate the abuse potential of the section 7421(a) injunctive bar.

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permitted an injunction. See discussion in 9 J. MERTENS, *supra* note 9, §49.212. Furthermore, "the rational of *Miller v. Standard Nut Margarine Company, supra,* cannot be extended to bring within some supposedly implied exception cases like the present one without emasculating the prohibition contained in the statute." 291 F.2d at 409, 1962-1 U.S.T.C. at 83,634. Realizing that *Nut Margarine* was not a case of an illegal exaction in the guise of a tax, Judge Rives recognized the central question of law-question of fact dichotomy that must be explored in determining jurisdiction. "[T]he question is closely and hotly litigated purely as a question of fact . . . ." *Id.* at 410, 1962-1 U.S.T.C. at 83,635.

33. 370 U.S. at 7, 1962-2 U.S.T.C. at 85,289. To establish equitable jurisdiction, the taxpayer would have to prove that he would suffer irreparable harm for which there is no adequate remedy at law.

34. As discussed in the text accompanying notes 201-204 *infra, Williams Packing* can be read to endorse a purpose-oriented approach to the application of §7421(a). But more recent Supreme Court opinions have rejected this view and applied the *Williams Packing* test so as to effectively preclude judicial relief. That such a possibility existed in situations where Tax Court relief was not available did not go unnoticed by commentators. *See, e.g., Section 7421(a) Literally Construed, supra* note 24, at 181; *Enjoining Collection, supra* note 24, at 409.

Interaction of the Jeopardy Assessment Procedures and the Section 7421(a) Prohibition

To allow a taxpayer sufficient opportunity to petition the Tax Court for a redetermination of a deficiency, section 6212(a) of the Code authorizes a notice of deficiency to be sent to the taxpayer.[35] Section 6213(a) provides that no assessment of a deficiency,[36] nor any levy or court proceeding for its collection, may be made until ninety days[37] after mailing of such notice. If a petition is filed with the Tax Court, there is a further prohibition until a final decision.[38]

Section 6213(a) also affords the taxpayer injunctive relief during the time these prohibitions are in force, thereby constituting a statutory exception to section 7421(a).[39] There are exceptions to these general rules,[40] however, including provisions covering situations where assessment or collection of a deficiency may be jeopardized by delay.[41] In such a case section 6861(a) provides for immediate jeopardy assessment of the deficiency, together with interest and additional amounts provided for by law, and demand for payment thereof.[42] Since this procedure gives the District Director rather broad discretionary powers in making the assessment,[43] the taxpayer's right of petition to the Tax Court is protected by section 6861(b). Generally, this provision requires the mailing of a deficiency notice to the taxpayer within

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35. INT. REV. CODE OF 1954, §6212(a). The notice of deficiency is of critical importance to the taxpayer because it is a jurisdictional prerequisite to litigation in the Tax Court. *See* Mason v. Commissioner, 210 F.2d 388, 1954-1 U.S.T.C. ¶9326 (5th Cir. 1954); INT. REV. CODE OF 1954, §6213(a).

36. "An assessment is an administrative determination that a certain amount is currently due and owing as a tax. It makes the taxpayer a debtor in much the same way as would a judgment." Rambo v. United States, 492 F.2d 1060, 1061, n.1, 1974-1 U.S.T.C. ¶9242, at 83,453 n.1 (6th Cir. 1974). As to a deficiency, see discussion *id.* at 1064. 1974-1 U.S.T.C. at 83,455; INT. REV. CODE OF 1954, §§6211, 6861; TREAS. REG. §301.6211-1(a).

37. The statutory period is extended to 180 days if the notice is addressed to a person outside the United States. INT. REV. CODE OF 1954, §6213(a).

38. *Id.*

39. *Id.*

40. For a discussion of other restrictions, see 9 J. MERTENS, *supra* note 9, §§49.138-.143, .158-.169.

41. INT. REV. CODE OF 1954, §§6861-64. Thus, §6213(a) contains an override, providing for a §6861 assessment.

42. The injunctive bar of §7421(a) is applicable to these jeopardy assessments. *See* Milliken v. Gill, 211 F.2d 869, 1954-1 U.S.T.C. ¶9343 (4th Cir. 1954); 9 J. MERTENS, *supra* note 9, §49.216 n.56. The absence of prior notice in this procedure has been held to be constitutional. Harvey v. Early, 66 F. Supp. 761, 1946-2 U.S.T.C. ¶9344 (W.D. Va. 1946), *aff'd*, 160 F.2d 836, 1947-1 U.S.T.C. ¶9229 (4th Cir. 1947). The underlying reason for the jeopardy assessment procedures was discussed in a case decided by the Seventh Circuit. "[I]t is clear that jeopardy assessments are of their nature and purpose arbitrary . . . . There is little doubt but what a jeopardy assessment is a statutory label for the sovereign's stranglehold on a taxpayer's assets." Homan Mfg. Co. v. Long, 242 F.2d 645, 650-51, 1957-1 U.S.T.C. ¶9372, at 56,599 (7th Cir. 1957).

43. *See* 9 J. MERTENS, *supra* note 9, §49.145 (1971).

sixty days after the jeopardy assessment, if such assessment is made before the issuance of a section 6212(a) notice of deficiency.[44]

In lieu of a jeopardy assessment, a taxpayer's taxable year may be terminated and demand made for immediate payment under section 6851(a). This provision may be invoked upon a finding that a taxpayer is about to leave the United States or "do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax . . . ."[45] There is presently a split of authority[46] as to which statutory provision, section 6201[47] (the general assessment provision) or section 6861,[48] provides assessment authority for this termination procedure. The significance of this difference is that only section 6861 requires the sending of a notice of deficiency. Therefore, because receipt of the notice is a jurisdictional prerequisite to litigation in the Tax Court,[49] a taxpayer is effectively precluded from that forum if assessment authority is found under section 6201.[50]

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44. INT. REV. CODE OF 1954, §6212(a).

45. INT. REV. CODE OF 1954, §6851(a).

46. The earlier view was that §6851(a) itself contained assessment authority. *See* Williamson v. United States, 31 A.F.T.R.2d ¶73-456 (7th Cir. 1971); Puritan Church-Church of America, 10 CCH Tax Ct. Mem. ¶18,332 (1951), *aff'd per curiam on other grounds,* 209 F.2d 306, 1953-2 U.S.T.C. ¶9601 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 975 (1953); Ludwig-Littauer & Co., 37 B.T.A. 840 (1938). This theory, which rests on the premise that §6851 presupposes a more exigent situation of jeopardy than does §6861, was first rejected in Schreck v. United States, 301 F. Supp. 1265, 1969-2 U.S.T.C. ¶9541 (D. Md. 1969). While courts since *Schreck* have been unanimous in their rejection of the earlier view, their rationales have differed. See notes 47, 48 *infra* and cases cited therein.

47. INT. REV. CODE OF 1954, §6201. The Service has argued that termination of the taxable year under §6851 does not invoke the §6861 60-day notice rule. The basis for the argument is that there is no deficiency within the meaning of §6211. For cases accepting this rationale, see Laing v. United States, 496 F.2d 853, 1974-1 U.S.T.C. 9423 (2d Cir. 1974), *cert. granted,* 9 CCH 1974 STAND. FED. TAX REP. 70,728; Irving v. Gray, 479 F.2d 20, 1973-2 U.S.T.C. ¶9581 (2d Cir. 1973); Williamson v. United States, 31 A.F.T.R. 2d 73-8456 (7th Cir. 1971).

48. For a good discussion of the history and development of the split in authorities, see Clark v. Campbell, 501 F.2d 108, 1974-2 U.S.T.C. ¶9687 (5th Cir. 1974). Using the language in the §6211 Regulations, the court concluded that a §6851 liability is a deficiency; §6851 assessment authority flows from §6861; and the procedural safeguards of §6861, especially the right to petition the Tax Court, are applicable to a §6851 quick termination. 501 F.2d at 116, 1974-2 U.S.T.C. at 85,231. The court's reasoning followed that of the 6th Circuit in Rambo v. United States, 492 F.2d 1060, 1974-1 U.S.T.C. ¶9242 (6th Cir. 1974). Certiorari has been applied for in a later 6th Circuit decision in *accord* with *Rambo.* Hall v. United States, 493 F.2d 1211, 1974-1 U.S.T.C. ¶9296 (6th Cir. 1974), *cert. granted,* 9 CCH STAND. FED. TAX REP. 70,773. District courts in accord include Lisner v. McCanless, 356 F. Supp. 398, 1973-1 U.S.T.C. ¶73-2038 (D. Ariz. 1973), *appeal docketed,* Nos. 73-2037, 73-2038, 9th Cir., June 8, 1973; Schreck v. United States, 301 F. Supp. 1265, 1969-2 U.S.T.C. ¶9541 (D. Md. 1969), *reaff'd on reconsideration,* 375 F. Supp. 742, 1974-1 U.S.T.C. ¶9295 (D. Md. 1973), *appeal docketed,* No. 74-1566, 4th Cir., May 16, 1974.

49. See note 35 *supra.*

50. Under §6201 a taxpayer's only remedy is to pay the entire tax, file a claim for refund, and, if the claim is denied, bring suit in a federal district court for refund. *See, e.g.,* INT. REV. CODE OF 1954, §§6511, 6532, 7422. In Hall v. United States, 493 F.2d 1211, 1974-1 U.S.T.C. ¶9296 (6th Cir. 1974), *cert. granted,* 9 CCH 1974 STAND. FED. TAX REP. 70,773,

Those courts holding that a notice of deficiency is required for a section 6851(a) taxable year termination could find that failure to issue a notice pursuant to section 6861(b) results in two forms of relief to the taxpayer. First, injunctive relief may be provided within the section 6213(a) exception to section 7421(a), as though the usual section 6212(a) notice had not been issued.[51] Second, although no court has specifically so held, such a failure seems to satisfy the first prong of the *Williams Packing* test[52] for injunctive relief. In addition to satisfaction of the statutory exception by failure of the Service to send a notice of deficiency, constitutional violations[53] and arbitrary assessments[54] have been found sufficient to trigger *Williams Packing* injunctive relief despite the prohibition of section 7421(a). The subsequent analysis focuses upon the various factual situations involving a jeopardy assessment wherein a taxpayer is able to satisfy the *William Packing* two-pronged test or the statutory exception to section 7421(a).

Representative of the split of the courts over assessment authority for a short year termination are the cases of *Irving v. Gray*[55] and *Rambo v. United States*.[56] The *Irving* case involved the "Hughes hoax," wherein McGraw-Hill, Inc. made payments to Clifford Irving in connection with his writing a book about the wealthy recluse, Howard Hughes.[57] Fearing that delay might imperil revenue, the Service terminated Irving's taxable year and levied on his securities accounts. The taxpayer claimed that he was entitled to injunctive relief because the Service had failed to comply with the deficiency notice requirements of section 6861(b). The Second Circuit disagreed, however, finding that short year assessment authority flowed from section 6201(a), not section 6861(b).[58] The court reached this conclusion by reasoning that a section 6851 assessment is not a deficiency as defined in section 6211,[59] and

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the 6th Circuit, following its precedent in *Rambo*, noted that no deficiency notice was given under §6861(b) after a §6861(a) taxable year termination. The court pointed out that "[i]t is very important to a taxpayer, particularly to one who does not have $52,000, that she have a right to litigate the validity of the tax before her property is levied upon and sold to pay the tax." Furthermore, "[the] I.R.S. has prevented plaintiff from availing herself of the remedy in the Tax Court." *Id.* at 1212, 1974-1 U.S.T.C. at 83,625.

51. *See* Lisner v. McCanless, 356 F. Supp. 398, 1973-1 U.S.T.C. ¶9299 (D. Ariz. 1973), *appeal docketed*, Nos. 73-2037, 73-2038, 9th Cir., June 8, 1973.

52. Failure of the Government to comply with the 60-day notice of deficiency requirement would mean that the Government could not possibly prevail in further litigation.

53. See text accompanying notes 95-97 *infra*.

54. See text accompanying notes 84-94 *infra*.

55. 479 F.2d 20, 1973-2 U.S.T.C. ¶9581 (2d Cir. 1973).

56. 492 F.2d 1060, 1974-1 U.S.T.C. ¶9242 (6th Cir. 1974).

57. This was "a scheme by Clifford Irving and Richard Suskind to write and sell an 'authorized' version of the life of billionaire recluse Howard Hughes, when in fact there was no authorization therefor by Hughes." 479 F.2d 20, 21, 1973-2 U.S.T.C. ¶9581, at 81,857 (2d Cir. 1973).

58. In so doing, it declined to follow Schreck v. United States, 301 F. Supp. 1265, 1969-2 U.S.T.C. ¶9541 (D. Md. 1969), *reaff'd on reconsideration*, 375 F. Supp. 742, 1974-1 U.S.T.C. ¶9285 (D. Md. 1973), *appeal docketed*, No. 74-1566, 4th Cir., May 16, 1974.

59. INT. REV. CODE OF 1954, §6211. The court followed, for example, Williamson v. United States, 31 A.F.T.R.2d ¶73-456 (7th Cir. 1971). *See also* Da Boul v. Commissioner, 429 F.2d 38, 1970-2 U.S.T.C. ¶9502 (9th Cir. 1970).

therefore the section 6861(b) deficiency notice requirement did not control. As a result, the taxpayers were barred from seeking Tax Court relief.[60]

In contrast to *Irving*, the Sixth Circuit in *Rambo* affirmed a summary judgment subsequent to an injunction,[61] ordering the Service to return attached property and to refrain from collecting any tax assessed for the terminated period. In a pattern of events that is becoming increasingly prevalent in drug-related cases,[62] taxable year termination and an assessment for income taxes were made following a traffic arrest and a subsequent search of the taxpayer's car and person.[63] The *Rambo* court concluded that statutory authority for the short year assessment was conferred by section 6861(b), and thus the sixty-day deficiency notice was mandatory.[64] The court reached its decision by reasoning that the tax imposed constituted a deficiency within the meaning of section 6211, and, therefore, the notice requirement of section 6861 was applicable.[65] The holding was buttressed by an examination of the statute's legislative history, which the court viewed as "a movement away from the harsh, and often unjust, effects of a code which required the taxpayer to pay his tax before he could have a judicial hearing on the amount properly due."[66] This supported the taxpayer's assertion that the procedural requirements of sections 6861 and 6863 were meant to apply to all jeopardy taxpayers, whether assessed at the end of the taxable year or upon taxable year termination pursuant to section 6851.[67]

Moreover, the court noted, the sequential arrangement of sections 6851 and 6861 permitted the reasonable inference that Congress intended for the latter section to provide assessment authority for the former.[68]

A comparison of the reasoning employed in the two opinions demonstrates the inadequacies of the *Irving* rationale. In arriving at its conclusion that a deficiency sufficient to trigger a notice requirement could not exist if *the taxpayer* had not filed a return prior to the assessment, the *Irving* court re-

60. See note 35 *supra*.

61. 353 F. Supp. 1021, 1972-1 U.S.T.C. ¶9244 (W.D. Ky. 1973).

62. *See, e.g.*, Clark v. Campbell, 501 F.2d 108, 1974-2 U.S.T.C. ¶9687 (5th Cir. 1974); Willits v. Richardson, 362 F. Supp. 456, 1973-2 U.S.T.C. ¶9602 (S.D. Fla. 1973), *rev'd*, 497 F.2d 240, 1974-2 U.S.T.C. ¶9583 (5th Cir. 1974).

63. The search revealed a supply of drugs and $2,200 in cash. There was no prosecution on any charge related to this arrest; probation arising from previous charges was, however, revoked 492 F.2d at 1061, 1974-1 U.S.T.C. at 83,453.

64. 492 F.2d at 1065, 1974-1 U.S.T.C. at 83,455. The Service took the position that termination under §6851(a) is not a deficiency within the meaning of §6211. That is, a §6851(a) termination results in a "provisional statement of the amount which must be presently paid as a protection against the impossibility of collection." Ludwig-Littauer & Co., 37 B.T.A. 840, 842 (1938). *See also* Williamson v. United States, 31 A.F.T.R.2d ¶73-456 (7th Cir. 1971).

65. "Clearly, the I.R.S. has imposed a tax and just as clearly the taxpayer has denied that he owes that amount by refusing either to pay the imposed tax or to file a return." 492 F.2d at 1064, 1974-1 U.S.T.C. at 83,455.

66. *Id.*

67. *Id.* For cases agreeing that §6861 provides the assessment authority for a §6851 quick termination, see cases cited note 48 *supra*.

68. 492 F.2d at 1064, 1974-1 U.S.T.C. ¶9242, at 83,455. Sections 6851 and 6861 both appear in ch. 70, subsch. A of the Code under the heading "Jeopardy."

fused to look beyond the statute itself and the "plain meaning" of its language.[69] The *Rambo* court, on the other hand, found that the opposite conclusion was compelled by congressional intent as gleaned from the legislative history and the practical realities of the situation.[70] Similarly, the *Irving* court failed to recognize the total effect of a failure to issue a deficiency notice. It limited its inquiry to the absence of the Tax Court forum, which it found inconsequential because of the available procedure of filing a full year return and suing for overpayment in a federal district court.[71] The *Rambo* court, however, held that the taxpayer should not be relegated to a refund suit,[72] which would deny him the other procedural safeguards provided in the jeopardy assessment sections.[73] Moreover, the court noted that permitting the Government to seize and sell property without judicial consideration of the validity of the tax constituted a potential due process violation.[74]

Although the *Rambo* court recognized the *Williams Packing* decision, it declined to decide the case within this judicially-created exception.[75] Rather, the injunction was sustained because of the Service's failure to send the section 6861 notice.[76] It seems quite clear, however, that the Government could not prevail because of its failure to send the required notice, and the second prong of *Williams Packing*—equity jurisdiction—also existed.[77] While the *Irving* court considered the availability of injunctive relief under *Williams Packing*,[78] it negated the second prong by finding that the taxpayers had an

69. 479 F.2d at 24, 1973-2 U.S.T.C. at 81,859.

70. 492 F.2d at 1064, 1974-1 U.S.T.C. at 83,455.

71. 479 F.2d at 24, 1973-2 U.S.T.C. at 81,859.

72. The only remedy would thus be for the taxpayer to pay the tax, file a return at the end of his regular taxable year and sue in district court for a refund. *See* INT. REV. CODE OF 1954, §§6511, 6532, 7422, and Flora v. United States, 362 U.S. 145, 1960-1 U.S.T.C. ¶9347 (1960).

73. Not only is the notice a jurisdictional prerequisite to Tax Court litigation, but "while awaiting the decision of the Tax Court, the jeopardy taxpayer may stall collection proceedings if he is able to post an adequate bond, *see* 6863(a). If he cannot, the seized property cannot be sold absent certain limited exigent circumstances; see 6863(b)(3)(A). The I.R.S. may abate the jeopardy assessment if it finds that jeopardy does not exist. Sec. 6861(g)." 492 F.2d at 1062, 1974-1 U.S.T.C. at 83,454.

74. *Id.* at 1064-65, 1974-1 U.S.T.C. at 83,455-56.

75. *Id.* at 1062 n.2, 1974-1 U.S.T.C. at 83,453 n.2.

76. See text accompanying notes 61-68 *supra*.

77. The Service had levied on Rambo's bank account and several of his automobiles. Furthermore, there was no adequate legal remedy, since the taxpayer had no notice of deficiency, barring Tax Court relief. The sufficiency of the lack of notice as a satisfaction of the first prong has not been clearly articulated in other lower court opinions following the *Rambo* logic as to requirement for the notice. Rather, the courts place their reliance on the statutory exceptions to §7421(a). *See* Shaw v. McKeever, 1974-1 U.S.T.C. ¶9348 (D. Ariz. 1974), *notice of appeal filed*, 9 CCH, 1974 STAND. FED. TAX REP. 70,741. In view of the hazards involved in meeting the first prong of *Williams Packing* such reliance seems well founded. In fact, where a taxpayer failed to demonstrate that the Government could not ultimately prevail as to the validity of its assessment upon trial, a court granted §6213(a) relief upon failure of the Service to issue the 60-day notice of deficiency. *Id.*

78. Because the court found no requirement for a notice of deficiency, §6213(a) injunctive relief was not available.

adequate legal remedy.[79] The court then apparently nullified the first prong by stating that no deficiency had been shown.[80] This type of reasoning is disturbing because it tends to expand the power matrix available to the Service. Thus, the section 6213(a) exception to section 7421(a) is not available to a taxpayer whenever a court follows the Service's contention that no notice of deficiency is required. The limited procedural safeguards[81] noted in *Rambo,* as well as the Tax Court forum,[82] are also negatived. The Service can, therefore, terminate a taxable year[83] and seize assets while precluding a petition to the Tax Court.

A related problem emanates from the Service's power to use the jeopardy procedures for other than revenue-related motives. The potential for abuse and the necessity for adequate judicial response are well demonstrated in *Willits v. Richardson.*[84] In that case a search of the taxpayer's purse at the police station following a traffic arrest revealed "a few pills" and 4,400 dollars in cash.[85] A subsequent call to an agent connected with the Narcotics Project[86] of the IRS resulted in termination of the plaintiff's taxable year and assessment of taxes on alleged income from drug sales.[87] An immediate demand for payment and levy upon the taxpayer's personal property were made. The taxpayer then sued for injunctive relief, whereupon the Service interposed section 7421(a) as a defense. The district court concluded that no notice of deficiency was required under a section 6851 termination, following *Irving,* and furthermore that neither prong of the *Williams Packing* test was satisfied.[88]

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79. See note 72 *supra.*

80. 479 F.2d at 25, 1973-2 U.S.T.C. at 81,860. The court also commented on the taxpayer's lack of "clean hands" and quoted the lower court: "[I]t is bearable inequity that those whose 'bold plans' are frustrated may suffer potentially costly inconveniences." *Id.* While the conduct by the taxpayers in *Irving* may have been socially undesirable, the Service had, perhaps, firm evidence on which to base its assessment. *Id.* at 22, 1973-2 U.S.T.C. at 81,857. This has not always been the case; see text accompanying notes 84-94 *infra.* Furthermore, the lack of rapid access to the Tax Court by a jeopardy taxpayer appears to be an additional penalty not meant to be imposed by Congress in enacting §6851. The harsh result of tax prepayment before litigation can easily financially ruin a taxpayer.

81. See note 73 *supra.*

82. See note 35 *supra.*

83. INT. REV. CODE OF 1954, §6851(a).

84. 362 F. Supp. 456, 1973-2 U.S.T.C. ¶9602 (S.D. Fla. 1973).

85. "[T]he police report indicated that only a few pills contained in two vials had been found in Mrs. Willits purse . . . ." *Id.* 1973-2 U.S.T.C. at 81,945. Several diamond rings worn by plaintiff were surrendered to police at their request. *Id.* 1973-2 U.S.T.C. at 81,944.

86. In Clark v. Campbell, 501 F.2d 114-15, 1974-2 U.S.T.C. ¶9687, at 85,229 (5th Cir. 1974), the court said: "Until quite recently there has been a paucity of litigation on the issue before this Court despite the lengthy codal coexistence of §§6851 and 6861. The emergence of the issue seems primarily attributable to the Service's recent pattern of its willingness to utilize §6851 in conjunction with requests from BNDD in narcotics enforcement activities."

87. 362 F. Supp. at 459, 1973-2 U.S.T.C. at 81,945; 1973 taxable income was computed to be $60,000 on sales of cocaine, although the method used was not stated in the opinion.

88. Relying on the evidence obtained by the possibly illegal police search, the district court determined that the plaintiff had failed to satisfy the first prong—that the Govern-

In reversing the decision of the district court,[89] the Fifth Circuit found "no basis in fact nor foundation for any reasonable assumption" that Mrs. Willits was connected with any narcotics sales.[90] Thus, the court concluded that "the evidence adduced established such a gossamer basis for the drastic actions of the Internal Revenue Service that they cannot be sustained."[91] Therefore, the first prong of the *Williams Packing* test was satisfied.[92] The court also held that seizure of Mrs. Willits' means of supporting her children and herself constituted irreparable harm for which a refund suit could not provide an adequate legal remedy because of the tremendous time delays involved.[93] Recognizing the dire consequences that unrestrained Service power could portend, the court observed:

> The I.R.S. has been given broad power to take possession of the the property of citizens by summary means that ignore many basic tenets of due process in order to prevent the loss of tax revenues. Courts cannot allow these expedients to be turned on citizens suspected of wrongdoing—not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures. The fact that they are cloaked in the garb of a tax collection and applied only by the Narcotics Project to those believed to be engaged in or associated with the narcotics trade must not bootstrap judicial approval of such use.[94]

A final ambiguity arising in this area is the viability of certain constitutional arguments. Although the taxpayer in *Willits* alleged that an illegal search and seizure had been made, the Fifth Circuit declined to consider this issue.[95] Such a consideration was not necessary in light of the finding of an arbitrary assessment. Had the court used such an approach, however, it could have buttressed its finding that the Government could not prevail, because there is case authority indicating that illegal evidence cannot be used

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ment could not possibly prevail. In so doing, the court ignored its own statement that it was *not necessary* to determine the legality of the search. As to the second prong, the court concluded that an adequate legal remedy was available through a refund suit *after* filing a return for the full taxable year. Alternatively, if the Service disagreed with the full year return, it could issue a §6212(a) notice of deficiency, allowing Tax Court jurisdiction. 362 F. Supp. at 461, 1973-2 U.S.T.C. at 81,947.

89. 497 F.2d 240, 1974-2 U.S.T.C. ¶9583 (5th Cir. 1974).

90. *Id.* at 245, 1974-2 U.S.T.C. at 84,835.

91. *Id. See also* Woods v. McKeever, 1973-2 U.S.T.C. ¶9727 (D. Ariz. 1973) (arbitrary assessment satisfied first prong of *Williams Packing*).

92. *Id.* at 245-46, 1974-2 U.S.T.C. at 84,836. The court followed the test announced in Lucia v. United States, 474 F.2d 565, 573, 1973-1 U.S.T.C. ¶16,075, at 81,368-69 (5th Cir. 1973), that: "[A] taxpayer under a jeopardy assessment is entitled to an injunction against collection of the tax if the Internal Revenue Service's assessment is entirely excessive, arbitrary, capricious, and without factual foundation, and equity jurisdiction otherwise exists."

93. Willits v. Richardson, 497 F.2d 240, 246, 1974-2 U.S.T.C. ¶9583, at 84,836 (5th Cir. 1974).

94. *Id. Accord,* Woods v. McKeever, 1973-2 U.S.T.C. ¶9527 (D. Ariz. 1973), *appeal docketed,* No. 74-1133, 9th Cir., Jan. 25, 1974.

95. *Id.*

to support a jeopardy assessment. In fact, where a taxpayer, arrested on a traffic violation, had his car searched and was interrogated without benefit of *Miranda* warnings, the blatant constitutional violations were held to satisfy the first prong of *Williams Packing*.[96] Because all of the plaintiff's assets were frozen, irreparable harm without an adequate legal remedy was present to satisfy the second prong and permit injunctive relief. Unfortunately, the weight of case authority suggests that constitutional objections are overwhelmingly ignored by acquiescence to the jurisdictional precedent of section 7421(a).[97]

It seems desirable that the Service not be permitted to continue making thinly supported assessments in "criminal" cases where there is no evidence to sustain a prosecution. Such a bifurcated system of justice, with an administrative agency essentially imposing sanctions for the appearance of a deviation from an undefined norm, has inherent dangers that this pluralistic society cannot tolerate. Historically, individual rights have been asserted and protected against the state in this country. Erosion of these rights through abrogation of well developed constitutional theories presages a trend that should alarm even the ardent apologist for administrative shortcut tactics in pursuance of "control" of drug-related and other activities at variance with agency norms. Tolerance of the developing pattern may result in domination of the acquiescent citizen.

Gambling Tax Cases

Is It a Tax? Initial attacks on the Wagering Tax[98] centered on the legality of the tax itself. Challengers either claimed that it was an attempt to regulate behavior rather than an exercise of the taxing power or that it was outside the congressional power to tax. As the effect of the law was to increase revenue, however, it was held to be an exercise of the taxing power, which could not be rendered invalid merely because it had a deterrent effect on the activity taxed.[99] Therefore, attempts to avoid the strictures of section

96. Anderson v. Richardson, 354 F. Supp. 363 (S.D. Fla. 1973). Despite an assurance by the Service that his returns were in order, the taxpayer learned on the next day that the IRS had attached his assets in a safety deposit box, joint checking and savings accounts, and had also placed a lien on his home. At a hearing for emergency injunctive relief, the IRS spokesman admitted that he saw no way in which the Service could succeed on the jeopardy assessment. *Id.* at 365.

97. *E.g.*, LaLonde v. United States, 350 F. Supp. 976, 1972-2 U.S.T.C. ¶9756 (D. Minn. 1972), *aff'd*, 478 F.2d 700 (8th Cir. 1973), plaintiff argued that a jeopardy assessment was made for the purpose of obtaining records to uncover sources of printed materials that he retailed and this violated his first amendment rights. Strict application of the first prong of the *Williams Packing* test resulted in acquiescence to §7421(a) and rejection of the constitutional argument.

98. INT. REV. CODE OF 1954, §4401. The language of the provision is set out in note 1 *supra*.

99. In United States v. Kahriger, 345 U.S. 22, 1953-1 U.S.T.C. ¶9245 (1953), appellee argued that the Wagering Tax was an attempt on the part of Congress to regulate intrastate crime by imposing a penalty on the activity under the pretext of taxation. Additionally, because the tax had the effect of deterring gambling, it was alleged to be an infringement

7421(a) on the basis that the "tax" caused an unconstitutional deprivation of property without due process of law were dismissed out of hand. Courts merely noted "it is settled law that the wagering tax itself . . . [is] constitutional."[100]

Is the Government "Attempting To Assess or Collect" Taxes? In 1968 the Supreme Court held that criminal sanctions could not be imposed on a person who failed to comply with the registration[101] and occupational[102] provisions of the Wagering Tax. The Court reasoned that such actions would violate the fifth amendment privilege against self-incrimination.[103] It later applied this same rationale to prohibit criminal prosecution for failure to pay the Wagering Tax.[104] Finally, in *United States v. United States Coin & Currency,*[105] the Supreme Court held the fifth amendment privilege applicable in proceedings for forfeiture of "property intended for use in violating the provisions of the internal revenue laws."[106] In that case the Court found a "forfeiture" resulting from a statutory offense to be indistinguishable from a "criminal fine."[107]

Although none of these cases concerned the tax per se, persons facing Wagering Tax assessments have attempted to avoid the application of section 7421(a) by asserting the same rationale. The central theme in each case has been that the government's motivation is punishment, not revenue, and

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on the states' police power and thus violative of the tenth amendment. Noting the extensiveness of the taxing power and focusing on the revenue-generating effect of the Wagering Tax, the Supreme Court upheld the tax.

100. Trent v. United States, 442 F.2d 405, 406, 1971-1 U.S.T.C. ¶5,995, at 87,091 (6th Cir. 1971). It has also been argued that Congress' failure to provide for Tax Court review of Wagering Tax assessments results in a deprivation of property in violation of the fifth amendment. The rationale is that the prerequisite to refund litigation, full payment of the assessment, is an intolerable burden. Courts, however, seizing upon the dicta in Flora v. United States, 362 U.S. 145, 175 n.38, that "excise tax assessments may be divisible into a tax on each transaction or event, so that the full-payment rule would probably require no more than payment of a small amount," have uniformly rejected the contention. They hold that making partial payment a prerequisite to contesting the assessment does not violate due process. *E.g.,* Cole v. Cardoza, 441 F.2d 1337, 1342, 1971-1 U.S.T.C. ¶15,986, at 87,071 (6th Cir. 1971); Bowers v. United States, 423 F.2d 1207, 1208, 1970-2 U.S.T.C. ¶9560, at 84,364 (5th Cir. 1970); Vuin v. Burton, 327 F.2d 967, 970, 1964-1 U.S.T.C. ¶15,553, at 92,525 (6th Cir. 1964).

101. INT. REV. CODE OF 1954, §4412(a) provides that "[e]ach person required to pay a special tax under the subchapter shall register with the official in charge of the internal revenue district . . . ."

102. INT. REV. CODE OF 1954, §4411 provides: "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

103. Marchetti v. United States, 390 U.S. 39, 1968-1 U.S.T.C. ¶15,800 (1968).

104. Grosso v. United States, 390 U.S. 62, 1968-1 U.S.T.C. ¶15,801 (1968).

105. 401 U.S. 715, 1971-1 U.S.T.C. ¶5,979 (1971).

106. INT. REV. CODE OF 1954, §7302.

107. The Court said: "From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct." 401 U.S. at 718, 1971-1 U.S.T.C. at 87,050.

thus a suit seeking to enjoin the governmental action is not intended to restrain the "assessment or correction of a tax." For example, in *White v. United States*,[108] the Service used plaintiff's personal records as a basis for computing the Wagering Tax assessment. Because this action made the plaintiff a witness against himself, he attempted to invoke the fifth amendment privilege against self-incrimination in his suit for injunctive relief. He argued that because a Wagering Tax assessment has the same consequences as a forfeiture, the *Coin Currency* rationale extended to him the fifth amendment protection. This argument was rejected on two grounds. First, the court found an "essential difference" between the two proceedings: forfeiture involves property that a person could have retained had he complied with the law; a tax assessment, on the other hand, applies to money that would have gone to the Government had the law been obeyed.[109] Moreover, the logical extension of the plaintiff's argument would be to preclude the possibility of imposing a tax on income derived from illegal activities, a result expressly disavowed in *Coin Currency*.[110] Thus, because the government's action was cast as a revenue measure, not a penalty, section 7421(a) barred the injunction.

Another perspective was taken in *Ianelli v. Long*.[111] The district court noted that a forced sale in satisfaction of a Wagering Tax assessment might cause plaintiff's property to be sold at much less than market value. Therefore, it held that "a tax sale of all property . . . without the opportunity to contest it in a court of law is for all intents and purposes a forfeiture, not a tax."[112] Accordingly, section 7421(a) did not prevent the court from issuing an injunction, effective until the plaintiff could appropriately contest the assessment without danger of self-incrimination.[113] The Third Circuit reversed the focus, however, and with it the decision.[114] While agreeing that "the section [7421(a)] presupposes a bona fide attempt of the government to collect revenue," the court held that these levies satisfied the requirement

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108. 363 F. Supp. 31, 1973-2 U.S.T.C. ¶16,117 (N.D. Ill. 1973).

109. This distinction was articulated in United States v. Donlon, 355 F. Supp. 220, 223, 1973-1 U.S.T.C. ¶16,090, at 81,400 (D. Del. 1973), a case that the *White* court cited in support of its "essential difference" remark. 363 F. Supp. at 35, 1973-2 U.S.T.C. at 82,776.

110. Urban v. United States, 445 F.2d 641, 643 (5th Cir. 1971), also cited in White v. United States, 363 F. Supp. at 35, 1973-2 U.S.T.C. at 82,776, stated this reason.

111. 333 F. Supp. 407, 1971-2 U.S.T.C. ¶16,021 (W.D. Pa. 1971).

112. *Id.* at 412, 1971-2 U.S.T.C. at 88,096.

113. The court attempted to buttress its circumvention of §7421(a) by stating that because it was issuing only a temporary injunction and was ordering a receiver to handle the property in the interim, its decision was "not really to prohibit but only to defer collection of the taxes. . . ." *Id.* at 413, 1971-2 U.S.T.C. at 88,096. But §7421(a) does not distinguish between temporary and permanent injunctions, and its central purpose is to avoid *delay* in the collection of government revenue. Thus, this statement does no more than show that the court was responding to the equities of the situation rather than the language of the Act.

114. Iannelli v. Long, 487 F.2d 317, 1973-2 U.S.T.C. ¶16,098 (3d Cir. 1973), *rev'g* 333 F. Supp. 407, 1971-2 U.S.T.C. ¶16,021 (W.D. Pa. 1971).

because they constituted a "potentially productive attempt to collect revenue." Any other governmental objectives were immaterial.[115]

The message of *White* and *Ianelli* is clear. So long as the court can discern a nexus between the government's action and procurement of its legal entitlements, section 7421(a) will bar a taxpayer's suit for injunctive relief.

Still another facet of the problem is exemplified by two cases in which the plaintiffs attacked the magnitude and method of the assessment. Where the Service projected the amount of wagers handled in a ten-month period from evidence of plaintiff's actual wagering in the preceding five-year period, the Seventh Circuit rejected plaintiff's contention that the assessment was so arbitrary that it became necessary to question the bona-fides of the government's revenue-raising objective.[116] On the other hand, when confronted with an assessment of $2,653,640 that was derived by projecting one day's betting slips over an arbitrarily determined period of four years and nine months, the Fifth Circuit remanded for findings of fact as to "whether the computative basis is so insufficient as to make the assessment an exaction in 'the guise of a tax' rather than a legitimate tax on wagers."[117] With reference to section 7421(a), the court stated: "A finding that the assessment is arbitrary, capricious, and without foundation in fact would free the Court of the constraint of the anti-injunction statute."[118]

As these latter two cases show, the section 7421(a) bar is formidable but not absolute. Upon a clear showing that the Service is abusing its statutory authority to assess or collect taxes, courts will find the actions outside the protective shield of section 7421(a).

Can the Tax Be Collected? The third category of Wagering Tax injunction suits comprises cases where the plaintiff, although conceding that the tax itself is legal and that the government's objective is to obtain revenue, contends that, on the facts presented, no tax can legally be assessed against him. This is the *Nut Margarine-Williams Packing* situation, and the plaintiff

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115. *Id.* at 318, 1973-2 U.S.T.C. at 82,728.

116. Collins v. Daly, 437 F.2d 736, 738, 1971-1 U.S.T.C. ¶16,976, at 87,041 (7th Cir. 1971). Other cases that have acknowledged the validity of this argument, although finding that the particular facts did not meet its requirements, are: Ianneli v. Long, 487 F.2d 317, 1973-2 U.S.T.C. ¶16,098 (3d Cir. 1973); Cole v. Cardoza, 441 F.2d 1337, 1971-1 U.S.T.C. ¶15,986 (6th Cir. 1971); Hamilton v. United States, 309 F. Supp. 468, 1969-2 U.S.T.C. ¶15,924 (S.D.N.Y. 1969).

117. Lucia v. United States, 474 F.2d 565, 575, 1973-1 U.S.T.C. ¶16,075 at 81,371 (5th Cir. 1973). Similarly, in Pizzarello v. United States, 408 F.2d 579, 1969-1 U.S.T.C. ¶15,886 (2d Cir. 1969), the court held that projecting wagers over an arbitrarily determined five-year period on the basis of three days' receipts was so "totally excessive . . . because based on entirely inadequate information, [that] collection should be enjoined if equity jurisdiction otherwise exists." *Id.* at 584, 1969-1 U.S.T.C. at 85,027.

118. 474 F.2d at 577, 1973-1 U.S.T.C. at 81,372. Of course, the ordinary requirements of equity jurisdiction, irreparable harm and an inadequate remedy at law, would also have to be established before an injunction would be issued. The court remanded for findings of fact on this question. *Id.*

stands or falls on his ability to meet the two-pronged *Williams Packing* test.[119]

An interesting, but unsuccessful, constitutional argument was raised in *Lucia v. United States*.[120] Under a provision declaring the ordinary three-year statute of limitations[121] inapplicable where no return is filed,[122] the Government assessed a Wagering Tax almost six years after the last transaction. Lucia sued for injunctive relief, claiming that he could not constitutionally be denied the benefit of the statute of limitations, and thus under no circumstances could the Government ultimately prevail. He argued that filing a return would have violated his fifth amendment privilege against self-incrimination. Therefore, a denial of the benefit of the statute of limitations constituted a penalty for the assertion of a constitutional right. The Fifth Circuit disagreed, however,[123] holding that "there is no substantive or fundamental right to the shelter of a period of limitations."[124] Therefore, because the plaintiff had not been denied anything to which he was otherwise entitled, the inapplicability of the limitation period did not constitute a penalty.

A more persuasive constitutional argument was raised in *Pizzarello v. United States*.[125] In a suit to enjoin a levy for unpaid wagering taxes, plaintiff claimed that under no circumstances could the Government prevail because the assessment was based on evidence seized in violation of his fourth amendment rights. After concluding that there was no Supreme Court precedent on point, the Second Circuit applied the exclusionary rule and held the assessment invalid.[126]

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119. In order to qualify for an injunction under *Williams Packing*, the taxpayer must show: (1) that under no circumstances can the Government prevail, and (2) that equity jurisdiction otherwise exists. For further amplification, see text accompanying notes 26-34 *supra*.

120. 474 F.2d 565, 1973-1 U.S.T.C. ¶16,075 (5th Cir. 1973).

121. INT. REV. CODE OF 1954, §6501(a) provides in pertinent part: "Limitations on assessment and collection (a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

122. INT. REV. CODE OF 1954, §6501(c) provides in pertinent part: "(c) Exceptions.—(3) No Return.—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

123. Lucia v. United States, 474 F.2d 565, 569-70, 1973-1 U.S.T.C. ¶16,075, at 81,366 (5th Cir. 1973).

124. *Id.* at 572, 1973-1 U.S.T.C. at 81,368.

125. 408 F.2d 579, 1969-1 U.S.T.C. ¶15,886 (2d Cir. 1969).

126. *Id.* at 586, 1969-1 U.S.T.C. at 85,028-29. Of course, this satisfied only the first prong of the *Williams Packing* test. He still had to satisfy the second prong of the test, by showing that he was entitled to equitable relief because he would suffer irreparable harm for which there was no adequate remedy at law, before an injunction would issue. The court remanded for findings of fact on this question. *Id.* at 587, 1969-1 U.S.T.C. at 85,030. Compare this result with the approach taken in the Jeopardy Assessment area (see note 97 *supra* and accompanying test) where the court refused to permit the taxpayer to invoke the fourth amendment as a basis for satisfying the first prong of the *Williams Packing* test.

Another successful attack on an attempted government collection was made in *Cole v. Cardoza*.[127] The Government had obtained a lien on the plaintiff's residence to satisfy overdue gambling taxes. Finding that under applicable law a federal tax lien solely against a husband could not attach to property owned by him as a tenant by the entirety, the court declared the lien void.[128]

Summary. As these cases show, attempts to characterize the Gambling Tax as a penalty have been unsuccessful, and section 7421(a) presents a formidable barrier to relief from its assessments. If a nexus between legal revenue and the government's action can be discerned, the Act will be applied.[129] On the other hand, if the assessment is so outrageous as to bear no resemblance to a "tax," the Service has not been permitted to hide its extra-legal actions behind the shield of section 7421(a).[130] Finally, even in cases seemingly within the scope of the Act, courts have granted relief where the facts satisfy the *Williams Packing* requirements. While constitutional claims alone are insufficient to invoke this exception,[131] they can be used to satisfy the first prong.

Perhaps the most important message conveyed by these cases is the courts' reluctance to apply section 7421(a) mechanically. Rather, they have examined each factual situation to assure that the purpose of the Act would be served, before applying its strictures. The desirability of this purpose-oriented approach is obvious, the application of section 7421(a) makes the Service's determination of the rights of the parties binding. Where such a situation reflects the will of the people, as interpreted by Congress, it must be obeyed. But courts must carefully examine each factual circumstance in order to ensure that they do not abdicate to the Service their role as final arbiter of the rights of men in contexts beyond those contemplated by Congress. The potential for abuse inherent in such situations is too great to be tolerated.[132]

127. 441 F.2d 1337, 1971-1 U.S.T.C. ¶15,986 (6th Cir. 1971).

128. The Government had conceded that it had "no valid claim" against Cole's home. *Id.* at 1343, 1971-1 U.S.T.C. at 87,071. Thus, appellant satisfied the first prong of the *Williams Packing* test—assured success on the merits. As the court found that the tax lien would cast "doubt [on] the title of the property and cause reasonably prudent purchasers to refuse to accept it until they were certain the title was clear," the court held that appellant was entitled to have the lien removed. *Id.* at 1344, 1971-1 U.S.T.C. at 87,072.

129. This interpretation of §7421(a)'s scope parallels the conclusion recently reached by the Supreme Court. See discussion of *Bob Jones* and *"Americans United"* accompanying notes 201-210 *infra.*

130. But compare with this conclusion the Supreme Court's rejection of Bob Jones University's argument that its suit was not for the purpose of restraining the assessment or collection of a tax, because the Service's objective in removing the school's tax-exempt status was unrelated to revenue. See discussion accompanying notes 204-205 *infra.*

131. Similarly, in *"Americans United"* the Supreme Court held that the institution's claim that the invocation of §7421(a) deprived it of due process of law was insufficient to avoid application of the act. See discussion accompanying notes 235-247 *infra.*

132. But compare the Supreme Court's decision in *"Americans United,"* where the Court held §7421 barred the action despite strong evidence that a suit for injunctive relief provided the only access to meaningful judicial review. See discussion accompanying notes 227-237 *infra.*

INTERACTION OF SECTION 501(c)(3) AND THE SECTION 7421(a) PROHIBITION

Background

In addition to its function as a revenue-generating device, the Internal Revenue Code is a vehicle for implementing congressional policies. One such policy is a tax subsidy for organizations carrying out functions that otherwise would be funded through federal programs.[133] Thus, Congress has provided in section 501(a) that income of certain organizations shall be exempt from specified federal taxation if the organization is one that is described in sections 401(d), 501(c), or 501(d).[134]

Included in the list of organizations exempt under section 501(c)(3) are corporations, and any community chest, fund, or foundation;[135] thus, individuals, partnerships, and formless aggregations of persons cannot qualify. Assuming compliance with this structural requirement, an organization seeking tax-exempt status faces a series of hurdles that must be negotiated from two perspectives: its organization and its operations.[136] The "organizational" requirement examines the dominant purpose for which the organization was created, focusing on substance, not form.[137] The operational test essentially requires that the organization's actual activities comport with its stated purposes while not contravening any of the statutory prohibitions.[138] Although the statute specifies that the organization must be "organized and operated *exclusively*" for certain enumerated purposes, courts have con-

133. *See* Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 GEO. L.J. 561 (1971). Sections 501(c)(3) and 170 of the Code have been characterized as reflecting a "Congressional disposition favoring various types of charitable organizations deemed beneficial to society . . . [by making them] objects of federal support through tax policy." Note, *The Loss of Privileged Tax Status in Suits To Restrain Assessments*, 30 WASH. & LEE L. REV. 573, 575 (1973).

134. INT. REV. CODE OF 1954, §501(a) provides tax exemptions to the organizations described in 501(c)(3): "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

135. See note 134 *supra*.

136. TREAS. REG. §1.501(c)(3)-1(a)(1).

137. In Samuel Friedland Foundation v. United States, 144 F. Supp. 74, 84, 1956-2 U.S.T.C. ¶9896, at 56,385 (D.N.J. 1956), the court said that an organization must be "created to perform" or "established to promote" a proper purpose. Merely having powers that are limited to proper purposes is not sufficient. Thus, the charter and bylaws are not conclusive, but may be supplemented or rebutted by extrinsic evidence of purpose, Faulkner v. Commissioner, 112 F.2d 987, 1940-2 U.S.T.C. ¶9544 (1st Cir. 1940); Journal of Accountancy, Inc., 16 B.T.A. 1260 (1929). The Service has proclaimed that the organization's purpose must be proper, and its power substantially limited to such purpose, in order to satisfy the organizational test. *See* TREAS. REG. §§1.501(c)(3)-1(b)(1)(i)(a), (b).

138. *See* TREAS. REG. §§1.501(c)(3)-1(c). The text of the statute is set out in note 134 *supra*.

sistently and liberally[139] construed the term "exclusively" to mean "principally" or "primarily."[140]

Unfortunately, the other requirements of the provision have not received such uniform construction. For example, the requirement that "no substantial part of the activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation," has resulted in a confusing array of interpretations. "Legislation" is defined in the Regulations to include action by any legislative body or by the public in a referendum.[141] There is, however, a wide divergence of opinion over exactly what constitutes "attempting to influence" legislation. The Service has broadly interpreted the provision to include any activity tending to influence the outcome of legislation—even if only by influencing public opinion on an issue.[142] It has also ruled that any organization that actively advocates a primary objective obtainable only by legislation or the defeat of proposed legislation cannot qualify for section 501(c)(3) status.[143] The legislative history of the provisions,[144] although inconclusive, suggests that Congress intended to preclude only politically self-serving donations,[145] and that the broadly stated prohibition was a drafting

139. Helvering v. Bliss, 293 U.S. 144, 1935-1 U.S.T.C.¶9001 (1934). The rule of construction that provisions granting exemptions to charities are to be construed liberally is derived from the idea that such provisions are "begotten from motives of public policy." *Id.* at 151, 1935-1 U.S.T.C. at 9403. The Service expressly adopted this rule in G.C.M. 21,610, 1939-2 CUM. BULL. 103. While this ruling was declared obsolete by Rev. Rul. 67-46, 1967-1 CUM. BULL. 377, there was no indication of a modification of the Service's view on this matter. *See* 6 J. MERTENS, *supra* note 9, §34.03.

140. Courts, in a rare display of uniformity in this area, have held that this requirement is satisfied if the activities that comprise a *substantial* portion of the organization's total operations pertain to a proper purpose. *E.g.*, Dulles v. Johnson, 273 F.2d 362, 1960-1 U.S.T.C. ¶11,916 (2d Cir. 1959); Seasongood v. Commissioner, 227 F.2d 907, 1956-1 U.S.T.C. ¶9135 (6th Cir. 1955); William L. Powell Foundation v. Commissioner, 222 F.2d 68, 1955-1 U.S.T.C. ¶9398 (7th Cir. 1955).

141. *See* TREAS. REG. §§1.501(c)(3)-1(c)(3)(ii)(b).

142. TREAS. REG. §§1.501(c)(3)-1(c)(3)(ii)(a), (b). This approach assumes that political activity is inconsistent with charitable purposes. Therefore, if any nexus can be shown, the activity is improper and the organization is denied §501(c)(3) status. But such groups, termed "Action Organizations" by the Service, may be eligible for a tax exemption under §501(c)(4) of the Code.

143. TREAS. REG. §§1.501(c)(3)-1(c)(3)(iv). Consistent with its premise that legislative activity is inconsistent with charitable purposes, the Service does not distinguish between political activity in furtherance of what might be considered a proper purpose, and political activity motivated by other concerns. The Regulations do require, however, that the organization do more than merely engage in nonpartisan analysis, study, or research, with the results made available to the public, in order to be classified as an "action" organization outside the scope of §501(c)(3). Such activity would fit within the "Education" classification, and thus should not be condemned as an attempt to influence legislation.

144. For debate on the provision, see 78 CONG. REC. 5861, 5959, 7831 (1934). *See also* 110 CONG. REC. 5078-79 (1964).

145. With respect to the purpose of §501(c)(3), Senator Reed said: "There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a *selfish one made to advance the personal interests of the giver of the money.* This is what the committee was trying to reach . . . ." 78 CONG. REC. 5861 (1934) (emphasis added). Such an analysis would start from the premise that charitable purposes and political activities are not mutually ex-

error.[146]

Judicial opinion is split with respect to this question. The majority of courts follow Judge Learned Hand's statement that: "[P]olitical agitation as such is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."[147] Section 501(c)(3) is thus interpreted as a broad prohibition against political activity.[148] Other courts have found political activity consistent with proper purpose,[149] and therefore, not grounds for denial of section 501(c) (3) status. Still others have concluded that the phrase refers only to direct communication with legislators.[150] The only certain conclusion to be drawn from these divergent views is that an organization cannot be sure when it is engaging in activities that "influence legislation" and imperil its tax-exempt status.[151]

The further requirement of section 501(c)(3), that legislation-influencing

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clusive. If it could be shown that the political activity is in fact in furtherance of the organization's charitable purpose, the activity would not be a potential cause of preferred tax status revocation.

146. In reference to the provision of §501(c)(3) prohibiting political activity, Senator Reed stated: "[W]e found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes further than the committee intended to go." 78 CONG. REC. 5861 (1934).

147. Slee v. Commissioner, 42 F.2d 184, 185, 2 U.S.T.C. ¶552, at 2302 (2d Cir. 1930).

148 In Estate of Blaine, 22 T.C. 1195, 1213 (1954), the court denied charitable deductions for contributions made to an organization whose "ultimate aim . . . was the attainment of a political objective." Similarly, preferred tax status was denied because of attempts to mold public opinion in favor of a certain revision of the law in American Hardware & Equip. Co. v. Commissioner, 202 F.2d 126, 1953-1 U.S.T.C. ¶9221 (4th Cir.), *cert. denied*, 344 U.S. 865 (1952). *Accord*, Kuper v. Commissioner, 332 F.2d 562, 1964-2 U.S.T.C. ¶9541 (3d Cir.), *cert. denied*, 379 U.S. 920 (1964); Marshall v. Commissioner, 147 F.2d 75, 1945-1 U.S.T.C. ¶10,166 (2d Cir.), *cert. denied*, 325 U.S. 872 (1945).

149. These courts responded to Judge Hand's dictum in Slee v. Commissioner, 42 F.2d 184, 185, 2 U.S.T.C. ¶552, at 2302 (2d Cir. 1930), that political activity that was "mediate to the primary purpose" would not be improper. In Dulles v. Johnson, 273 F.2d 362, 1960-1 U.S.T.C. ¶11,916 (2d Cir. 1959), the court found the activities of a bar association, including reporting to the legislature on proposed and existing legislation, to be beneficial to the public. It therefore permitted donations made in support of these actions to be taken as §170 charitable deductions. *Accord*, International Reform Fed'n v. District Unemployment Compensation Bd., 131 F.2d 337 (D.C. Cir. 1942); Martha H. Davis, 22 T.C. 1091 (1954).

150. Seasongood v. Commissioner, 227 F.2d 907, 1956-1 U.S.T.C. ¶9135 (6th Cir. 1955). This interpretation attempted to restrict the prohibition against influencing legislation by focusing on the *form* of the activity rather than on its purpose. Prohibiting direct lobbying but permitting "grass roots" lobbying has been criticized as allowing an organization to do indirectly what it is forbidden to do directly. *See* Note, *The Revenue Code and a Charity's Politics*, 73 YALE L.J. 661, 673 n.56 (1964).

151. Another factor adding to the organization's uncertainty is the selective and sporadic nature of the Service's enforcement of §501(c)(3). For example, it has been suggested that the Sierra Club lost its §501(c)(3) status not for the opinion it expressed in a full page ad, but because of the openness with which it acted. *See* Note, *The Internal Revenue Code's Provisions Against Legislative Activity on the Part of Tax Exempt Organizations: A Legitimate Safeguard or a Violation of the First Amendment?*, 3 N.Y.U.L. & SOCIAL CHANGE 159, 164 (1973).

activities may not constitute a "substantial" part of the organization's operations, presents a similar but distinct problem. In *Seasongood v. Commissioner*[152] the Sixth Circuit concluded that attempts to influence legislation were not substantial when constituting only five per cent of the organization's total activities.[153] Unfortunately, the court's attempt to quantify the statutory term has not generally been followed.[154] Rather, weight has been given to more qualitative factors such as the sporadic nature of the legislative activity,[155] the amount of time spent on such activities in comparison to the total activities of the organization,[156] and the benefit that the group's over-all activities bestow on the community.[157]

An additional problem in determining substantiality is the question of how much, if any, of the organization's supporting activities should be considered. In *Kuper v. Commissioner*[158] the time devoted by the League of Women Voters in discussing issues, formulating alternatives, and agreeing on a position with respect to various legislative measures was taken into account in determining the substantiality of the time spent attempting to influence legislation. Another court impliedly rejected this position by refusing to disallow deductions for contributions to the same organization, because its "sporadic forays into the political arena were of little consequence [when] viewed against the background of the whole of their efforts in behalf of better government."[159] Perhaps the only conclusion that can be reached concerning judicial guidelines in this area is that the absence of accord in defining "substantial" makes the courts' inability to define "influencing legislation" less problematical.

Several commentators have suggested that the restraints imposed by section 501(c)(3) on political activity should be totally or partially removed.[160] Because section 162(e) allows a business expense deduction for direct lobbying activities, organizations such as public interest groups arguably should be permitted to use political means to create an adversary viewpoint representative of segments of society that lack political or economic power. Imposition of political sterility on these organizations also seems contrary to the first and

152. 227 F.2d 907, 1956-1 U.S.T.C. §9135 (6th Cir. 1955).

153. *Id.* at 912, 1956-1 U.S.T.C. at 54,210.

154. *See* Note, *supra* note 151, at 162.

155. Liberty Nat'l Bank & Trust Co. v. United States, 122 F. Supp. 759, 766, 1954-2 U.S.T.C. ¶9537, at 46,403 (W.D. Ky. 1954).

156. Kuper v. Commissioner, 332 F.2d 562, 1964-2 U.S.T.C. ¶9541 (3d Cir.), *cert. denied*, 379 U.S. 920 (1964); League of Women Voters v. United States, 180 F. Supp. 379, 1960-1 U.S.T.C. ¶11,924 (Ct. Cl. 1960).

157. *Compare* Dulles v. Johnson, 273 F.2d 362, 1960-1 U.S.T.C. ¶11,916 (2d Cir. 1959) (donations to a bar association, which reported to the legislature on existing and proposed legislation, held deductible), *with* Hammerstin v. Kelley, 235 F. Supp. 60, 1964-2 U.S.T.C. ¶12,269 (E.D. Mo. 1964), *aff'd*, 349 F.2d 928, 1965-2 U.S.T.C. ¶12,343 (8th Cir. 1965) (contributions to medical society held not deductible because its political and legislative activities were substantial).

158. 332 F.2d 562, 1964-2 U.S.T.C. ¶9541 (3d Cir.), *cert. denied*, 379 U.S. 920 (1964).

159. Liberty Nat'l Bank & Trust Co. v. United States, 122 F. Supp. 759, 766, 1954-2 U.S.T.C. ¶9537, at 46,403 (W.D. Ky. 1954).

160. *See, e.g.*, Garrett, *supra* note 133; Note, *supra* note 151.

fourteenth amendments.[161] Indeed it is difficult to find any basis that justifies this unequal treatment.[162]

Although section 501(c)(3) exempts organizations for "charitable . . . or educational purposes,"[163] the Supreme Court has recently concluded that the common law concept of charity—benefit to the entire society—subsumes all section 501(c)(3) classifications.[164] As a result, section 501(c)(3) status has been denied, for example, to educational institutions that discriminate on the basis of race.[165] The net effect of these varying judicial and administrative interpretations of ambiguous statutory language, exacerbated by arbitrary enforcement, is that an organization cannot be certain of its compliance with the requirements for tax-exempt status. Because an organization attempting to enjoin revocation or denial of section 501(c)(3) status must either demonstrate that it is outside the scope of the section 7421(a) prohibition, or that it can satisfy the stringent *Williams Packing* test, this interpretational uncertainty over the parameters of permissible action places a virtually insuperable burden on the organization.

Lower Court Decisions Granting Injunctive Relief

Informative in determining the scope of section 7421(a) are several recent cases in which taxpayers successfully enjoined the Service from affording tax-exempt status to certain private organizations. Attempts to circumvent federal court integration orders resulted in the formation of numerous white-only private schools, many of which were accorded section 501(c)(3)

161. See Note, *supra* note 151, at 166-76.

162. One counter-argument is that because corporations pay taxes and 501(c)(3) organizations do not, a taxpayer may be forced to support a distasteful viewpoint if exempt groups are allowed to lobby. This ignores, however, the direct tax subsidies such as oil depletion allowances that support the corporate establishment. Additionally, the corporate goal of profit maximization has not suffered because of an overabundance of concern for social issues. The economic power of the country is increasingly concentrated in corporations. *See* Berle, *Property, Production, and Revolution*, 65 COLUM. L. REV. 1 (1965). Corporate subsidies tend to cluster at one end of the socio-economic spectrum. Tax exempt organizations represent virtually the only viable adversary viewpoint with a capability to illuminate the other end. Without indirect tax subsidies through allowances of lobbying, the omnipotence of corporate wealth may tend to impose increasingly unilateral approaches on congressional action.

163. The entire text of §501(c)(3) is set out in note 134 *supra*.

164. In Alexander v. "Americans United," Inc., 94 S. Ct. 2053, 2065 n.10, 1974-1 U.S.T.C. ¶9439, at 84,082 n.10 (1974), it was noted that "the §501(c)(3) revocation is arrived at by the Commissioner not solely by construing the language of §501(c)(3), but by his assertion that that section and §170(a)(1) and (c)(2)(D) are *in pari materia*. Thus, the idiosyncracies of the word 'charitable' in §170(a)(1) are engrafted upon, and entwined with, the 'organized and operated exclusively for religious charitable . . . or educational purposes' standard of §501(c)(3)." *Accord*, Green v. Connally, 330 F. Supp. 1150, 1157-61, 1971-2 U.S.T.C. ¶9529, at 87, 146-49 (D.D.C.), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997, 1972-1 U.S.T.C. ¶9123A (1971) (conclusion that "educational purposes" require actions in best interests of society as a whole, as opposed to a limited group, derived from law of charitable trusts).

165. Green v. Conally, 330 F. Supp. 1150, 1971-2 U.S.T.C. ¶9529 (D.D.C.). *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997, 1972-1 U.S.T.C. ¶9123A (1971).

status. In *Green v. Kennedy*[166] black plaintiffs sued for declaratory and injunctive relief, arguing that the exemptions amounted to government aid of racial discrimination in violation of the due process clause of the fifth amendment. Although the Service had changed its position in the interim and construed the Code to exclude such schools from tax-exempt status,[167] the court issued a permanent injunction to ensure the plaintiffs adequate relief.[168] The decision was defended on two grounds. First, discrimination was found to be inconsistent with the common law notion of "charitable."[169] Second, and more compelling,[170] was the fact that affording preferred tax status to institutions following racially discriminatory admissions practices amounted to a frustration of federal policy against racial segregation in education, an impermissible result because "[t]he Code must be construed and applied in consonance with the Federal public policy."[171] While the section 7421(a) bar was not directly asserted in this case,[172] the fact that a taxpayer was permitted to interfere with an IRS determination of section 501(c)(3) status showed that the Service's power in this area is not plenary, a recognition long overdue.

Less than a year later, the question of the Anti-Injunction Act's applicability in this context was brought before the same court.[173] Grasping the

166. 309 F. Supp. 1127, 1970-1 U.S.T.C. ¶9176 (D.D.C. 1970). In the original class action, Green v. Kennedy, 309 F. Supp. 1127, 1970-1 U.S.T.C. ¶9176 (D.D.C. 1970), plaintiffs sought a preliminary injunction prohibiting the Service from granting any future exemptions, pending a determination of whether the schools actually were "part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated public schools." *Id.* at 1140, 1970-1 U.S.T.C. at 82,732. A preliminary injunction was issued because the court found that the tax benefits constituted "substantial and significant support by the Government," thus raising a question of constitutional violation if the schools in fact were part of a segregated private school pattern. *Id.* at 1134, 1970-1 U.S.T.C. at 82,728. Additionally, the injunction was issued because of the "probability of irreparable harm to plaintiffs' class and the public interest." *Id.* at 1139, 1970-1 U.S.T.C. at 82,731.

167. News Release, 7 CCH 1970 STAND. FED. TAX REP. ¶¶6790, 6814.

168. It was in the sequel action, Green v. Conally, 330 F. Supp. 1150, 1971-2 U.S.T.C. ¶9529 (D.D.C., *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997, 1972-1 U.S.T.C. ¶9123A (1971), that a permanent injunction, covering all the racially discriminating private schools in Mississippi, was issued. The court said: "We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion." *Id.* at 1170-71, 1971-2 U.S.T.C. at 87,156.

169. This conclusion was reached after an extensive discussion of the law of charitable trusts. 330 F. Supp. at 1157-61, 1971-2 U.S.T.C. at 87,146-49.

170. The court admitted that while there was merit in interpreting Code provisions by reference to the common law background, "the ultimate criterion for determination . . . [is] Federal policy." *Id.* at 1161, 1971-2 U.S.T.C. at 87,149.

171. *Id.* at 1163, 1971-72 U.S.T.C. at 87,151. The court pointed out that federal public policy included the Civil Rights Act of 1964, 42 U.S.C. §§2000c to 2000d-4 (1964). *Id.* at 1164, 1971-72 U.S.T.C. at 87, 151.

172. Notwithstanding this fact, one commentator has suggested that because this case recognized the underlying issue to be one of social policy, it could be used to support the argument that §7421(a) should not bar injunctive relief in a case involving social policy, because there is no question of revenue generation. *See* Comment, *supra* note 30, at 599.

173. McGlotten v. Conally, 338 F. Supp. 448, 1972-1 U.S.T.C. ¶9185 (D.D.C. 1972). The

functional utility of section 7421(a) with a refreshing clarity of thought, the court held that this indeed was a case where the "central purpose of the [Anti-Injunction] Act is inapplicable,"[174] because the plaintiff did not "seek to *limit* the amount of revenue collectible by the United States."[175] The importance of this case lies in its limitation of section 7421(a) to situations in which a revenue effect is discernable.[176] To hold otherwise would afford the Service essentially unlimited power in this area because it would be able to invoke the protective shield of section 7421(a) virtually at will. Thus, a taxpayer beyond the scope of the Anti-Injunction Act, as in this case, should never be subjected to the rigorous examination required under the *Williams Packing* doctrine.

Since *Williams Packing*, there have been few cases in which a taxpayer within the scope of section 7421(a) has been able to overcome its formidable prohibition and obtain an injunction against the Service.[177] A notable exception is the case of *Center on Corporate Responsibility, Inc. v. Schultz*.[178] Plaintiff filed suit when faced with protracted delay over its request for section 501(c)(3) status, despite compliance with all of the Service's suggestions and the apparent favorable stance of the IRS.[179] Shortly thereafter, the Service ruled that the plaintiff was not entitled to section 501(c)(3) status. The court held to the contrary, however, nullifying the exemption denial on

contested exemptions in this case arose from INT. REV. CODE OF 1954, §501(c)(8), which covers fraternal organizations.

174. *Id.* at 454, 1972-1 U.S.T.C. at 83,752, *quoting* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, 1962-2 U.S.T.C. ¶9545, at 85,289 (1962).

175. 338 F. Supp. at 453, 1972-1 U.S.T.C. at 83,751 (emphasis added). In this context the net revenue effect, if any, would be favorable to the Government if plaintiff prevailed. Thus, application of §7421(a) would produce an effect diametrically opposed to the central purpose of the Act. Loss of tax exempt status would produce tax revenue on the organization's income.

The court went on to hold that the provision, which grants a tax deduction for charitable contributions, is a grant of federal financial assistance within the scope of the 1964 Civil Rights Act, as is the exemption provided fraternal orders by §501(c)(8). In contrast, the motion to dismiss was granted as to the nonprofit clubs exempted under §501(c)(7) because that exemption was limited to member-generated funds. In reaching the issue of the constitutionality of federal tax benefits to these groups, the court noted: "The minds and hearts of men may be beyond the purview of this or any other court; perhaps those who cling to infantile and ultimately self-destructive notions of their racial superiority cannot be forced to maturity. But the Fifth and Fourteenth Amendments do require that such individuals not be given solace in their delusions by the government." *Id* at 454, 1972-1 U.S.T.C. at 83,752.

176. *But see* discussion accompanying notes 201-225 *infra*.

177. Of course, the *Green* and *McGlotten* cases are exceptional, because they were aimed at forcing the Service to *withdraw* or *refrain from granting* such status.

178. 368 F. Supp. 863, 1974-1 U.S.T.C. ¶9118 (D.D.C. 1973), *appeal dismissed*, 9 CCH 1974 STAND. FED. TAX REP. 70,707. The Government had moved to dismiss its appeal. T.I.R. No. 1277, 9 CCH 1974 STAND. FED. TAX. REP. ¶6463.

179. The stated purpose of the taxpayer was to "engage in and conduct educational and charitable activities on a non-profit basis to improve and better the conditions of American life and institutions by promoting the development of increased responsibility and awareness on the part of corporate entities and decision-makers to use the corporate institution and power to better the social welfare . . . ." *Id.* at 866, 1974-1 U.S.T.C. at 83,047.

procedural grounds.[180] To buttress its conclusion, the court observed that even without this nullification plaintiff was entitled to section 501(c)(3) status because it satisfied the operational test for such groups.[181]

Although the Center had instituted the action as a refund suit for FICA taxes, its primary purpose was clearly injunctive relief. Although this question immersed it in the section 7421(a) quagmire, the district court met the challenge directly by finding that it had the power to grant the requested remedy. Because the FICA refund necessitated resolving the tax-exempt status issue, the court found that the injunctive request would not burden the Government with additional litigation, an ancillary purpose of section 7421(a).[182] Moreover, because the plaintiff was legally entitled to section 501(c)(3) status, "a suit to prevent collection of those revenues [to which there is no legal entitlement] cannot be a suit interfering with the collection of legal revenues, as forbidden by the Statute."[183] Thus, the central purpose[184] of the Act was not contravened. Instead of holding that these facts placed the plaintiff outside section 7421(a), however, the court used them to show that the Center had satisfied the first *Williams Packing* requirement— assured success on the merits.[185] The second prong was established because, *inter alia,*

180. Because the Service failed to comply with a discovery order, which was intended to determine the extent of political influence on the ruling, the court invoked the sanction of FED. R. CIV. P. 37(b)(2)(A), and held plaintiff's allegation of political influence on the Service's decision established as fact.

181. See text accompanying notes 137-140 *supra.*

182. 368 F. Supp. at 879, 1974-1 U.S.T.C. at 83,058. In Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7-8, 1962-2 U.S.T.C. ¶9545, at 85,289 (1962), the Supreme Court noted that "a collateral objective of the [Anti-Injunction] Act [is] protection of the collector from litigation pending a suit for refund."

183. 368 F. Supp. at 879, 1974-1 U.S.T.C. at 83,058.

184. In Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, 1962-2 U.S.T.C. ¶9545, at 85,289 (1962), the Supreme Court said that the "manifest purpose of §7421(a)" is to assure the Government of "prompt collection of its *lawful* revenue." Where the Government cannot possibly achieve this goal "the central purpose of the Act is inapplicable." (Emphasis added.)

185. In light of its statements, the court's application of the *Williams Packing* doctrine warrants further analysis. As previously indicated (see text accompanying notes 181-184 *supra*), the court found that the plaintiff was not attempting to do anything forbidden by the Act. Nevertheless, it proceeded to analyze the situation until it was satisfied that "the Plaintiff has fully demonstrated that it fits the *exception* to 26 U.S.C. §7421(a) as specified in *Williams Packing.*" 368 F. Supp. at 880, 1974-1 U.S.T.C. ¶9118, at 83,059 (emphasis added). The question then becomes: Why did the court require the plaintiff to show that it satisfied the *Williams Packing* exception to §7421(a) when it had previously found that the plaintiff was not attempting to do anything that §7421(a) condemned? The logical answer is that the court, at least implicitly, viewed the *Williams Packing* situation as the *only* context in which §7421(a) would not bar the action. In other words, the court read the *Williams Packing* statement that "[i]f it is clear that under no circumstances could the government ultimately prevail, the central purpose of the Act is inapplicable," 370 U.S. at 7, 1962-2 U.S.T.C. ¶9545, at 85,289, to mean that certain government defeat on the merits was the *only* case when the Act would not be applied. This rationale rejects the purpose-oriented approach taken in the Gambling Tax cases (*see* text accompanying notes 131-132 *supra*), which would interpret this language in *Williams Packing* to mean that whenever the central purpose of §7421(a) is not served the Act should not be applied, with *Williams Packing's* factual circumstance being merely one example of such a situation.

the organization was exposed to probable extinction if forced into repeated litigation. Further equitable grounds were found in the "dirty hands"[186] of the Service. The court thus held that the plaintiff satisfied the *Williams Packing* requirements, and it enjoined the Service from denying section 501(c)(3) status.

In comparing this case to the most recent Supreme Court decisions in the area,[187] it is of critical importance to note that the Center was able to litigate the section 501(c)(3) issue by instituting the action as an FICA refund suit. Once the plaintiff's right to tax-exempt status had been settled in the FICA controversy, the organization was able to use this determination to prove that it satisfied the strict, first prong of *Williams Packing*. Thus, by raising the question of injunctive relief as a collateral issue in a refund suit, the Center was able to overcome the section 7421(a) bar. Unfortunately, not all groups are able to survive the financial strain involved in waiting to litigate their tax-exempt status in a suit for refund. For less financially solid organizations, section 7421(a) provides a serious threat to survival.[188]

Recent Supreme Court Decisions

On July 10 and July 19, 1970, the Service announced that private schools following racially discriminatory admissions policies would no longer be eligible for tax-exempt status, and that gifts to such institutions could no longer be deducted as charitable contributions.[189] Upon receipt of an inquiry letter regarding its admissions practices, Bob Jones University, a fundamentalist institution, replied that its religious beliefs[190] forbade an open admissions policy. When negotiations reached an impasse, the University

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This rejection of a purpose-oriented approach to the application of §7421(a) appears to comport with the position taken by the Supreme Court in the *Bob Jones* case. See text accompanying notes 204-205 *infra*.

186. 368 F. Supp. 880, 1974-1 U.S.T.C. at 83,058-59. The court pointed principally to the defendants' refusal to grant the exemption despite the fact that the plaintiff had made all the changes the Service had specified as necessary to its receipt of §501(c)(3) status.

187. Bob Jones Univ. v. Simon, 94 S. Ct. 2038, 1974-1 U.S.T.C. ¶9438 (1973); Alexander v ."Americans United" Inc., 94 S. Ct. 2053, 1974-1 U.S.T.C. ¶9439 (1974).

188. It has been estimated that under optimum conditions there would be a one- to two-year time lag between a revocation ruling by the Service and adjudication of an organization's claim of §501(c)(3) status at the district court level. Thrower, *I.R.S. Is Considering Far Reaching Changes in Ruling on Exempt Organizations*, 34 J. TAX. 168 (1971). An appeal would add several additional years to the timespan. *E.g.*, Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 1973-1 U.S.T.C. ¶9129 (10th Cir. 1973), *cert. denied*, 414 U.S. 864 (1973) (final judicial review of a 1966 revocation, litigated in an F.I.C.A. refund suit, was not concluded until 1973).

189. Rev. Rul. 71-447, 1971-2 CUM. BULL. 230. See text accompanying notes 183-184 *supra*.

190. The school subscribes to the doctrine that God intended the various races of men to live separately, and that intermarriage is contrary to God's will and the Scriptures. *See* Bob Jones Univ. v. Connally, 472 F.2d 903, 904-05, 1973-1 U.S.T.C. ¶9185, at 80,287 (4th Cir. 1973).

filed suit requesting that the Service be enjoined from revoking its tax-exempt status.[191]

"Americans United" (AU), an organization dedicated to the separation of Church and State, had enjoyed section 501(c)(3) status for nearly twenty years. On April 25, 1969, the Service revoked the ruling on the ground that a "substantial" part of the organization's activities constituted attempts to influence legislation.[192] Although AU's *income* tax status was not affected because it was granted a section 501(c)(4) exemption,[193] the ruling caused the organization to be liable for Federal Unemployment (FUTA) taxes.[194] More significantly, AU was removed from the list of organizations to whom tax-deductible contributions could be made.[195] Asserting that the 1969 ruling caused a "substantial decrease in its contributions," AU filed suit for declaratory and injunctive relief from the Service's revocation of its section 501(c)(3) status.[196]

In both cases the Government moved to dismiss the action on the ground that the suit was for the purpose of restraining the assessment or collection of a tax, and thus barred by section 7421(a).[197] Although both the Fourth Circuit in *Bob Jones University v. Connally* and the District of Columbia Circuit in *"Americans United" v. Walters* adopted a purpose-oriented approach, they evolved widely differing tests[198] and reached opposite conclusions as to the applicability of section 7421(a).

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191. *Id.*

192. "Americans United" Inc. v. Walters, 477 F.2d 1169, 1172, 1973-1 U.S.T.C. ¶9165, at 80,216 (D.C. Cir. 1973).

193. INT. REV. CODE OF 1954, §501(c)(4) lists "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare. . . . the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes" for exemption under §501(a) from income tax liability only.

194. *See* INT. REV. CODE OF 1954, §§3301, 3306(c)(8). As §501(c)(3) organizations are exempt from social security (FICA) taxes, while §501(c)(4) organizations are not, the shift in AU's status would, in the ordinary case, result in this additional tax burden. But, because AU had been voluntarily paying FICA taxes for more than eight years, it was now incapable of terminating the election even if it had retained its §501(c)(3) status. *See* INT. REV. CODE OF 1954, §§3121(b)(8)(B), 3121(k)(1); Alexander v. "Americans United" Inc., 94 S. Ct. 2053, 1974-1 U.S.T.C. ¶9439 (1974).

195. In order to qualify as a charitable contribution, deductible under INT. REV. CODE OF 1954, §170(a)(1), INT. REV. CODE OF 1954, §170(c)(2)(D) requires that a gift be made to an organization "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . ." Organizations that meet this and the other requirements of §170(c) are listed in the Service's Publication No. 78, "Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954." Because the actions that caused AU's §501(c)(3) status to be revoked also contravened §170(c)(2)(d), the organization was excluded from the "Cumulative List" as well.

196. "Americans United" Inc. v. Walters, 477 F.2d 1169, 1973-1 U.S.T.C. ¶9165 (D.C. Cir. 1973).

197. Bob Jones Univ. v. Conally, 472 F.2d 903, 904, 1973-1 U.S.T.C. ¶9185, at 80,287 (4th Cir. 1973); "Americans United" Inc. v. Walters, 477 F.2d 1169, 1177, 1973-1 U.S.T.C. ¶9165, at 80,217 (D.C. Cir. 1973).

198. The D.C. Circuit limited its inquiry to the effect that the requested relief would have on the taxes of the organization itself. Although an injunction would cause

The Supreme Court granted certiorari[199] to resolve this conflict between circuits. In each case the Court denied injunctive relief, holding section 7421(a) applicable. Although separate opinions were handed down, the cases

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contributions to be deductible, and thus decrease the tax liability of AU's donors, this result was held to be "at best a collateral effect of the action, [beyond] the primary design," and insufficient to trigger §7421(a). 477 F.2d at 1179, 1973-1 U.S.T.C. at 80,221. Moreover AU was exempt from income taxes by virtue of its §501(c)(4) status, its attack was placed "in a posture removed from a restraint on assessment or collection." *Id.* Therefore, the court refused to hold the action barred by §7421(a).

In its original opinion the Fourth Circuit's approach was considerably less constrained. That court found that the withdrawal of Jones University's tax exempt status would subject the organization to tax liability and prohibit donors from taking deductions. Noting that "[e]ither event would result in an increase in taxes," the court held §7421(a) applicable. 472 F.2d at 906, 1973-1 U.S.T.C. at 80,288. While these statements clearly imply that donor-deductibility would be a sufficient reason for invoking §7421(a), the court seemingly retreated from this position in its opinion denying rehearing. Bob Jones Univ. v. Connally, 476 F.2d 259, 1973-1 U.S.T.C. ¶9306 (4th Cir. 1973). There, the court attempted to reconcile its original opinion with *"Americans United"* by noting that, although AU would have been exempt from income taxes regardless of the outcome of the litigation, injunctive relief would have affected Jones University's income tax liability. *Id.* at 260, 1973-1 U.S.T.C. at 80,650. (This distinction, based on the fact that AU had §501(c)(4) status while Jones University did not, was expressly rejected by the Supreme Court. See text accompanying notes 219-220 *infra.*)

The test as originally articulated, however, was accepted and applied by other courts, in one case notwithstanding knowledge of the Fourth Circuit's seeming retreat. *See, e.g.,* Crenshaw County Private School Foundation v. Conally, 474 F.2d 1185, 1973-1 U.S.T.C. ¶9287 (5th Cir. 1973), *cert. denied,* 94 S.Ct. 2604 (1974); Peach Bowl, Inc. v. Shultz, 1973-2 U.S.T.C. ¶9705 (N.D. Ga. 1973). In *Crenshaw,* a nonprofit, religious private school, threatened with termination of its tax-exempt status because it would not publicly advertise a racially nondiscriminatory admissions policy, filed suit requesting that the Service be enjoined from withdrawing its §501(c)(3) exemption. The institution argued that its suit was not for the purpose of restraining the assessment or collection of a tax, because the administrative acts that it sought to enjoin did not constitute an "assessment or collection" of a tax, and because the purpose of the contested acts was to compel compliance with the Government's policy of racially integrated education, not to raise revenue. Stating that it "agree[d] with the Fourth Circuit in *Bob Jones University,"* the court rejected both arguments. The reasons for the Government's action were found to be "irrelevant." With respect to the question of whether the Service's actions constituted an "assessment or collection" of a tax, the court, citing *Bob Jones University,* said: "If those rulings are withdrawn, appellant will be liable for taxes on any net income realized by it and contributors to it will not be permitted to deduct from their gross income the amount of their contributions. Either event will result in an increase in taxes. On the contrary, if the injunction issues, any assessment or collection of such increased taxes will be prohibited. Section 7421(a) is directed against that result." 474 F.2d 1185, 118, 1973-1 U.S.T.C. ¶9287, at 80,581-82. The *Peach Bowl, Inc.* court noted that *Bob Jones University* had "impliedly agree[d] that assessment and collection of taxes upon contributors to would-be §501(c)(3) organizations was not sufficient to raise the bar of §7421(a)." 1973-2 U.S.T.C. at 82,284 n.1. But in denying injunctive relief, it declined to follow this logic, opting for the test as originally articulated in *Bob Jones University,* because it agreed with the *Crenshaw* court. *Id.*

199. Bob Jones Univ. v. Simon, 414 U.S. 817 (1973); Alexander v. "Americans United" Inc., 412 U.S. 927 (1973).

will be analyzed together because the Court's rationale in applying section 7421(a) to AU relies and builds upon the *Bob Jones* decision.[200]

Purpose. The question of "purpose" in this context connotes the coalescence of two similar, but distinct issues: the purpose of section 7421(a) and the purpose of the litigation under consideration.

A careful reading of *Williams Packing* suggests that it *can* be read to endorse a purpose-oriented approach to the application of section 7421(a).[201] Noting that "[t]he manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention,"[202] the Supreme Court stated that a clear showing of the government's inability to succeed in its claim would make *"the central purpose of the Act . . .* inapplicable," thus permitting "the attempted collection [to] be enjoined if equity jurisdiction otherwise exists."[203] In other words, section 7421(a) should not be applied where a denial of injunctive relief would not serve the central purpose of the statute.[204]

Jones University's attempt to avoid the application of section 7421(a) reflected this approach. It contended that the Service's actions represented an attempt to regulate the admissions policies of private universities, rather than to protect revenue, and thus the case was not one to which the Anti-Injunction Act was meant to apply. The Court rejected this argument, stating that as the Service was attempting "to enforce the technical requirements of the tax laws . . . we cannot say that its position . . . is unrelated to the protection of the revenues. The Act is therefore applicable."[205]

The implications of this conclusion merit further consideration. It must be remembered that section 7421(a) literally prohibits a suit for the *purpose* of restraining the assessment or collection of any *tax*. It does not prohibit a suit that seeks to restrain enforcement of a *Code provision,* nor one that *ultimately results* in restraining a *tax*. Inferring a revenue-protecting *purpose* from an attempt to enforce a Code section requires an unarticulated major premise that the provision is a revenue-raising measure. But such is not the case with section 501(c)(3).[206] Its purpose, rather, is to "assure the existence

200. Bob Jones Univ. v. Simon, 94 S. Ct. 2038, 1974-1 U.S.T.C. ¶9438 (1974); Alexander v. "Americans United" Inc., 94 S. Ct. 2053, 1974-1 U.S.T.C. ¶9439 (1974).

201. *See* Comment, *Applicability of Prohibition of Suits To Restrain Assessment and Collection of Taxes To Revocation of Tax Exemptions Under Section 501(c)(3) of the Internal Revenue Code,* 73 COLUM. L. REV. 1502, 1510-15 (1973), where the commentator articulates the dichotomy resulting from a focus on *purpose* or *effect* and advocates use of the test applied by the D.C. Circuit in *"Americans United."*

202. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, 1962-2 U.S.T.C. ¶9545, at 85,289 (1962).

203. *Id.* (emphasis added).

204. *Cf.* cases discussed in note 14 *supra;* Comment, *supra* note 201. The Third Circuit has noted that "section [7421(a)] presupposes a bona fide attempt of the government to collect revenue." Iannelli v. Long, 487 F.2d 317, 318, 1973-2 U.S.T.C. ¶16,098, at 82,728 (3d Cir. 1973).

205. 94 S. Ct. at 2047, 1974-1 U.S.T.C. at 84,069.

206. It is true, of course, that revocation of §501(c)(3) exemption could, in the proper case, result in a change in net revenue. Therefore, the provision could be *used* to generate

of truly philanthropic organizations and the continuation of the important public benefits they bestow."[207] Nor can a purpose of tax assessment be inferred from the factual background giving rise to the Service's action. The proceedings against Jones University were begun "in accordance with an announced policy of withdrawing tax-exemption and deductibility-assurance rulings of schools having racially discriminatory policies."[208] Indeed, the organization had only to conform its admissions policy to the social goals expressed in the 1964 Civil Rights Act in order to have its exemption returned.[209] By finding a mere tax nexus sufficient to trigger section 7421(a), the Court effectively read the word "purpose" out of the Act insofar as the Government is concerned, and repudiated the purpose-oriented approach to the Act's application suggested in *Williams Packing*.[210] An uncollectible assessment has thus been made the *only* situation where the Act will be held inapplicable, rather than merely one example of a case where failure to comport with the central purpose of section 7421(a) placed the action outside the Act.

Both Jones University and AU attempted to persuade the Court that, regardless of the government's objectives, their own purpose was not to restrain any tax. Because Jones University would be liable for FICA, FUTA, and probably income taxes[211] if its suit were successful, the Court had no problem holding that "in any of its implications this case falls within the literal scope and the purposes of the Act."[212] AU, on the other hand, presented a more difficult situation. Because the organization also had a section 501(c)(4) classification, the outcome of the suit would have no effect on its income tax liability. Moreover, AU was already locked into paying FICA taxes,[213] and it

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revenue. At this point, however, we are concerned only with the purpose of the provision itself, and in the words of Commissioner Alexander "the exempt organization provisions of the law must be interpreted in light of their special purpose and their place in the tax law. Their purpose is *not* to raise revenue." BNA Daily Tax Report, Aug. 30, 1973, at J-1 (emphasis added).

207. 94 S. Ct. at 2064, 1974-1 U.S.T.C. at 84,081 (Blackmun, J., dissenting).

208. Bob Jones Univ. v. Conally, 472 F.2d 903, 904, 1973-1 U.S.T.C. ¶9185, at 80,287 (4th Cir. 1973).

209. Bob Jones Univ. v. Connally, 341 F. Supp. 277, 284, 1971-1 U.S.T.C. ¶9245, at 83,882 (D.S.C. 1971).

210. See text accompanying notes 201-204 *supra*. *Compare* the approach taken in the Wagering Tax cases (see text accompanying notes 129-132 *supra*), *with* the suggested implication of the *Center on Corporate Responsibility* rationale. See note 185 *supra*.

211. In support of its claim of irreparable harm, Bob Jones University alleged that it would be subject to "substantial" income tax liability if the Service were permitted to revoke its §501(c)(3) exemption, an allegation that the Court found somewhat difficult to reconcile with the institution's claim that it was not attempting to restrain the assessment or collection of a tax. 94 S. Ct. at 2046, 1974-1 U.S.T.C. at 84,068. But the Court noted that "petitioner's assertions that it will owe federal income taxes should its §501(c)(3) status be revoked are open to debate, because they are based in part on a failure to take into account possible deductions for depreciation of plant and equipment." 94 S. Ct. at 2047, 1974-1 U.S.T.C. at 84,069.

212. *Id.*

213. See note 194 *supra*.

expressed willingness to pay any FUTA taxes.[214] Therefore, the issuance of an injunction could have tax consequences only with respect to the organization's contributors. AU vigorously maintained that such result was not *its purpose*. Instead, its primary design was to "avoid the disposition of contributed funds away from" itself; the removal of tax burdens from contributors was at best a collateral effect.[215] The Court responded by stating that because the organization's objective could be accomplished only by permitting donors to deduct their contributions, the purpose of the suit was "to restrain the assessment and collection of taxes . . . ."[216]

Once again the Court's definition of the word "purpose" goes far beyond the normal characterization. While some element of effect is implicit, the term is normally limited to the object that one *desires* to achieve.[217] Here the Court has included within its meaning all the tax consequences that could conceivably result. Thus, the Court has done implicitly what it expressly stated it would not do; it has made the prohibition of section 7421 coextensive with the Declaratory Judgment Act's ban on suits "with respect to Federal Taxes."[218]

Taxes. Having decided that "purpose" includes the consequences of the action, the Court was next faced with the question of whose tax consequences were included within the Anti-injunction Act's prohibition against restraint of "any tax." While granting injunctive relief would have no effect on AU's tax outlay, it would increase Jones University's assessment.[219] The Court,

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214. "Americans United" had begun paying FUTA taxes in 1970. stating that it preferred to continue doing so rather than challenging their imposition via a refund suit. 94 S. Ct. at 2056 n.4, 2059 n.13, 1974-1 U.S.T.C. at 84,075 n.4, 84,077 n.13.

215. 94 S. Ct. at 2058-59, 1974-1 U.S.T.C. at 84,077.

216. 94 S. Ct. at 2058, 1974-1 U.S.T.C. at 84,077.

217. "Purpose" is defined as "[t]he object toward which one strives . . . [a] result or effect that is intended or desired." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1062 (W. Norris ed. 1971). Moreover, its distinguishing characteristic is that it connotes "what one *proposes* to accomplish . . . in distinction from . . . the *actual* or envisioned outcome." WEBSTER'S NEW DICTIONARY OF SYNONYMS 458 (P. Gove ed. 1973) (emphasis added).

218. 28 U.S.C. §2201 (1970). *See* Bob Jones Univ. v. Simon, 94 S. Ct. 2038, 2044 n.7, 1974-1 U.S.T.C. ¶9438, at 85,066 n.7 (1974); Alexander v. "Americans United" Inc., 94 S. Ct. 2053, 2057-58 n.10, 1974-1 U.S.T.C. ¶9439, at 84,076 n.10 (1974). The Supreme Court's decision, that the scope of the Acts is coextensive, is not unusual. Several courts have agreed with the D.C. Circuit's statement that although the Declaratory Judgment Act is "[l]iterally broader than §7421(a) in its preclusion of tax oriented remedies, the §2201 [Declaratory Judgment] exception has literally been found coterminus [*sic*] with that provided by §7421(a)." "Americans United" Inc. v. Walters, 477 F.2d 1169, 1176, 1973-1 U.S.T.C. ¶9165, at 80,219 (D.C. Cir. 1973); *accord, e.g.*, Tomlinson v. Smith, 128 F.2d 808, 1942-2 U.S.T.C. ¶9540 (7th Cir. 1942); McGlotten v. Connally, 338 F. Supp. 448, 1972-1 U.S.T.C. ¶12,827 (D.D.C. 1972). But the Supreme Court's *focus* is unique. The lower courts have found the Declaratory Judgment Act to be coterminous with the more restrictive language of §7421(a). In contrast, the Supreme Court's interpretation of §7421 has the effect of making that Act's restrictions conform to the broader language of the Declaratory Judgment Act.

219. See text accompanying notes 211-215 *supra*.

however, found this distinction "irrelevant";[220] it would not avail AU because "a suit to enjoin the assessment or collection of *anyone's* taxes triggers the literal terms of section 7421(a)."[221] Consequently, it became necessary to consider the effect of the litigation on contributors to the organization. It was contended that granting the requested injunctive relief would not affect even the donors' tax liability; a fortiori contributors would continue to achieve tax deductibility, even if the injunction were denied, by merely redirecting their gifts to other exempt organizations. The Court rejected this argument, finding it "too speculative to be persuasive."[222] Therefore, because the contributors' tax liability *could* be affected by the outcome of the litigation, section 7421(a) applied.[223]

In his dissent, Justice Blackmun severely reproached the majority for giving such a sweeping definition to the Act's prohibition. He predicted that section 7421(a) would become "an absolute bar to any and all injunctions, irrespective of tax liability, of purpose, or effect of the suit, or of the character of the Service's action."[224] Moreover, he warned that the combination of section 7421(a)'s sweeping prohibition of judicial review and section 501(c)(3)'s lack of clear statutory requirements raised grave concerns about possible administrative abuse.[225]

As suggested by Justice Blackmun's statements, the Court's acceptance of a scintilla of revenue effect as sufficient to trigger the Anti-Injunction Act's prohibition, without consideration of the magnitude of such effect or its nexus to a litigant's primary purpose, appears dubious. When the first revenue effect occurs at the donor level, as in *"Americans United,"* the nexus to primary purpose is slight indeed. Why should a litigant be denied injunctive relief because of an arguable revenue effect of very low magnitude that is far removed from his purpose? He did not, after all, bring a class action. It would seem that a minimum threshold level, beyond which such effect is de minimis in relation to the "central purpose" of the statute, should be defined by the judiciary in order to ensure that a litigant who is properly

220. Alexander v. "Americans United" Inc., 94 S. Ct. 2053, 2059 n.13, 1974-1 U.S.T.C. ¶9439, at 84,077-78 n.13 (1974).

221. 94 S. Ct. at 2058, 1974-1 U.S.T.C. at 84,077 (emphasis added).

222. This point was addressed in the *Bob Jones* opinion. 94 S. Ct. at 2047 n.10, 1974-1 U.S.T.C. at 84,069 n.10. The court took issue with the premises of the argument that all donors who take §170(c)(2) deductions will both desert those organizations and contribute equivalent amounts to other tax-exempt organizations. *See also* Note 238 *infra.*

223. 94 S. Ct. at 2047 n.10, 1974-1 U.S.T.C. at 84,069 n.10. In his dissent, Justice Blackmun questioned the wisdom of such a broad interpretation. Addressing "Americans United's" assertion that its contributions had "dried up" due to the loss of its favorable ruling letter, resulting in "contributors [finding] other [tax deductible] objects for their bounty," he concluded: "When nothing more than *possible* collateral effect on the revenues is involved, the Court's wide-ranging test of applicability of §7421(a), announced today, is, for me, too *attenuated* and too removed to be encompassed within the intendment of the statute's phrase, 'for the purpose of restraining the assessment or collection of any tax.' " 94 S. Ct. at 2062, 1974-1 U.S.T.C. at 84,080 (Blackmun, J., dissenting) (emphasis added).

224. 94 S. Ct. at 2063, 1974-1 U.S.T.C. at 84,081.

225. See text accompanying note 180 *supra.*

outside the jurisdictional prerequisites to section 7421(a) is not subjected to its strictures. By declining to recognize that the *Williams Packing* criteria are irrelevant in a situation where the revenue effect is so attenuated as to be secondary to the need for equitable jurisdiction, the Court appears to have eschewed the judicial function.[226]

Procedural Adequacy. Although the District of Columbia Circuit held that AU's suit was not barred by section 7421(a) because, *inter alia,* "an alternate legal remedy in the form of adequate refund litigation [was] unavailable,"[227] the Supreme Court found that AU was not being *foreclosed* from judicial review. An FUTA refund suit would provide an opportunity to litigate the legality of the Service's withdrawal of its section 501(c)(3) status. The inability of this remedy to prevent irreparable harm in the form of lost contributions was inconsequential, because it satisfied only the second prong of the *Williams Packing* test.[228]

While the Court's logic with respect to the availability of a legal remedy contains a superficial appeal, a careful analysis places its conclusion in doubt. As implied in both *Bob Jones* and *"Americans United,"* a finding of some alternative access to judicial review of disputed section 501(c) (3) status appears crucial to the application of section 7421(a).[229] In holding that an FUTA refund suit provides the proper litigatory opportunity, the Court said that AU's voluntary payment of these taxes "does not alter this conclusion. A taxpayer cannot render an available *review procedure* an inadequate remedy at law by voluntarily foregoing it."[230]

But is the FUTA action in fact a "review procedure?" That term connotes a method for passing upon the correctness of a decision with respect to a claim,[231] in this case AU's complaint that its section 501(c)(3) status should not have been revoked. But an FUTA refund suit fails to meet this definition for two reasons. First, judicial review is not available based solely on the section 501(c) (3) claim. Rather AU must first raise the issue of its FUTA liability—an issue it did *not* want to litigate—before this route becomes available. Therefore, the FUTA refund suit is not a review procedure for the *wrong complained of,* but rather for a different action that has its roots in a common legal and factual issue. Moreover, the remedy addresses

226. See text following note 249 *infra.*

227. 477 F.2d 1169, 1180, 1973-1 U.S.T.C. ¶9165, at 80, 222 (D.C. Cir. 1973).

228. 94 S. Ct. at 2059, 1974-1 U.S.T.C. at 84,077.

229. In *Bob Jones University* the Court said: "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different." 94 S. Ct. at 2050, 1974-1 U.S.T.C. at 84,071. Similarly, the Court's refutation of the possibility that "respondent lacks an opportunity to have its claims finally adjudicated by a court of law" in *"Americans United"* implies that such a failing would otherwise have been fatal. 94 S. Ct. at 2059, 1974-1 U.S.T.C. at 84,077.

230. 94 S. Ct. at 2059 n.13, 1974-1 U.S.T.C. at 84,077 n.13 (emphasis added).

231. "Review" is defined: "to *re-examine* judicially," and as a "consideration for purposes of correction." BLACK'S LAW DICTIONARY 1425 (rev. 4th ed. 1968). Clearly, the FUTA refund suit is not for the purpose of correcting the alleged mistake made in determining AU's §501(c)(3) status. *See* text following immediately.

a wrong other than the one with which AU is primarily concerned. It seems an unwarranted distortion of the term "judicial review" to say that it may be satisfied by the availability of another, "manufactured" action.

Even assuming that the FUTA refund suit does provide suitable alternative access to judicial review, there is no assurance of its availability. By deciding to refund the FUTA assessment rather than to litigate, the Service can completely eliminate judicial review of the section 501(c)(3) claim.[232] This conclusion renders curious Justice Powell's statement in the majority opinion that "this is not a case in which an aggrieved party has no access at all to judicial review. *Were that true, our conclusion might well be different.*"[233]

It is worthy of note that the Service's power to moot the litigation is not limited to the FUTA situation; it extends to all Tax Court and refund litigation. In the typical case this power presents no problem. Since the taxpayer is usually concerned with the size of his tax bill, by refusing to contest the issue the Service provides the relief sought. But when an organization's claim to section 501(c)(3) classification is litigated in a refund suit, the desired relief (determination of tax-exempt status) is not obtained from the Service's failure to contest the refund. Thus, by using section 7421(a) in conjunction with a refusal to contest an assessment, the Service is able to preclude judicial review of its section 501(c)(3) determinations. Power of control over the availability of redress in the hands of the one from whom redress is sought is inconsistent with the term "right," and the existence of this power renders the present statutory procedure inadequate for claims of this sort.[234]

Fairness. In discussing the problems faced by an organization seeking judicial review of its section 501(c)(3) status, the Court recognized that "these

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232. In his dissent, Justice Blackmun said: "There is little doubt that the Commissioner possesses the authority to make the refund and moot the suit if he chooses not to litigate the underlying issues." In response to the Commissioner's assertion that such action would amount to impermissible bad faith, he said that it would be virtually impossible for the organization to prove bad faith where, as here, "sound administration may not warrant the time and expense necessary to contest a claim of small amount when vital issues and conceivably profound precedents are at stake." He also noted the possibility that the Service might inadvertently concede the refund. 94 S. Ct. at 2067, 1974-1 U.S.T.C. at 84,084 (Blackmun, J., dissenting). Thus, the FUTA Refund Procedure merely changes the stage at which the Service's decision with respect to an organization's §501(c)(3) status becomes final, rather than guaranteeing access to judicial review.

233. Bob Jones Univ. v. Simon, 94 S. Ct. 2038, 2050, 1974-1 U.S.T.C. ¶9438, at 84,071 (1974) (emphasis added).

234. This inadequacy has not gone unnoticed. *See generally* Worthy, *Judicial Determination of Exempt Status: Has the Time Come for a Change of Systems?*, 40 J. TAX. 324 (1974). There, the commentator suggests that the jurisdiction of the Tax Court include determination of an organization's exempt status. Noting that "there is now a precedent for declaratory judgments in exempt organization matters in the Tax Court in a little noticed provision of the omnibus Pension bill, H.R. 4200," he suggests a similar provision for §501(c)(3) organizations. *Id.* at 327. Commissioner Alexander has endorsed legislation that would provide for such direct appeal. *See* 40 J. TAX. 273 (1974).

avenues of review . . . present serious problems of delay during which the flow of donations to an organization will be impaired and in some cases perhaps even terminated."[235] It held, however, that forcing the organization to meet the standards of section 7421(a) and *Williams Packing* did not amount to a denial of due process of law "in light of the *powerful* governmental interests in protecting the administration of the tax system from premature judicial interference."[236]

In deciding whether a procedure violates the due process clause, the extent of the infringement must be weighed against the asserted governmental interest.[237] In terms of the actual revenue involved, a suit aimed primarily at litigating tax-exempt status, such as AU's, has only a de minimis revenue effect.[238] Detriments to the taxpayer include the delay inherent in the judicial process, a time span frequently measured in years.[239] The typical charitable organization cannot survive such a delay; its very existence depends upon maintenance of a flow of contributions. Even if the organization is able to survive the lack of contributions long enough to litigate the issue, it is faced with additional procedural problems. Refund suits are "geared to a determination of the technical aspects of [tax] liability and not to the larger constitutional issues,"[240] and the relief granted may be inadequate.[241] More-

235. 94 S. Ct. at 2051, 1974-1 U.S.T.C. at 84,072.

236. *Id.* (emphasis added).

237. *See* Roe v. Wade, 410 U.S. 113 (1973).

238. Assuming AU cannot be forced to withhold its FUTA payments, the only revenue restrained by an injunction will be that which otherwise would have become due from contributors to the organization. It would seem that the majority of large contributions are part of an "intelligent tax plan." That is, they are contingent upon the availability of a tax deduction. Therefore, the requested relief would have no revenue effect with respect to these contributions. Such donors would merely reallocate their gifts to other tax-exempt organizations. *See* Garrett, *supra* note 133, at 581-82; Note, *The Revenue Code and a Charity's Politics*, 73 YALE L.J. 661 (1964). Thus, the "governmental interest" is reduced to the minority of donations that come from contributors whose interest in a *specific* organization is such that they will make contributions to it regardless of the tax consequences. There are so many §501(c)(3) organizations with similar goals that a donor can virtually always find another tax-exempt group that will put his money to the same use. Thus, the purpose of the organization is not the controlling factor. Rather, allegiance to the institution is the key. *See* Garrett, *supra* note 133. But even these contributions represent an overstatement of the government's interest. Because §170 charitable contributions are not included in §62 of the Code, they must be deducted *from* adjusted gross income and can be taken only *in lieu of* the standard deduction. *See* INT. REV. CODE OF 1954, §§62, 63, 141, 170. Therefore, donors in this category who elect the standard deduction could not take advantage of the tax benefit regardless of its availability. Consequently, the grant of injunctive relief will have tax consequences only for the subcategory of donors who itemize deductions.

239. *See* note 188 *supra.*

240. 94 S. Ct. at 2067, 1974-1 U.S.T.C. at 84,083. But at least one organization has successfully used a refund suit as a vehicle for vindicating its claim to §501(c)(3) status. See discussion of Center on Corporate Responsibility v. Schultz, 368 F. Supp. 863, 1974-1 U.S.T.C. ¶9,118 (D.D.C. 1973), accompanying notes 178-188 *supra.*

241. It is not at all clear that a district court has the power to grant injunctive relief in a suit for refund. In *Bob Jones*, the Court said: "Petitioner did not bring this case as a refund action. Accordingly, we have no occasion to decide whether the Service is correct in asserting that a district court may not issue an injunction in such a suit, but

over, the organization must contend with the unfettered power that is vested in the Service.[242] The availability of section 501(c)(3) status involves:

> [S]ocial policy . . . a matter for legislative concern. To the extent these determinations are reposed in the authority of the Internal Revenue Service, they should have the system of checks and balances provided by judicial review *before* an organization['s status] . . . is imperiled by an allegedly unconstitutional change of direction on the part of the Service.[243]

Finally, application of section 7421(a) retards the development of clarifying case law,[244] and the resulting ambiguity surrounding section 501(c)(3)'s applicable scope tends to inhibit vital innovation, experimentation, and adaptation.[245]

In the final analysis, the competing considerations in a due process analysis are these: the government is interested in protecting revenues obtainable through a percentage tax assessment on contributions made by those donors who neither follow intelligent tax planning nor take the standard deduction.[246] Arrayed against this need are the interests of the organization and of society. The harm to the organization includes at least irreparable harm and possibly extinction through the loss of donations, and the further possibility that procedural problems may produce nonexistent or inadequate relief. The injury to society stems from the abuse potential inherent in the Service's virtually uncontrolled power over section 501(c)(3) status, and from the "chilling effect" of such power on creative experimentation by tax-exempt organizations. Simply to state these competing factors is sufficient to compel agreement with Commissioner Thrower's statement that to prefer the former over the latter "offends my sense of justice."[247]

A recurring element of the foregoing analysis has been a sense of distortion of reality. In reaching its decision, the Court defined "purpose" to

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is restricted in any tax case to the issuance of money judgments against the United States." 94 S. Ct. at 2051 n.22, 1974-1 U.S.T.C. at 84,072 n.22. Absent such action, it is questionable whether potential contributors would regard a favorable outcome of such suit, which carries with it no assurance of future deductibility, as possessing the reliability of a favorable letter-ruling by the Service.

242. With respect to §7421(a)'s foreclosure of judicial determination of suits for injunctive relief from revocation of §501(c)(3) status, Commissioner Thrower said: "This is an extremely unfortunate situation for several reasons . . . . [I]n practical effect it gives a greater finality to I.R.S. decision than we would want or Congress intended." Thrower, *supra* note 188, at 168.

243. 94 S. Ct. at 2065, 1974-1 U.S.T.C. at 84,082 (Blackmun, J., dissenting).

244. Thrower, *supra* note 188, at 168.

245. *See* 1965 Treas. Dep't Information Rep. on Private Funds, *quoted in* "Americans United," 94 S. Ct. at 2064 n.8, 1974-1 U.S.T.C. at 84,081 n.8 (Blackmun, J., dissenting).

246. See note 238 *supra*.

247. Thrower, *supra* note 188, at 168. This statement was quoted in both the *Bob Jones University* majority opinion, 94 S. Ct. at 2052 n.23, 1974-1 U.S.T.C. at 84,072-73 n.23, and in Mr. Justice Blackmun's dissent in "Americans United," 94 S. Ct. at 2067 n.14, 1974-1 U.S.T.C. at 84,083 n.14.

include any conceivable consequences, and stated that the requisite "tax" effect will be found whenever anyone's taxes are influenced. An awesome barrier to injunctive relief has thus been erected, as demonstrated by the Court's seizure upon an artificial procedure to provide satisfactory alternative relief. The confluence of these factors produces a result that is difficult to reconcile with the notion of fairness.

The Court could have avoided many of the objectionable features of its interpretation by adopting a purpose-oriented approach to the application of section 7421(a).[248] By limiting application of the Act to factual situations in which its central purpose is contravened, the terms "purpose" and "tax" would assume more rational and definite meanings. Particularly, the plaintiff organization would not be barred by the potential effect that its suit would have on the taxes of others. Moreover, it would not be necessary to employ such artificial procedures as FICA and FUTA refund suits as the appropriate forms of relief. Finally, the increased availability of judicial relief would place a needed restriction on the Service's power in this area.

For Congress to carve out a specific statutory exception, providing injunctive relief for section 501(c)(3) groups, is a process measured in years.[249] Certainly in the case of AU any revenue effect caused by litigation of its status was negligible in comparison with the need for judicial review. A judiciary that is not willing to carry out its role as a "feedback system," correcting power imbalances without the legislative time lag, strains the operational efficiency of a tripartite political system. Due process considerations are reduced to responses to "average" factual situations. This is inappropriate in an AU situation where a litigant is effectively barred from access to the courts by an abrogation of jurisdictional powers in favor of an already powerful administrative agency. A limited judiciary function is not compatible with the complex problems facing this society in the future.

CONCLUSION

Although section 7421(a) is undeniably useful in situations where the suit simply delays assessment or collection of taxes, its abuse potential is extremely high in several areas. The statute has been used in conjunction with the jeopardy assessment and wagering tax provisions as a fairly effective harassment tool. The presence of arbitrary assessment appears to be more than occasional, yet there seems to be no effective restraint.

In the area of exempt organizations, it would appear that public policy favors a means of obtaining equity relief in contesting revocation of section

248. But the Court rejected the purpose-oriented approach because: "[W]e think our reading of §74121(a) is compelled by the language and apparent congressional purpose of this statute." 94 S. Ct. at 2059 n.14, 1974-1 U.S.T.C. at 84,078 n.14. By adopting this posture and interpreting §7421(a) as a broadly based prohibition, the Court apparently truncated judicial responsiveness to a litigant's plight.

249. For example, there are indications that the breadth of §501(c)(3)'s prohibition against political activity is the result of an error in draftsmanship. See note 146 *supra*. Yet this language remains intact forty years later.

501(c)(3) status. For example, the political influence in *Center on Corporate Responsibility* served to deny section 501(c)(3) status to a group with ideas and values contrary to those of the current administration, but arguably in the best interests of many poorly represented segments of the American public. This result vividly portrays the abuses that can occur when virtually unfettered power to interpret and enforce social policy is vested in an administrative agency. Certainly, in factual situations like that of *"Americans United,"* the remoteness of any possible revenue effect and the tenuous nexus to a litigant's primary purpose indicate that judicial caution should be observed in permitting section 7421(a) to bar injunctive relief. Otherwise, the Service may be able to rely on section 7421(a) to avoid equity jurisdiction even though the central purpose of the statute is not being contravened.

Recent Supreme Court decisions appear to have sounded the death knell for attempts by the judiciary to delimit the already vast scope of section 7421(a). In fact, under *Bob Jones University* and *"Americans United,"* it would appear that the often fatal loss of contributions stemming from revocation of tax-exempt status can never be challenged in the courts at the preliminary stage. Even if the organization manages to survive, its lack of taxable income would preclude the tax assessment necessary for Tax Court or refund relief. Alternatively, an FICA or FUTA refund suit, aside from the lengthy time factor involved, may not allow litigation of the actual issues. Moreover, it is subject to the whims of the Service, which may moot the litigation before the section 501(c)(3) issues can be reached. Certainly, one cannot find any indication that good faith is in overabundance within this agency[250] in light of the arbitrary assessment techniques sometimes employed in the jeopardy assessment and wagering tax areas.

It appears that legislation is desirable in several areas to provide access to judicial relief. Specifically, it is suggested that exceptions to section 7421(a) be codified to permit organizations to contest Service determinations of tax-exempt status in a suit for injunctive relief. This would permit litigation of the section 501(c)(3) issue before the sweeping prohibitions of section 7421(a) could be imposed, thereby alleviating the problem of ineffective judicial remedies for such groups.[251] Further, within section 501(c)(3) itself, it is recommended that provision be made for tax-exempt organizations to devote a specified portion of their activities to direct lobbying. The purpose of such a provision would be to provide an adversary voice to that of the business and industrial lobbyists, who can deduct lobbying expenses under section 162(e).

Because the Supreme Court has interpreted section 7421(a) to preclude injunctive relief where there is the slightest revenue effect, it seems that the Court has ignored its function as a flexible corrective body, operational when

250. *See* Clark v. Campbell, 501 F.2d 108, 1974-2 U.S.T.C. ¶9687 (5th Cir. 1974) (opinion quoted at note 85 *supra*); Sherman v. Nash, *** F.2d ***, 1974-1 U.S.T.C. ¶9111 (3d Cir. 1973) (bad faith jeopardy assessment enjoined); Anderson v. Richardson, 354 F. Supp. 363 (S.D. Fla. 1973).

251. See note 234 *supra*.