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JEOPARDY, TERMINATION, AND MATHEMATICAL OR CLERICAL ERROR ASSESSMENTS AFTER THE TAX REFORM ACT OF 1976

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INTRODUCTION

On October 4, 1976, President Ford signed into law the Tax Reform Act of 1976,[1] of which the administrative provisions[2] constitute some of the most significant and important changes brought about by the entire act. These provisions, which involve the creation by Congress of completely new as well as extensive revision of old, long-standing procedural sections of the Internal Revenue Code of 1954, had their genesis in the post-Watergate era with its attendant doubts and suspicions of many of our federal administrative officials and agencies. As such, it should not seem too surprising that the majority of these changes are so-to-speak, consumer-oriented, being designed to extend greater protection to the individual taxpayer in his disputes with the government and to curb the potential for abuse seemingly inherent in the effective administration by the Internal Revenue Service of the taxing statute. This is particularly true as to those administrative provisions dealing with the assessment powers of the Service.

The objective of this article is to acquaint the reader with the import of those administrative provisions of the T.R.A. which enhance the procedural protections available to the taxpayer in jeopardy, termination, and mathematical or clerical error assessments.[3] This will be done by first tracing the

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1. Pub. L. No. 94-455, Stat. [hereinafter cited as T.R.A.].

2. T.R.A., *supra* note 1, §§1201-1212, 1306, 2114.

3. Because of this limitation to the I.R.S. assessment process, the following administrative provisions of the T.R.A. are not within the scope of this article: §1201 (public disclosure of letter rulings, determination letters and technical advice memoranda); §1202 (disclosure of returns and return information); §1203 (income tax return preparers); §1205 (absolute right of taxpayer to intervene and to stay compliance with I.R.S. administrative summons directed to third-party recordkeepers; reasonable basis for "John Doe" summons directed to third-party recordkeeper); §1207 (withholding of state and local income taxes from military pay; voluntary withholding of state income taxes from federal employees' compensation; withholding of federal income tax on certain gambling winnings; withholding of federal taxes on members of fishing boat crews, etc.); §1208 (state-conducted lotteries); §1209 (minimum exemption from levy for wages, salary or other income); §1210 (Joint Committee on Internal Revenue Taxation refund cases); §1211 (social security number as individual taxpayer's identification number); §1306 (declara-

background of these sections and the law as it existed prior to the T.R.A., followed by a detailing of the changes and innovations themselves, coupled with a discussion of the reasons behind them.

JEOPARDY AND TERMINATION ASSESSMENTS: BACKGROUND AND PRIOR LAW

Assuming that a taxpayer does not wish or is unable to pay a proposed deficiency of federal income, gift or estate taxes[4] before litigating the matter, the ordinary statutory deficiency procedures require the passage of a substantial period of time before the Internal Revenue Service (I.R.S.) may actually enforce collection.[5] Under these procedures, the I.R.S. generally must first send[6] notice of the deficiency to the taxpayer[7] who then has 90 days[8]

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tory judgments by the United States Tax Court, United States Court of Claims or the United States District Court for the District of Columbia relating to the qualification or classification or organization under §§170(c)(2), 501(c)(3), 509(a) and 4942(j)(3) of the Internal Revenue Code of 1954); §2114 (limited retroactive extension of the benefits of §6013(e) of the Internal Revenue Code of 1954 to those taxpayers otherwise prevented from obtaining such "innocent spouse" relief solely by reason of the operation of *res judicata*).

4. The normal deficiency procedures are also applicable to certain excise taxes. *See* I.R.C. §§6211(a), 6212(a), 6213(a).

5. In addition, the appeal procedure available within the I.R.S. itself prior to litigation in court may consume a significant amount of time. *See, e.g.*, I.R.S. Statement of Procedural Rules, 26 C.F.R. §§601.103(b)-(c), .105(b)(4), (c), (d), (e)(2), (1), .106(b) (1976).

6. The statute provides that the I.R.S. "is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." I.R.C. §6212(a). For the modern view that §6212(a) does not require that a valid notice be sent by certified or registered mail as long as the taxpayer receives actual notice in time to file his petition with the Tax Court, see Tenzer v. Commissioner, 285 F.2d 956 (0th Cir. 1960) (hand delivery but allowable time measured from date of receipt in such case) and Boren v. Riddell, 241 F.2d 670 (9th Cir. 1957) (ordinary mail).

7. The Code states that "[i]n the absence of notice to the . . . [I.R.S.] under §6903 of the existence of a fiduciary relationship, notice of a deficiency . . . if mailed to the taxpayer at his *last known address shall be sufficient.*" I.R.C. §6212(b)(1). Generally, the I.R.S. is entitled to use the taxpayer's address shown on the return for the taxable year in question as the "last known address" unless the taxpayer has properly and timely notified the I.R.S. of a change of address. *See, e.g.*, Harvey L. McCormick, 55 T.C. 138 (1970). The filing of a return for a subsequent taxable year showing a new address is not sufficient notice of a change of address to the I.R.S. for the prior year. Culver M. Budlong, 58 T.C. 850 (1972); L. KEIR & D. ARGUE, TAX COURT PRACTICE 15 (5th ed. 1976). For what is the minimum sufficient notice of a change of address, *see* Edward J. Camous, 67 T.C. 721 (1977). Actual receipt by the taxpayer of a properly mailed notice to his "last known address" within the meaning of §6212(b)(1) is irrelevant to the validity of such notice. DeWelles v. United States, 378 F.2d 37 (9th Cir. 1967); Pfeffer v. Commissioner, 272 F.2d 383 (2d Cir. 1959). On the other hand, under the more recent cases, if the notice was not mailed to the taxpayer's "last known address," it will be valid if taxpayer actually received it in time to file a petition with the Tax Court. *See, e.g.*, Clodfelter v. Commissioner, 527 F.2d 754 (9th Cir. 1975), *cert. denied*, 425 U.S. 979 (1976).

8. The allowable time for filing the petition for redetermination with the United States Tax Court is normally measured from the date of mailing, not the later date of actual receipt by the taxpayers. I.R.C. §6213(a); Teel v. Commissioner, 248 F.2d 749, 751 (10th Cir. 1957). *But see* Kennedy v. United States, 403 F. Supp. 619, 37 A.F.T.R.2d 76-672 (W.D. Mich. 1975), *aff'd*, 40 A.F.T.R.2d 77-5173 (6th Cir. 1977). The taxpayer will have 150 days if the notice is addressed to a person outside the United States. I.R.C. §6213(a). For the 150 day period to be applicable the taxpayer only has to be *temporarily* abroad at the

in which to file a petition for redetermination of the deficiency with the United States Tax Court.[9] After such a timely filing by the taxpayer, the ability of the I.R.S. to assess and collect the asserted deficiency depends upon a favorable, final[10] Tax Court decision. It generally takes twelve to thirty months for the decision to become final.[11]

These procedures are clearly designed to give the taxpayer the opportunity to obtain pre-payment judicial review of the I.R.S. determination on a de novo basis. Because of the necessary delay involved, however, they obviously do not protect the revenue in those cases in which the individual facing the deficiency assertion suddenly decides to go to Brazil permanently or to liquidate his assets and transfer them to a foreign bank account or otherwise conceal them. In these and other similar situations the I.R.S. clearly has need of some extraordinary remedy in order to insure the ultimate payment of any tax found to be due. From an early date,[12] Congress, recognizing this need, has supplied the necessary statutory authority in the jeopardy assessment and termination provisions of the tax law.

The present jeopardy assessment authority involving income, gift and estate taxes[13] on the one hand, and that dealing with other taxes such as employment and wagering taxes[14] on the other hand, are to be found in sections 6861 and 6862 of the Code, respectively. The section 6861 assessment is utilized if in the case of income taxes, for example, it relates to a *prior* taxable year as to which the statutory date for filing the return and paying

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time the deficiency notice is mailed. Estate of Krueger, 33 T.C. 667 (1960) (taxpayer in Yokohama, Japan on world cruise when notice mailed to last known address in the United States). But being temporarily outside the United States on the date of mailing requires that the stay abroad be of some minimum duration. *See* Jules Cowan, 54 T.C. 647 (1970) (taxpayer in Tijuana, Mexico from approximately 9:00 A.M. to 7:30 P.M. on date of mailing but returned to the United States on that same day, held that 150 day period not applicable). Apparently, the 150 day period is not applicable if, on the date of mailing, the taxpayer is in the United States but leaves the United States before receiving it. *See* Mianus Realty Co., 50 T.C. 418 (1968). For the applicable period, pursuant to I.R.C. §6212(b)(2), in the case of the wife if a single joint notice is sent to a husband and wife for a joint return year and the husband, but not the wife, is outside the United States on the date of mailing, *see* Edward J. Camous, 67 T.C. 721 (1977) (150 days).

9. Timely filing of the petition for redetermination with the United States Tax Court is a jurisdictional requirement. Culver M. Budlong, 58 T.C. 850, 853 (1972). The Tax Court, however, has recently held that it has jurisdiction to determine whether an untimely filed petition should be dismissed on the taxpayer's motion to dismiss based upon an inadequate deficiency notice (not to the last known address) or on the I.R.S. motion to dismiss because not timely filed. Emmet N. Shelton, 63 T.C. 193 (1974), *acq.* 1975-2 C.B. 2 (taxpayer's motion granted as deficiency notice invalid; I.R.S.' motion denied).

10. For when a Tax Court decision becomes final, see I.R.C. §7481.

11. *See* S. REP. No. 94-938, 94th Cong., 2d. Sess. 363 (1976) [hereinafter cited as S. REP.].

12. *See generally* Veeder v. Commissioner, 36 F.2d 342, 343-44 (7th Cir. 1929).

13. The jeopardy assessment authority of §6861 also extends to certain excise taxes. *See* I.R.C. §§6861(a), 6211(a).

14. *See, e.g.*, S. REP., *supra* note 11, at 360; H.R. REP. No. 94-658, 94th Cong., 1st Sess. 29 (1975) [hereinafter cited as H.R. REP.]; *In re* Cornell, 24 A.F.T.R.2d 69-5632 (D. Nev. 1969) (withholding and Social Security taxes).

the tax has already passed, whereas, the section 6862 assessment is made after the taxable period has expired.[15]

The section 6861 assessment authority is a specific exception to the normal statutory deficiency procedures.[16] Under this section, if the district director of the I.R.S. believes that the assessment or collection of a deficiency will be jeopardized by delay,[17] he may immediately assess the tax, send notice and demand for payment,[18] file notice of tax liens,[19] and then immediately proceed to enforce collection by way of levy upon the property of the taxpayer. The 10-day waiting period normally required between the demand for payment and the seizure of the taxpayer's property does not apply.[20] If the section 6861 jeopardy assessment is made before the normal statutory notice of deficiency has been sent to the taxpayer, the Code specifically requires that the I.R.S. mail such a notice within 60 days after the making of the jeopardy assessment[21] and the failure to so mail will enable the federal district court to entertain the taxpayer's suit for an injunction.[22]

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15. H.R. REP., *supra* note 14, at 299. *See* Laing v. United States, 423 U.S. 161, 172 (1976).

16. I.R.C. §§6861(a), 6213(a). The normal deficiency procedures do not apply to the taxes covered by §6862. I.R.C. §6862(a); S. REP., *supra* note 11, at 361; H. REP., *supra* note 14, at 301.

17. The §6862 assessment authority is similar, but not identical, stating: "If the . . . [district director] believes that the collection of . . . [the tax] . . . will be jeopardized by delay, he shall, whether or not the time otherwise prescribed . . . for making return and paying such tax has expired, immediately assess such tax . . . . Such tax . . . shall thereupon become immediately due and payable, and immediate notice and demand shall be made . . . for the payment thereof." I.R.C. §6862(a).

18. I.R.C. §6861(a).

19. *See* I.R.C. §§6321-6324.

20. I.R.C. §6331(a); S. REP., *supra* note 11, at 361; H.R. REP., *supra* note 14, at 301.

21. I.R.C. §6861(b). This requirement of mailing the §6861 jeopardy assessed taxpayer the statutory deficiency notice gives the taxpayer the opportunity to litigate his ultimate tax liability in the Tax Court because the notice constitutes his "ticket to the [T]ax [C]ourt." *See* Commissioner v. Shapiro, 424 U.S. 614, 630 n.12 (1976); Corbett v. Frank, 293 F.2d 501, 502-03 (9th Cir. 1961). Contrariwise, both before and after the T.R.A., there has never been such a requirement in the case of §6862 jeopardy assessments because the Tax Court has no jurisdiction over those types of taxes. *See* I.R.C. §§6213(a), 6212(a), 6211(a); S. REP., *supra* note 11, at 361; H.R. REP., *supra* note 14, at 301. This has the effect of limiting the forums available to the §6862 jeopardy assessed taxpayer to litigate the matter by relegating him to a suit for refund in either the federal district court or the United States Court of Claims. *See* S. REP., *supra* note 11, at 361; H.R. REP., *supra* note 14, at 301.

22. Prior to the T.R.A. the Anti-Injunction Act provided that: "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 such tax was assessed." I.R.C. §7421(a) (1966). Section 6213(a) itself, however, contains an exception for the §6861 jeopardy assessment [and, by virtue of the T.R.A., also for the §6851 termination assessment], stating: "Except as otherwise provided in . . . section 6861 no assessment of a deficiency . . . and no levy . . . shall be made . . . until such notice . . .]of the deficiency has been mailed to the taxpayer and the allowable period has expired without the filing of a Tax Court petition or, if filed, until the Tax Court decision has become final.]" Because of this exception in §6213(a), the §6861 jeopardy assessment normally can not be enjoined. However, if the §6861 jeopardy assessment is not made in compliance with the provisions of §6861 because, for

The I.R.S. authority to terminate the taxable year of a taxpayer is contained in section 6851 of the Code.[23] Generally, under this provision as it existed prior to the T.R.A., if the district director determined that collection of income tax from a taxpayer for either the current or preceding taxable year might be jeopardized by delay due to some act of the taxpayer (such as leaving the United States or concealing himself or his property), then he could immediately terminate the taxable period of such taxpayer, give notice thereof and demand for immediate payment of the tax determined to be due for the terminated period. If payment was not immediately forthcoming, the district director could also levy upon the taxpayer's property because, again, the normal ten-day waiting period is not applicable. The tax collected under a termination assessment is credited against the taxpayer's liability as finally determined for the full taxable year.[24] The section 6851 termination provision applies only to *income* taxes and is utilized if the jeopardy exists as to the taxpayer's *current* normal taxable year or the preceding normal taxable year and the statutory date for filing the return and paying the tax has not yet passed.[25]

The stated I.R.S. position concerning both jeopardy assessments and terminations is that they should be made "sparingly," be "reasonable in amount in the light of existing facts," and be personally approved by the district director.[26] Further, it is the policy of the I.R.S. that they should not be made unless at least one of the following conditions concerning the taxpayer in question is met: (1) he is, or appears to be, designing quickly either to leave the United States or otherwise conceal himself; or (2) he is, or appears to be, designing quickly either to remove his property from the United States, or to conceal or transfer it to others, or to dissipate it; or (3) his financial solvency is, or appears to be, endangered.[27]

Because, by the very nature of the problems with which these sections were designed to deal, "[e]xigency is the matrix,"[28] it is understandable that the amount of the assessment to be made by the I.R.S. cannot usually be determined with the "leisure of chartered accountants over their books and tea."[29] It is not surprising to find that such assessment amounts generally tend to be too high, rather than too low,[30] probably because of the government's desire

example, no statutory notice of deficiency is sent within 60 days after the assessment, then it is not made "as otherwise provided in . . . §6861" such that the requirements of the "except" clause of §6213(a) have not been satisfied. Accordingly, the general prohibition against immediate assessment contained in §6213(a) becomes applicable, thereby bringing into operation the "except" clause of the Anti-Injunction Act. In such a situation the jeopardy assessment (and any collection action) can be enjoined. Laing v. United States, 423 U.S. 161, 184 n.27 (1976).

23. I.R.C. §6851(a)(1).

24. S. REP., *supra* note 11, at 361; H.R. REP., *supra* note 14, at 301.

25. S. REP., *supra* note 11, at 361; H.R. REP., *supra* note 14, at 299.

26. Rev. Proc. 60-4, 1960-1 C.B. 877, 878.

27. S. REP., *supra* note 11, at 360 n.1; H.R. REP., *supra* note 14, at 300 n.1.

28. Homan Mfg. Co. v. Long, 242 F.2d 645, 655 (7th Cir. 1957)

29. *Id.* at 650.

30. In a draft report of the United States General Accounting Office based upon an examination of two Internal Revenue Service districts, it was concluded that in 25

to protect the fisc. Although these provisions are concededly a necessary weapon in the I.R.S. arsenal, their implementation in a given case can be arbitrary in the sense that the use of "figures unaudited to the last penny is the equivalent of the word 'arbitrary.' "[31] Despite the fact that it has been determined that the I.R.S. generally has not misused this authority,[32] at least infrequent abuses have apparently occurred.[33]

Regardless of the infrequent abuse situation, however, the awesome power conferred on an administrative agency by these sections, characterized by one court as "the sovereign's stranglehold on a taxpayer's assets,"[34] could result in great hardship to a taxpayer against whom they have been implemented. Several factors inhere in the situation generally to produce this hardship. In addition, the differing procedures of sections 6861, 6862, and 6851 may further inconvenience the taxpayer.

Inherent Hardship Generally

The inherent factors producing hardship included not only the probability of an excessive assessment but also the suddenness with which the action might be taken by the I.R.S.,[35] both of which could result in tying up a substantial part or all of the taxpayer's assets to the extent that, in some cases, he might not even have the wherewithal to pay accounting or legal fees for representation in already pending civil or criminal tax cases.[36] Moreover,

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cases of termination assessments the ultimate tax deficiency as determined by audit was only about $37,000, although a total of about $742,000 had been assessed. S. REP., *supra* note 11, at 362-63; H.R. REP., *supra* note 14, at 302.

31. Homan Mfg. Co. v. Long, 242 F.2d 645, 650 (7th Cir. 1957).

32. S. REP., *supra* note 11, at 362; H.R. REP., *supra* note 14, at 302.

33. *See* Homan Mfg. Co. v. Long, 264 F.2d 158, 161 (7th Cir. 1959) (Duffy, C.J., concurring): "I am fully convinced that the . . . jeopardy assessment . . . totalling more than $3,000,000 was arbitrary . . . . After extended investigation and lengthy audits, agents representing the Treasury Department testified in the criminal case that Homan owed less than $300,000 for income taxes, interest and penalties. When a number of taxpayer's deposits were found in various savings and loan associations, the amount claimed to be owing was quickly raised to $3,000,000. I think . . . [it is] a reasonable inference . . . [that] the assessment was deliberately put at this fantastic and insupportable figure simply so that Homan couldn't pay it, thus creating appearance of jeopardy."; Rinieri v. Scanlon, 254 F. Supp. 469, 474 (S.D.N.Y. 1966) (testimony of revenue agent that he was instructed to, and did, write a report showing an income tax of an already determined amount so that the government's seizing of that amount would be justified). *See also* S. REP., *supra* note 11, at 363; H.R. REP., *supra* note 14, at 302-03; Bray, *Supreme Court's Shapiro decision restricts use of jeopardy assessments*, 44 J. TAX. 264, 266 (1976).

34. Homan Mfg. Co. v. Long, 242 F.2d 645, 651 (7th Cir. 1957).

35. S. REP., *supra* note 11, at 363; H.R. REP., *supra* note 14, at 302-03.

36. *See, e.g.*, Avco Delta Corp. Canada Ltd. v. United States, 484 F.2d 692, 706-07 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Illinois Redi-Mix Corp. v. Coyle, 360 F.2d 848 (7th Cir. 1966); Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957); United States v. Brodson, 241 F.2d 107 (7th Cir. 1957); Shapiro v. Secretary of State, 38 A.F.T.R. 2d 76-5453 (D.D.C. 1976); United States v. Rinieri, 11 A.F.T.R.2d 518 (E.D.N.Y.), *aff'd*, 304 F.2d 885, 11 A.F.T.R. 2d 518 (2d. Cir. 1962). In *Shapiro* the United States Supreme Court indicated that, if jeopardy assessment levies operated to deprive the taxpayer of funds needed to provide bail (for an unrelated foreign criminal charge) in order to be able to contest the assessment itself, the first prong (irreparable harm for which there is no adequate

because both jeopardy assessment sections[37] provide that the condition activating their applicability is the belief of the district director that the factor causing jeopardy exists,[38] the traditional view of the courts has been that such "belief" was not subject to much if any judicial review.[39] This reluctance of courts to engage in review of the basis for the district director's belief obviously caused hardship to the taxpayer if jeopardy did not, in fact, exist, as for example, when the taxpayer was not about to depart for Costa Rica Rica or conceal his assets.[40] This judicial restraint was apparently predicated

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remedy at law) of the two-pronged *Williams Packing* test for obtaining an injunction despite the Anti-Injunction Act was satisfied. Commissioner v. Shapiro, 424 U.S. 614, 633 (1976). *See* I.R.C. §7421(a); Enochs v. Williams Packing & Navig. Co., 370 U.S. 1 (1962). In *Lloyd* and *Brodson* the Fifth and Seventh Circuits denied the release of funds subject to a jeopardy assessment lien and denied the dismissal of a criminal tax evasion indictment, respectively, despite contentions that the jeopardy assessments in question deprived the taxpayers of the funds needed to pay for legal and accounting services necessary in pending civil and criminal tax cases and thereby operated to deny them their rights under the Fifth and Sixth Amendments (fair trial, effective assistance of counsel, etc.). The reasoning behind the *Lloyd* and *Brodson* decisions was that the I.R.S. had the power to make the jeopardy assessments in question as to which the Anti-Injunction Act ordinarily prevented the issuance of an injunction; that the taxpayer action here was really premature because it is not possible to determine in advance of the trial of the pending civil and criminal cases whether their constitutional rights would be violated in view of the many possible contingencies that might occur (i.e., the possible obtaining of funds from outside sources, volunteering of services by an accountant, method of presentation of the government's case in such manner as to render services of accountant unnecessary, etc.). Although it is speculative, as to the ultimate effect of *Shapiro* on the *Lloyd-Brodson* line of decisions, the Eighth Circuit has indicated that it will have almost no effect. *See* Rosenblum v. United States, 549 F.2d 1140, 77-1 U.S. Tax Cas. ¶9177 (8th Cir. 1977). *See generally*, Bray, *supra* note 33.

37. I.R.C. §§6861, 6862.

38. The termination section, as it existed prior to the T.R.A., provided that the district director's "finding . . . made as herein provided . . . shall be for all purposes presumptive evidence of jeopardy." I.R.C. §6851(a)(1) (1958).

39. *See, e.g.*, Transport Mfg. & Equip. Co. v. Trainor, 382 F.2d 793, 799 (8th Cir. 1967); Veeder v. Commissioner, 36 F.2d 342 (7th Cir. 1929); Communist Party, U.S.A. v. Moysey, 141 F. Supp. 332 (S.D.N.Y. 1956); Publishers New Press, Inc. v. Moysey, 141 F. Supp. 340 (S.D.N.Y. 1956); Foundation Co. v. United States, 15 F. Supp. 229 (Ct. Cl. 1936); James Couzens, 11 B.T.A. 1040, 1157-59 (1928). This remains the case even if the reason for the jeopardy assessment is the imminent expiration of the statute of limitations on assessment. Veeder v. Commissioner, 36 F.2d 342 (7th Cir. 1929); Foundation Co. v. United States, 15 F. Supp. 229 (Ct. Cl. 1936); James Couzens, 11 B.T.A. 1040, 1157-59 (1928). *See* Martinon v. Fitzgerald, 306 F. Supp. 922 (S.D.N.Y. 1968), *aff'd per curiam*, 418 F.2d 1336 (2d Cir. 1969). For the applicable statute of limitations on assessment, see I.R.C. §6501.

40. *See generally*, Administrative Procedure Act, 5 U.S.C. §701(a) (1970) (Judicial review under the A.P.A. applies "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."). For the standards to be applied in determining whether judicial review has been precluded, see Abbott Laboratories v. Gardner, 387 U.S. 136, 139-41 (1967); for the standards to be applied in determining whether agency action has been committed to its discretion by law, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-16 (1971); Ness Inv. Corp. v. Department of Agriculture, 512 F.2d 706, 715-16 (9th Cir. 1975). One of the most blatant examples of legislative preclusion of judicial review is that found in the statute concerning the Veterans' Administration which provides that the decisions of the Administrator "shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus

on the statutory delegation of this matter to the personal opinion and discretion of the district director. As stated by the Ninth Circuit,

> The decision of the District Director to make a §6861 jeopardy assessment is subject to a very narrow review. . . . It is necessary only that the District Director *believe* that collection of the tax will be jeopardized by delay. The Code grants him a broad discretionary power, the exercise of which is a matter left to his personal judgment and opinion. For this reason the Tax Court and other courts have declined to inquire into the District Director's belief or in any way to substitute their judgment for the judgment of the District Director. (emphasis in original).[41]

Inherent Hardship: The Anti-Injunction Act and the District Director's "Belief"

In early 1976, prior to the T.R.A., the United States Supreme Court had the occasion in *Commissioner v. Shapiro*[42] to consider some of the elements of a jeopardy assessment in the context of whether, and under what circumstances, it could be enjoined despite the Anti-Injunction Act.[43] Under the standards previously set out in *Enochs v. Williams Packing & Navigation Company*[44] the taxpayer, in a suit to enjoin the assessment or collection of tax, generally has the burden of proving two elements: (1) that he would otherwise suffer irreparable injury for which there is no adequate remedy at law, and (2) certainty of success on the merits (i.e., that under the most liberal view of the law and facts, it is clear that under no circumstances could the government ultimately prevail).[45] Further, as stated in *Williams Packing*,

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or otherwise." 38 U.S.C. §211(a) (1970). Although it may seem surprising that judicial review can be completely precluded, this provision has been given full effect. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 447 (1976); Fritz v. Director of Veterans Administration, 427 F.2d 154, 154-55 (9th Cir. 1970). Section 211(a) does not, however, preclude a challenge to the constitutionality of a particular veterans benefit statute. *See* Johnson v. Robison, 415 U.S. 361, 367-75 (1974); B. SCHWARTZ, *supra* at 477 n.79; Morris, *Judicial Review of Non-Reviewable Administrative Action: Veterans Administration Benefits Claims*, 29 AD. L. REV. 65 (1977). Normally, a provision precluding judicial review will pass constitutional muster although there may be certain types of cases involving basic personal rights in which judicial review would be required by the constitution. *See* Briscoe v. Bell, 97 S. Ct. 2428 (1977); Estep v. United States, 327 U.S. 114, 120 (1946); Morris, *supra* at 66, 70-72; B. SCHWARTZ, *supra* at 439-41. *See generally*, W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 217-40 (6th ed. 1974).

41. Westgate-California Corp. v. United States, 496 F.2d 839, 841 n.3 (9th Cir. 1974).

42. 424 U.S. 614 (1976).

43. I.R.C. §7421(a). See note 22, *supra.*

44. 370 U.S. 1 (1962). The Anti-Injunction Act speaks in terms of prohibiting a "suit for the purpose of *restraining* the assessment or collection of any tax." United States v. First Nat'l City Bank, 77-1 U.S. Tax Cas. ¶9198 (2d Cir. 1977) (emphasis added). It, therefore, assumes that the suit is brought by a *taxpayer*. Accordingly, the Act is not applicable to counterclaims or defenses raised by a taxpayer in a suit brought by the *government*.

45. The *Williams Packing* test has recently been acknowledged by the Supreme Court "to be the capstone to judicial construction of the [Anti-Injunction] Act." Bob Jones University v. Simon, 416 U.S. 725, 742 (1974). *See* Alexander v. "Americans United," Inc., 416 U.S. 752, 758 (1974).

"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 suit."[46] Obviously, under this two-pronged test, few taxpayers have been able to carry this "nearly impossible burden."[47] Because *Williams Packing* specifically involved only a normal assessment of social security and unemployment taxes, it would appear to be reasonable to infer that the burden might be even heavier in the case of jeopardy assessments and terminations which encompass emergency situations where exactitude by the I.R.S. is usually not possible, given this nature of the beast. Thus, in attempting to be consistent with the *Williams Packing* standard in the jeopardy situation, the lower federal courts have understandably held that to satisfy the second prong of the test the taxpayer must show that the assessment was "entirely excessive, arbitrary, capricious, and without factual foundation."[48]

In *Shapiro*, the taxpayer, a citizen of Israel, had been indicted in Israel sometime after he had arrived in the United States on a criminal charge of securities fraud, and the Israeli government sought his extradition. Shapiro eventually consented to be extradited after Israel agreed to give him a speedy trial when he arrived there and to release him on $60,000 bail pending such trial. On December 6, 1973, only three days before he was scheduled to leave for Israel, the I.R.S. made a jeopardy assessment of income taxes in the amount of approximately $93,000 against him for the years 1970 and 1971, filing liens and serving notices of levy upon various New York banks in which he maintained accounts or had safety deposit boxes. The effect of this I.R.S. action was, of course, to freeze about $35,000 in the accounts and the contents of the boxes so that Shapiro could not utilize them. After quickly obtaining the consent of the Israeli government to a week's postponement of his extradition, he filed suit in federal district court seeking, *inter alia*, injunctive relief that would have the effect of requiring the I.R.S. to withdraw the notices of levy. Shapiro alleged in his complaint that he did not in fact owe any tax, that he could not litigate the matter with the I.R.S. while in an Israeli jail, that he needed the frozen $35,000 in order to meet the agreed-to $60,000 Israeli bail, and that the I.R.S. had acted deliberately and in bad faith in waiting until only three days before his departure for Israel in making the jeopardy assessment.

Shapiro's attorney immediately served interrogatories on the government inquiring into the basis for the jeopardy assessment. After initially responding on December 19, 1973, that Shapiro was not yet entitled to know the basis for the assessments, the government supplemented this on December 21, 1973, with responses that included the required statutory deficiency notices.[49] These

46. 370 U.S. 1, 7 (1962).

47. *See* Bray, *supra* note 33, at 265.

48. Shapiro v. Secretary of State, 499 F.2d 527, 533 (D.C. Cir. 1974), *aff'd sub nom.*, Commissioner v. Shapiro, 424 U.S. 614 (1976); Willits v. Richardson, 497 F.2d 240, 245 (5th Cir. 1974); Lucia v. United States, 474 F.2d 565, 573 (5th Cir. 1973); Pizzarello v. United States, 408 F.2d 579, 584, 586 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).

49. The jeopardy assessment provision of §6861 states that, if the jeopardy assessment is made before the issuance of the statutory deficiency notice, the I.R.S. "shall" mail such a notice within 60 days thereafter. I.R.C. §6861(b).

notices indicated only that the assessment for 1970 was based on an unexplained cash deposit of $18,000 and that the assessment for 1971 was based on Shapiro's having received approximately $137,000 in income from selling hashish.[50]

On the basis of these conclusory statements the district court decided that the Anti-Injunction Act deprived it of jurisdiction to order withdrawal of the levies and granted the government's motion to dismiss the complaint. On appeal, the District of Columbia Circuit vacated the dismissal and remanded[51] in reliance upon cases in the Second[52] and Fifth Circuits.[53] The appellate court found that Shapiro had satisfied the first prong of the *Williams Packing* test in that he had shown that he would otherwise suffer the requisite irreparable injury due to the freezing of funds upon which he relied to meet bail in Israel; although he had a remedy at law through which he could seek restoration of these funds,[54] this remedy was inadequate because mere recovery would not repair the injury caused by imprisonment.[55] As to the second prong of *Williams Packing* requiring the taxpayer to show certainty of success on the merits, the circuit court remanded for a determination of whether there was "no factual foundation for the allegation that Shapiro was a narcotics dealer, or that the Government's calculation of the deficiency has no rational basis," in which event it would be proper to find that the government could not ultimately prevail.[56] In order to make this determination the district court would obviously have to make some factual inquiry into the basis for the assessment either through whatever evidence Shapiro might be able to show or factual submission by the I.R.S., in camera or otherwise.[57]

In the Supreme Court the government contended that the decision of the court of appeals was erroneous in that it operated to place the onus on the government to show a factual basis for the assessments,[58] contrary to *Williams*

50. This was the posture of the case insofar as relevant to the actual holding of the Supreme Court, which regarded the allegation in the 1971 deficiency notice as "wholly conclusory." 424 U.S. at 632. It should be noted, however, that the government subsequently filed an affidavit by the revenue agent who had investigated Shapiro's income tax liabilities which set out a more substantial basis for the assessments, but this being after-the-fact, so to speak, the Supreme Court did not consider it for purposes of its precise holding. *Id.* at 632.

51. Shapiro v. Secretary of State, 499 F.2d 527, 532-35 (D.C. Cir. 1974).

52. Pizzarello v. United States, 408 F.2d 579 (2d. Cir.), *cert. denied*, 396 U.S. 986 (1969).

53. Lucia v. United States, 474 F.2d 565 (5th Cir. 1973).

54. See note 21 *supra*.

55. Shapiro v. Secretary of State, 499 F.2d 527, 535-36 (D.C. Cir. 1974). By the time this case was decided by the Supreme Court, the basis for the circuit court's finding of irreparable injury had evaporated due to Shapiro's having been able to meet a reduced bail in Israel following extradition. Commissioner v. Shapiro, 424 U.S. at 624 n.9. Accordingly, on the remand to the district court as the result of the circuit court decision being affirmed by the Supreme Court, the preliminary issue of irreparable injury as a result of the jeopardy assessment levies would have to be considered again. *Id.* at 633-34 & n.15.

56. Shapiro v. Secretary of State, 499 F.2d 527, 533, 535 (D.C. Cir. 1974). *See* Commissioner v. Shapiro, 424 U.S. at 623.

57. Shapiro v. Secretary of State, 499 F.2d 527, 533, 535 (D.C. Cir. 1974).

58. *See* Commissioner v. Shapiro, 424 U.S. at 624 n.9 (district court interpretation of court of appeals decision).

Packing which required the taxpayer to prove that "under no circumstances could the Government ultimately prevail."[59] In rejecting this argument, and affirming the court of appeals, the Supreme Court noted that *Williams Packing* had required that the second prong be satisfied on the basis of the information available to the government at the time of the suit and that this clearly implied disclosure by the government; otherwise, the *Williams Packing* exception to the Anti-Injunction Act would be meaningless.[60] Although the ultimate burden of proving that under no circumstances can the government prevail remains with the taxpayer, "the relevant facts are those in the Government's possession and they must somehow be obtainable from the Government."[61] Concluding that there should be disclosure by the government, at least at the instance of the taxpayer,[62] the Court stated that:

> The Government may defeat a claim by the taxpayer that its assessment has *no basis in fact* — and therefore render applicable the Anti-Injunction Act — without resort to oral testimony and cross-examination. Affidavits are sufficient so long as they disclose basic facts from which it appears that the Government may prevail.[63]

In essence, the *Shapiro* court adopted a "no basis in fact" standard for testing under the second prong of *Williams Packing* in the case of a jeopardy assessment.[64] But the district director's "belief" that jeopardy actually existed was never in issue in *Shapiro* because it was clear that the assessments were made only three days before Shapiro was scheduled to be extradited to Israel. Given the traditional view of the courts that such "belief" is not subject to much, if any, judicial review,[65] and given the context in which *Shapiro* was decided, the factual issues being related to whether he was a narcotics dealer and how the deficiency was calculated, it is extremely doubtful that the "no basis in fact" test extends to the issue of jeopardy itself. In other words, *Shapiro* probably does not require an inquiry into the facts underlying the district director's "belief" that jeopardy is present in the sense that the court should examine the facts as to whether the taxpayer is actually about to

59. *Id.* at 625.

60. *Id.* at 627.

61. *Id.* at 628.

62. The Court indicated that it would be "consistent with *Williams Packing* to place the burden of producing evidence with the taxpayer, and to require, if the Government insists, that facts in its sole possession be obtained through discovery," but it went on to urge the government to make immediate, voluntary disclosure in such situations. *Id.* at 628 n.10.

63. *Id.* at 633 (emphasis added). For the view that *Shapiro*, which dealt with a post-seizure suit for an injunction, has no applicability to preseizure summary judicial proceedings to enforce I.R.S. levies, see United States v. First Nat'l City Bank, 77-1 U.S. Tax Cas. ¶9198 (2d Cir. 1977).

64. The Government "is required simply to litigate the question whether its assessment has a basis in fact." 424 U.S. at 629. For an example of what has been held to show a factual basis for the assessment under the *Shapiro* test, see James v. United States, 38 A.F.T.R. 2d 76-5732, 5733 (6th Cir. 1976). For the view that the effect of *Shapiro* will be to put a brake on the frequency of jeopardy assessments in the future, see Bray, *supra* note 33.

65. See notes 38-41, *supra* and accompanying text.

conceal or dissipate his assets, or to do something similar to "abjuring the realm."[66] This can be shown from the second prong of *Williams Packing* requiring, that the taxpayer show that under no circumstances could the government ultimately prevail as to its claim for taxes due.[67] Thus, the issue is really only whether the taxpayer engaged in certain transactions or events giving rise to a certain tax liability, not whether collection of the tax would be jeopardized by delay. Accordingly, under the law prior to the T.R.A., even if tax liability were present, unwarranted hardship to the taxpayer could result from a jeopardy assessment, if jeopardy did not in fact exist, particularly if the assessment were too high.

Procedural Hardship: Sections 6861 and 6862

Unjustifiable difficulties of a procedural nature also faced taxpayers against whom these sections were invoked by the I.R.S., exacerbated or not depending upon precisely which section was applicable. Thus, in the case of a section 6861 jeopardy assessment, although the taxpayer could petition the Tax Court for redetermination of his ultimate tax liability because the I.R.S. is required to issue the statutory deficiency notice, he might have to wait as much as 60 days for its issuance;[68] even then, after his petition was filed, his case would only be placed on the regular docket so that ultimate resolution would be considerably delayed during which time he might lose the benefit of part or substantially all of his assets.[69]

This delay factor can be more grievous if a section 6862 assessment is made. In this situation the forum of the Tax Court is not available to the taxpayer because that court has no jurisdiction of the types of taxes to which section 6862 can apply.[70] Therefore, the taxpayer is relegated to first paying the tax,[71] filing a claim for refund,[72] and then waiting for six months in

66. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 431 (5th ed. 1956).

67. See notes 44-46 *supra* and accompanying test.

68. *See* I.R.C. §6861(b).

69. S. REP., *supra* note 11, at 363; H.R. REP., *supra* note 14, at 303. From the time of filing the Tax Court petition to the rendering of a decision there is normally a lapse of 12 to 30 months. S. REP., *supra* note 11, at 363.

70. S. REP., *supra* note 11, at 361; H.R. REP., *supra* note 14, at 300. This remains true after the T.R.A.

71. Payment of the tax *in full* is a jurisdictional prerequisite to maintaining a suit for refund under Flora v. United States, 357 U.S. 63 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960). Thus, in the case of income tax which had been jeopardy assessed under §6861, full payment of the tax deficiency for the taxable year would be required if the taxpayer wished to litigate the matter in the district court or Court of Claims by way of a tax refund suit in lieu of filing a petition in the Tax Court. In the case of §6862 jeopardy assessments which encompass divisible taxes. the *Flora* "full payment" rule can be met by payment of the tax on a single divisible transaction or event, which can be far less than the entire assessment. 362 U.S. at 171 n.37, 175 n.38. *See, e.g.*, Steele v. United States, 280 F.2d 89 (8th Cir. 1960) (assessment of $5,186.47 penalty against each of two officers of a corporation for failure to pay over social security taxes withheld; held that the officers could contest their liability for the penalty in a suit for refund by paying the penalty applicable to withholding on only one employee): Jones v. Fox, 162 F. Supp. 449 (D. Md. 1958). *See also*, M. GARBIS & A. SCHWAIT, TAX REFUND LITIGATION 39-43 (1971); Ferguson, *Jurisdictional*

order to file a suit for refund[73] (unless the claim is denied earlier), with the normal time-lag thereafter attendant to judicial proceedings before there is a final resolution of the controversy.[74] The burden of this delay was enhanced by the fact that prior to the T.R.A. property seized under a section 6862 assessment could be sold before the taxpayer had the opportunity to obtain judicial review, unlike section 6861 assessments for which the Code generally provided a stay of sale.[75]

Procedural Hardship: Section 6851

Where the district director terminated the taxable year of the taxpayer under section 6851, it was the position of the I.R.S. that it was not necessary to send the taxpayer any deficiency notice;[76] this was unlike the procedural requirements imposed upon the Service in section 6861 assessments.[77] The consequence of this interpretation is to deny the taxpayer access to the Tax Court,[78] leaving him to litigate his ultimate tax liability in a refund suit with all of its time-consuming prerequisites.[79] Likewise, the I.R.S. took the view that it could sell assets seized pursuant to section 6851 prior to or during judicial review.[80] Although some lower federal courts agreed with the I.R.S. stance concerning section 6851,[81] others did not.[82]

Problems in Federal Tax Controversies, 48 IOWA L. REV. 312, 332-36 (1963). In the event that the otherwise strict application of the *Flora* "full payment" would prevent resort by the taxpayer to *any* judicial forum, it is likely that due process would require such access to judicial relief, at least in those cases where the taxpayer is not at fault due to his own negligence. *See* Laing v. United States, 423 U.S. 161, 208-09 (1976) (Blackmun, J., dissenting); Commissioner v. Shapiro, 424 U.S. at 630 n.12, 634 n.34.

72. The claim for refund is a jurisdictional prerequisite to a refund suit. I.R.C. §7422(a).

73. I.R.C. §6532(a)(1).

74. This procedure must also be followed in the case of a §6861 jeopardy assessment if the taxpayer wishes to litigate his ultimate tax liability by way of a refund suit.

75. I.R.C. §6863(b)(3)(A) (1954); S. REP., *supra* note 11, at 363; H.R. REP., *supra* note 14, at 303. *See* Smith v. Flinn, 261 F.2d 781 (8th Cir. 1958), *modified*, 264 F.2d 523 (8th Cir. 1959). This stay-of-sale provision does not apply if the taxpayer consents to the sale, or if the district director determines that the expenses of conserving or maintaining the property will greatly reduce the net proceeds from its sale, or if the property is of the type described in §6336 (relating to perishable goods, etc.). I.R.C. §6863(b)(3)(B).

76. S. REP., *supra* note 11, at 361-62; H.R. REP., *supra* note 14, at 301.

77. There was no provision in the termination section, as it existed prior to the T.R.A. comparable to that which specifically required the issuance of a deficiency notice in the case of §6861 jeopardy assessments. *Compare* I.R.C. §6851 (1958) *with* I.R.C. §6861(b).

78. *See* William Jones, 62 T.C. 1 (1974).

79. See notes 71-74 *supra* and accompanying text. The delay factor was heightened in the termination context by the I.R.S. practice of not considering any claim for refund until after the close of the taxpayer's regular taxable year. S. REP., *supra* note 11, at 362; H.R. REP., *supra* note 14, at 301.

80. H.R. REP., *supra* note 14, at 303.

81. *See, e.g.*, Irving v. Gray, 479 F.2d 20 (2d Cir. 1973); Williamson v. United States, 31 A.F.T.R. 2d 73-800 (7th Cir. 1971).

82. *See, e.g.*, Clark v. Campbell, 501 F.2d 108 (5th Cir. 1974), *cert. denied*, 423 U.S. 1091 (1976); Hall v. United States, 493 F.2d 1211 (6th Cir. 1974); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974); Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973).

In the companion cases of *Laing v. United States* and *United States v. Hall*[83] the Supreme Court resolved this conflict.[84] In *Laing* the taxpayer, a citizen of New Zealand who had entered the United States from Canada on a temporary visitor's visa, sought to re-enter Canada from Vermont on June 24, 1972. After being turned back by Canadian authorities, he was detained by United States customs officials at Derby, Vermont, and the vehicle in which he had been riding was searched. During this search a suitcase containing approximately $310,000 was discovered in the engine compartment. The district director, upon being apprised of these facts by customs, immediately orally terminated Laing's 1972 taxable year pursuant to section 6851(a), and an assessment of tax in the amount $310,000 was made for the period of January 1 through June 24, 1972. Upon Laing's refusal to pay the assessment, the I.R.S. seized the currency in the suitcase. When the formal letter of termination was sent, this assessment against Laing was reduced to about $196,000 and a portion of the seized money was applied thereto. On July 15, 1972 Laing filed suit in the Vermont federal district court seeking an injunction against the continued possession by the I.R.S. of the seized currency on the grounds that the provisions of the levy and distraint statute,[85] as well as the action of the Service in taking the currency without making a determination of the likelihood of the existence of a connection between it and taxable income, were violative of due process. After the expiration of 60 days from the date of the termination assessment, the complaint was amended to assert that the I.R.S. had violated the correct statutory procedure by not mailing any notice of deficiency within the time period allowed by section 6861(b), as the Service had concededly not done.[86] The district court, in reliance upon *Irving v. Gray*,[87] held that the statutory deficiency notice was not required in a section 6851 termination, dismissing the suit pursuant to the Anti-Injunction Act,[88] and the Second Circuit affirmed.[89]

In *United States v. Hall*, following the arrest of her husband in Texas on drug-related charges, Mrs. Hall's home in Kentucky was searched under a warrant on January 31, 1973, by state troopers who found controlled substances. On February 1, 1973, the district director terminated the taxable period of Mrs. Hall and assessed a tax of approximately $53,000 for the period January 1, 1973 through January 30, 1973. When payment of the assessed tax was not forthcoming in response to the notice of termination and demand for immediate payment, the I.R.S. levied upon and seized Mrs. Hall's 1970 Volks-

83. 423 U.S. 161 (1976). The two cases were consolidated for the decision that was rendered on January 13, 1976.

84. For an excellent article discussing the *Laing-Hall* cases and the jeopardy assessment-termination background generally, as well as specifically dealing with the issues raised in the context of the Fourth Amendment, see Rosenthal, *Jeopardy and Termination Assessments After* Laing *and* Hall: *Jeopardizing the Fourth Amendment*, 31 TAX L. REV. 317 (1976).

85. I.R.C. §6331(a).

86. Laing v. United States, 423 U.S. at 184-85 n.27 (1976).

87. 479 F.2d 20 (2d Cir. 1973).

88. Laing v. United States, 364 F. Supp. 469 (D. Vt. 1973).

89. Laing v. United States, 496 F.2d 853 (2d Cir. 1974).

wagen and offered it for sale.[90] On February 13, 1973 Mrs. Hall filed suit in federal district court seeking, *inter alia*, injunctive relief, alleging that the I.R.S. was violating the stay-of-sale provision of section 6863(b)(3)(A) by offering her car for sale before issuing her the statutory deficiency notice as set out in section 6861(b).[91] The district court granted the relief on the basis that the Anti-Injunction Act was inapplicable due to the failure of the Service to follow the section 6861 procedures which included those contained in section 6863.[92] Because of its earlier decision in *Rambo v. United States*,[93] the Sixth Circuit affirmed.[94]

In the Supreme Court the government contended that what is procedurally required of the Service in section 6861 jeopardy assessments is not so required in the case of section 6851 terminations, not only because section 6851 itself does not specifically so state such procedure while section 6861 does, but also because the two sections were designed to deal with separate and distinct problems. Section 6861 is applicable to taxes already owing for a prior, normally expired taxable year — if the due date for filing the return and paying the tax has already passed — and operates to advance the time for collection of such overdue taxes; contrariwise, section 6851 terminations advance the date on which taxes would otherwise become due and payable.[95] In the former case a deficiency[96] exists so that the issuance of the statutory deficiency notice pursuant to section 6861(b) (with the resulting opportunity for access to the Tax Court) is logical.[97] But, in the latter case, since a deficiency is "[i]n essence . . . the amount of tax imposed less any amount that may have been reported by the taxpayer on his return,"[98] according to the government's contention, such term presupposes a completed, full taxable year[99] when "the taxpayer files a return showing a lesser amount of tax than is actually due or until the time for filing a return is past, and the taxpayer has not complied."[100] Under this view, because a termination truncates the

90. See note 80 *supra* and accompanying text. That section of the Code providing for a stay of sale of seized property, as it existed prior to the T.R.A., specifically referred only to jeopardy assessments made under §6861 and not to terminations under section 6851. I.R.C. §6863(b)(3)(A) (1954).

91. The Service did not issue the statutory deficiency notice within 60 days nor did Mrs. Hall receive specific information about how the $53,000 amount had been determined. *See* Laing v. United States, 423 U.S. at 168, 184-85 n.27.

92. *Id.* at 168. *Compare* I.R.C. §7421(a) (1966) *with* I.R.C. §6213(a) (1969).

93. 492 F.2d 1060 (6th Cir. 1974), *cert. denied*, 423 U.S. 1091 (1976).

94. United States v. Hall, 493 F.2d 1211 (6th Cir. 1974).

95. *See* Laing v. United States, 423 U.S. at 171-72.

96. The term "deficiency," insofar as income tax is concerned, is defined as "the amount by which the tax imposed . . . exceeds the *excess* of (1) the *sum* of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, *over* (2) the amount of rebates . . . ." I.R.C. §6211 (emphasis added).

97. *See* Laing v. United States, 423 U.S. at 172; Rambo v. United States, 492 F.2d at 1063.

98. Laing v. United States, 423 U.S. at 173. See note 96 *supra*.

99. *Id.* at 174.

100. Rambo v. United States, 492 F.2d at 1063.

normal taxable year and creates a lesser taxable period[101] resulting in only a "provisional statement of the amount which must be presently paid as a protection against the impossibility of collection,"[102] no "deficiency" is thereby created, particularly if such period may be reopened.[103] Accordingly, due to the fact that there is no "deficiency" *in esse* by way of a termination, no statutory deficiency notice nor any of the other procedures applicable to section 6861 jeopardy assessments should be required. Thus, the government maintained that a terminated taxpayer has no judicial remedy in the Tax Court but instead must first pay the tax and then file a claim for refund, waiting up to six months before obtaining access to any judicial forum.[104]

Rejecting this analysis, the Supreme Court held that in section 6851 terminations the procedures of section 6861 and 6863 must be adhered to, including the issuance of the notice of deficiency within 60 days[105] and the prohibition against the sale of seized property[106] until the taxpayer has had the opportunity to litigate in the Tax Court.[107] Noting that the jeopardy assessment and the termination sections "have long been treated in a closely parallel fashion," the Court held that a termination did result in a "deficiency," not only because the tax becomes immediately due and payable[108] and is unreported, but also because the term "taxable year" is defined by the Code to include a terminated taxable period and in such case requires a return.[109] The two sections being companion provisions designed to deal with similar aspects of the same problem, the Court refused to impute to Congress any intent to accord greater procedural safeguards to the jeopardy-assessed taxpayer than to the terminated taxpayer.[110] The result was that the Court read into section 6851 the procedural protections of sections 6861 and 6863, and, by this device of statutory interpretation, succeeded in avoiding the constitutional issues raised by the taxpayers.[111]

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101. *See* I.R.C. §441(b)(3).

102. Ludwig Littauer & Co., 37 B.T.A. 840, 842 (1938).

103. *See* I.R.C. §6851(b) (1958); Laing v. United States, 423 U.S. at 175-76 n.21.

104. 423 U.S. at 172-73. See notes 71-74 *supra* and accompanying text.

105. I.R.C. §6861(b).

106. I.R.C. §6863(b)(3)(A) (1954).

107. Laing v. United States, 423 U.S. at 183-84.

108. I.R.C. §6851(a)(1) (1958).

109. 423 U.S. at 175. *See* I.R.C. §§441(b)(3), 443(a)(3) (1969).

110. 423 U.S. at 176.

111. In a footnote the Court stated, "As a final reason for adopting their construction of the Code, the taxpayers argue that the Government's reading would violate the Due Process Clause of the Fifth Amendment. The basis for this claim is that under the assessment procedures of §6861 *et seq.* the taxpayer is guaranteed access to the Tax Court within 60 days, while under the procedures suggested by the Government the taxpayer in a termination case could be denied access to a judicial forum for up to six months . . . . Moreover, . . . under the procedures of §6861 *et seq.* the property seized may not be sold until after a final determination by the Tax Court . . . while under the Government's theory the property seized in a . . . termination may be immediately subject to sale. Because we agree with the taxpayers' construction of the Code, we need not decide whether the procedures available under the Government's theory would, in fact, violate the Constitution.

"The taxpayers do not question here, and we do not consider whether, even if the

In summary, these inherent factors in the jeopardy problem itself, in combination with the procedural aspects of the different sections involved, operated to produce considerable and unjustifiable hardship to the taxpayers affected in individual cases.[112] Although the *Laing* and *Shapiro* decisions by

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jeopardy assessment procedures of §6861 *et seq.* are followed, due process demands that the taxpayer in a jeopardy assessment situation be afforded a prompt post-assessment hearing at which the Government must make some preliminary showing in support of the assessment." *Id.* at 183-84 n.26. Although the foregoing quotation implies that due process could require some type of prompt *post*-assessment hearing in the jeopardy context, as a preliminary matter it is at least arguable that, given the immediate and substantial adverse effect upon the taxpayer in particular cases, some type of *pre*seizure hearing, abbreviated though it might be, could also be necessary under the Constitution. *See, e.g.*, Spencer Press, Inc. v. Alexander, 491 F.2d 589 (1st Cir. 1974) (suit for an injunction to restrain the I.R.S. from collecting only the late filing of return penalty of I.R.C. §6651 without the issuance of any statutory notice of deficiency due to I.R.C. §6659(b)(1969) which provides that, in such case, no notice is required; held that district court dismissal of suit was vacated and the case remanded for convening of a three-judge court, if plaintiff timely so requested, to resolve the question whether due process is violated by such a statutory scheme which would deprive a taxpayer of an opportunity to contest, prior to payment, a penalty claimed by the government. On remand a three-judge court held that the statutory scheme did not constitute a denial of due process; that decision was affirmed by the Supreme Court. Spencer Press, Inc. v. Alexander, 39 A.F.T.R.2d 77-118 (D. Mass.), *aff'd sub nom*, Spencer Press, Inc. v. Kurtz, 40 A.F.T.R.2d 77-5990 (1977) (per curiam). Logically, this could be analogized to such cases as Goldberg v. Kelly, 397 U.S. 254 (1970), holding that due process requires that an evidentiary hearing be held *before* termination of welfare benefits in view of the fact that otherwise the recipient might be deprived "of the very means by which to live while he waits" for any post-termination hearing. *Id.* at 264.

Only about two months after *Laing* was decided, however, the Court in *Shapiro* touched upon these issues again, emphasizing that although a *pre*seizure hearing was not required by due process a prompt *post*seizure hearing may be necessary. Commissioner v. Shapiro, 424 U.S. at 630 n.12. The Court said, "We have often noted that, in resolving a claimed violation of procedural due process, a careful weighing of the respective interests is required. Goss v. Lopez, 419 U.S. 565, 579 (1975); and we have noted that the Government's interest in collecting the revenues is an important one, Fuentes v. Shevin, 407 U.S. 67, 92 (1972). This interest is clearly sufficient to justify seizure of a taxpayer's assets without a *pre*seizure hearing, Fuentes v. Shevin, *supra*, ... However, it is very doubtful that the need to collect the revenues is a sufficient reason to justify seizure causing irreparable injury without a prompt *post*seizure inquiry of any kind into the Commissioner's basis for his claim.

"The taxpayer has no right to start a proceeding before the Tax Court for 60 days following a jeopardy seizure: the IRS may under the statute wait 60 days before it issues the deficiency notice which gives the taxpayer his 'ticket to the Tax Court.' 26 U.S.C. §6861. The record does not indicate how quickly a hearing on the merits can be obtained there. Preliminary relief is not there available." *Id.* The Court, however, did not resolve the *Shapiro* case on due process grounds, instead deciding it on the basis of the Anti-Injunction Act. *Id.* at 632. However, the majority opinion concluded by inviting the government to come up with its own answer to this problem, saying, "Nothing we hold today, of course, would prevent the Government from providing an administrative or other forum outside the Art. III judicial system for whatever preliminary inquiry is to be made as to the basis for a jeopardy assessment and levy." *Id.* at 630 n.12.

112. There were, of course, some statutory means of lessening the harsh effects of a jeopardy assessment. For example, a stay of collection of a jeopardy assessment could be had by the filing of a bond. I.R.C. §6863(a) (1954). *See* I.R.C. §6851(e) (1954). The assessment could be abated to the extent the district director believed it to be excessive in

the Supreme Court in early 1976 had removed some of the inequities, many remained. Principally because of the delay factor involved in obtaining ultimate resolution of the liability of a taxpayer subjected to a jeopardy assessment or termination[113] and doubts about the constitutionality of the existing review procedure,[114] Congress decided to revise the jeopardy scheme in the T.R.A., its resolve no doubt spurred on by the Supreme Court's invitation to that effect in *Shapiro*.[115]

JEOPARDY ASSESSMENTS AND TERMINATIONS UNDER THE T.R.A.

The method of revision of the jeopardy scheme chosen by Congress in the T.R.A. was essentially to provide for an expedited form of review, both administrative and judicial, of not only section 6851 termination assessments and section 6861 jeopardy assessments, but also section 6862 jeopardy assessments. This was accomplished by enacting new Code section 7429 and by making amendments, conforming and otherwise, to related sections of the Code.

Administrative Review Under Section 7429

Pursuant to the new procedure of section 7429, within 5 days after the day on which it makes an assessment under section 6851, 6861 or 6862, the I.R.S. must now provide the taxpayer with a written statement of the information upon which the Service relied in making such assessment.[116] Thereafter, the taxpayer may obtain administrative review of the assessment by so requesting the I.R.S. within 30 days after either (1) the day on which he is furnished the written statement by the Service, or (2) the last day of the aforesaid five-day period.[117] If the taxpayer makes such a timely request, then there must be an administrative determination made as to (1) whether the making of the assessment is reasonable under the circumstances, and (2) whether the amount so assessed or demanded is appropriate under the circumstances.[118]

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amount. I.R.C. §6861(c). Likewise, the assessment could be abated if the district director found that jeopardy itself did not exist. I.R.C. §6861(g). But these statutory remedies, depending as they do upon the district director's "belief" or "finding" or upon the financial ability of the taxpayer, might not be available realistically to a particular taxpayer.

113. *See* S. REP., *supra* note 11, at 364; H.R. REP., *supra* note 14, at 303.

114. *See* S. REP., *supra* note 11, at 363-64.

115. *See id.* at 364. See note 112 *supra*.

116. I.R.C. §7429(a)(1). If the written statement is provided to the taxpayer shortly before the assessment is actually made, then the assessment apparently is not invalidated. This is because the purpose of the statement is only to alert the taxpayer to any basis he may have for contesting it, and in this situation the time period for requesting administrative review runs from the day of delivery. Loretto v. United States, 41 A.F.T.R.2d 78-301, at 305 (E.D. Pa. 1977).

117. I.R.C. §7429(a)(2).

118. I.R.C. §7429(a)(3)(A)-(B). These determinations are similar to those made by the district director under I.R.C. §6861(g) and (c), respectively, on receipt of a taxpayer request for abatement. *See* Rev. Proc. 60-4, 1960-1 C.B. 877.

The Senate Finance Committee report states that in making these determinations in the administrative review stage the Service is to consider not only the information available at the time the assessment was made but also information that subsequently becomes available.[119] If as a result of this review the I.R.S. finds that the making of the assessment was inappropriate or that it was excessive in amount, it should be abated in whole or in part.[120]

Judicial Review Under Section 7429

If the taxpayer is not satisfied with the particular result of this administrative review,[121] within 30 days after the earlier of (1) the day the Service notifies him of its review determination, or (2) the 16th day after a timely taxpayer request for administrative review, he may bring a civil action against the United States under section 7429(b).[122] This action may only be brought in a United States District Court,[123] venue being generally in the district where the taxpayer resides.[124]

This 30-day period of section 7429(b)(1) has two aspects, the most obvious being that it constitutes a statute of limitations under which a suit by the taxpayer can not be maintained pursuant to this section after the expiration of the 30 days. The second aspect relates to the other end of the spectrum in regard to how early the suit can be brought. Here, the time limit is posited upon there having been a taxpayer request for administrative review.[125] Presumably, then, such a timely taxpayer administrative review request constitutes an absolute prerequisite to obtaining judicial review under this section. This would appear to be the case despite the somewhat deceptive language, couched in only permissive terms, of section 7429(a)(2) under which the taxpayer "may request" administrative review. This conclusion is bolstered by the reasons given in the Senate Finance Committee report for this administrative review provision, including the probability that the later judicial review proceeding of section 7429(b) would be facilitated (or, perhaps, even avoided entirely) by the exchange of information incident to such administrative review.[126] Therefore, if immediately after a jeopardy assessment the taxpayer were to seek judicial review pursuant to section 7429(b) without having first requested administrative review, it is likely that his suit would be dis-

119. S. REP., *supra* note 11, at 365.

120. *Id.* at 364. The legislative history indicates that the I.R.S. may take such abatement action even though the assessment was neither inappropriate nor excessive, if it finds that the taxpayer would suffer "unusual hardship." *Id.* at 364 n.5. For what might be construed to constitute "unusual hardship," see notes 158-161 *infra* and accompanying text.

121. Access to judicial review under §7429 is also available where the I.R.S. makes no administrative review determination in response to a timely taxpayer request. I.R.C. §7429 (b)(1)(B). After such a timely request is made, the Service has 15 days in which to complete the administrative review process. *Id.*

122. I.R.C. §7429(b)(1).

123. *Id.*

124. I.R.C. §7429(e). *See* S. REP., *supra* note 14, at 364.

125. *See* note 123 *supra* and accompanying text.

126. *See* S. REP., *supra* note 11, at 365-66.

missed. This would be similar to the dismissal of a suit seeking judicial review of agency action for failure to exhaust administrative remedies.[127]

Within 20 days after the action is commenced, the district court is to determine (1) whether the making of the assessment is reasonable under the circumstances, and (2) whether the amount so assessed or demanded is appropriate under the circumstances.[128] The statute provides that this 20-day period may be extended at the request of the taxpayer for not more than 40 additional days upon a showing of reasonable grounds.[129] Although section 7429 does not expressly deny them, the legislative history clearly states that no extensions of the 20-day period are to be granted either at the request of the I.R.S. or on the court's own motion.[130]

Determination by District Court: In General. Even though section 7429, in essence, provides for judicial review of the I.R.S. assessment action, which would normally be subject to only the limited scope of judicial review applicable to only the limited scope of judicial review applicable to agency action,[131] the Senate Finance Committee report states that the determination

127. The leading case dealing with the doctrine of exhaustion of administrative remedies on the federal level is Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). The reasons given by the Senate Finance Committee for having an administrative review provision are among those that serve to support the exhaustion doctrine. *See* McKart v. United States, 395 U.S. 185, 194-96 (1969); League of United Latin Am. Citizens v. Hampton, 501 F.2d 843, 847 (D.C. Cir. 1974). In *McKart* the Supreme Court enunciated these various purposes and functions, saying, "A primary purpose is . . . the avoidance of premature interruption of the administrative process. The agency . . . is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or . . . require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And . . . it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. . . .

"Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. [The doctrine] . . . is, therefore, an expression of executive and administrative autonomy . . . .

". . . . Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or to apply its expertise . . . . Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Id.* at 193-95.

128. I.R.C. §7429(b)(2).

129. I.R.C. §7429(c).

130. *See* S. REP., *supra* note 11, at 365. *See* H.R. REP., *supra* note 14, at 303.

131. Action taken by an administrative agency is generally subject to only a narrow or restricted scope of judicial review aimed at ascertaining, for example, whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or whether it was "unsupported by substantial evidence." Administrative Procedure Act, 5 U.S.C. §706(2)(A), (E) (1966).

of the district court is to be made on an independent, de novo basis.[132] In so doing, the district court "is to take into account not only information available to the Service at the time of the assessment but also any other information which bears on these issues."[133] This should be contrasted with a taxpayer's suit to enjoin a jeopardy assessment under the *Williams Packing* exception to the Anti-Injunction Act in which the determination of its second prong as to whether "under no circumstances could the government ultimately prevail" is to be made on the basis of the information available to the government at the time of the suit.[134] Thus, it would appear that the section 7429(b) action would permit the use of evidence arising over a wider range of time than does an injunction suit pursuant to the *Williams Packing* exception.

Determination by District Court: Reasonableness of Making Assessment. The first issue that the district court must determine in a section 7429(b) civil action is whether the making of the assessment is reasonable under the circumstances.[135] This determination goes to the issue of the existence of jeopardy itself; in other words, whether the taxpayer is, for example, designing quickly to leave the United States or otherwise conceal himself. In this regard both the House Ways and Means Committee report and the Senate Finance Committee report to section 7429 stated that they considered "the general standards set forth in the Internal Revenue Manual relating to the conditions which must exist before a jeopardy or termination assessment is made [to be] reasonable."[136] These Internal Revenue Manual standards, at least one of which must be met, included the following:

> (1) The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself;
> (2) The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it; or
> (3) The taxpayer's financial solvency appears to be imperiled.[137]

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132. S. REP., *supra* note 11, at 364. For a recent case stating that the §7429(b) judicial review proceeding may be summary in nature instead of requiring a full evidentiary hearing, see Canon v. United States, 40 A.F.T.R.2d 77-5529 (D.C. Nev. 1977). It has been held that, in view of this de novo responsibility, the district court should give "no weight whatsoever" to any administrative determinations concerning the reasonableness of making the assessment; to do otherwise would impermissibly shift the statutory burden of proof on this issue from the government to the taxpayer. Loretto v. United States, 41 A.F.T.R.2d 78-301, at 303 (E.D. Pa. 1977).

133. Loretto v. United States, 41 A.F.T.R.2d 78-301, at 303-04 (E.D. Pa. 1977). *See* S. REP., *supra* note 11, at 365. *But see* H.R. REP., *supra* note 14, at 304. The Conference Committee report stated that the conference agreement followed the Senate amendment. S. REP. No. 94-1236, 94th Cong., 2d Sess. 485 (1976) [hereinafter cited as CONF. COMM. REP.].

134. See notes 44-46 *supra* and accompanying text.

135. I.R.C. §7429(b)(2)(A). It has been suggested that this "reasonable under the circumstances" standard is somewhere between the "arbitrary and capricious" and "substantial evidence" scope of judicial review test of the Administrative Procedure Act. Loretto v. United States, 41 A.F.T.R.2d 78-301, at 303 (E.D. Pa. 1977).

136. H.R. REP., *supra* note 14, at 304; S. REP., *supra* note 11, at 365 n.6.

137. H.R. REP., *supra* note 14, at 304 n.5; S. REP., *supra* note 11, at 360 n.1. When a

In view of this legislative history and the fact that section 7429(b)(2)(A) requires the district court to determine whether the making of the assessment was reasonable, presumably by utilizing the foregoing standards, it seems clear that section 7429 authorizes — indeed, mandates — an inquiry into the facts constituting the basis for the "belief"[138] or "finding"[139] that jeopardy exists. Assuming that the *Shapiro* "no basis in fact" test[140] did not authorize an inquiry into the district director's "belief" or "finding" that jeopardy exists as previously discussed,[141] it would appear that this new section represents a substantial change in the law[142] to the ultimate benefit of the taxpayer. On the same assumption, it also follows that after the T.R.A. a jeopardy-assessed taxpayer bringing a civil action under section 7429(b) would thereby make possible a broader range of inquiry by the district court into the propriety of the I.R.S. action — including the factual basis for the district director's belief that jeopardy exists — than would be available in a suit for an injunction under *Williams Packing* and *Shapiro* which would likely not allow such an inquiry.[143] This aspect in itself should guarantee the popularity of the section 7429 civil action among practitioners representing jeopardy-assessed taxpayers.[144]

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termination assessment is based on a taxpayer's design to place his property beyond the reach of the government by either concealing or dissipating it, the assessment is not necessarily invalidated by the present inability of the taxpayer to have access to that property. Thus, in a case in which money as well as marijuana was seized by state police and remained in their custody at the time the assessment was made, the I.R.S. was justified in making that precautionary assessment in view of the absence of other assets to satisfy the tax liability. Loretto v. United States, 41 A.F.T.R.2d 78-301, at 304-05 (E.D. Pa. 1977).

138. *See* I.R.C. §6861(a).

139. *See* I.R.C. §6851(a)(1).

140. See notes 63-64 *supra* and accompanying text.

141. See text accompanying notes 65-67 *supra*.

142. See notes 37-41 *supra* and accompanying text.

143. See text accompanying notes 65-67 *supra*.

144. Because the district court determinations under §7429(b)(2) are to be based upon whether the I.R.S. action was "reasonable" or "appropriate" under the circumstances, and not "rightness" in the literal sense, it is possible to analogize the §7429 hearing to the somewhat similar "probable cause" determination made at the preliminary hearing in the criminal law field. *See, e.g.*, 17 ARIZ. REV. STAT. (1973), Rules of Criminal Procedure, rule 5.4a; Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (4th ed. 1974). In any event, in *Shapiro* the Supreme Court stated in regard to its "no basis in fact" test that "it seems apparent that if the facts do not even disclose 'probable cause' . . . to support the assessment, the Government would certainly be unable to prevail at trial." Commissioner v. Shapiro, 424 U.S. at 633, citing North Ga. Finishing, Inc. v. Di-Chem., Inc., 419 U.S. 601, 607 (1975) (garnishment). If this second prong of the *Williams Packing* test, as amplified by *Shapiro*, in a suit for an injunction and the §7429 determination are to hinge on the existence of something akin to "probable cause" then this aspect of the "belief" difference between the two types of actions becomes all the more accentuated. It should be remembered, moreover, that in the suit for an injunction, unlike a §7429(b) civil action, the taxpayer has the additional burden of satisfying the first prong of the *Williams Packing* test, the showing of irreparable injury for which there is no adequate remedy at law. See text accompanying note 45 *supra*. That aspect of this additional burden — no adequate remedy at law — may be even more difficult to carry in view of the existence of the new §7429 remedy. *Cf.* White v. United States, 39 A.F.T.R.2d 77-1103 (N.D. Ga. 1977) (enact-

Determination by District Court: Appropriateness of Amount Assessed. The second issue that must be resolved by the district court under section 7429 is whether the amount assessed or demanded is appropriate under the circumstances.[145] This does not require the district court to decide the taxpayer's ultimate tax liability, but instead only whether the amount of the assessment is reasonable based upon the information then available.[146] The Senate Finance Committee report states that "in the absence of other evidence made available to the [I.R.S.] . . . before . . . or during the proceeding, an estimate of the taxpayer's liability to date based on information in fact available to the [I.R.S.] . . . will be presumed to be reasonable."[147]

Because this new civil action does not result in a resolution of the taxpayer's ultimate liability, it is clear that section 7429(b) neither supplants nor substitutes for the normal ways of determining correct tax liability,[148] such as a petition for redetermination in the United States Tax Court or a refund suit in federal district court or the United States Court of Claims.[149] Therefore, the determinations made by the district court under section 7429 are to have no effect upon any later proceedings to determine the correct liability of the taxpayer, since this new, expedited form of judicial review is separate and unrelated, both substantively and procedurally, to such later proceedings.[150]

Section 7429 and the Burden of Proof. The burden of proof under section 7429 is divided according to the issues to be resolved by the district court. The statute places the burden upon the government as to whether the making of the assessment is reasonable under the circumstances,[151] but the burden is on the taxpayer as to whether the amount assessed or demanded is appropriate under the circumstances, although the government must provide the taxpayer with a written statement containing the information constituting its basis for determining the amount of the assessment.[152] This written statement can be supplied by the government in its answer to the taxpayer's petition under section 7429(b).[153]

The Senate Finance Committee report compared this split in the burden of proof to the division in a civil tax fraud case,[154] the stated rationale for placing the burden on the government as to the reasonableness of making

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ment of I.R.C. §7609 by T.R.A. §1205 gave taxpayer an adequate remedy at law to challenge enforcement of I.R.S. summons to third-party recordkeeper; suit for injunction dismissed).

145. I.R.C. §7429(b)(2)(B).

146. S. REP., *supra* note 11, at 365; H.R. REP., *supra* note 14, at 304.

147. S. REP., *supra* note 11, at 365. *See* H.R. REP., *supra* note 14, at 304.

148. S. REP., note 11, at 365. *See* H.R. REP., *supra* note 14, at 304.

149. See note 21 *supra*, and notes 71-74 *supra* and accompanying text.

150. S. REP., *supra* note 11, at 365. *See* H.R. REP., *supra* note 14, at 304.

151. I.R.C. §7429(g)(1).

152. I.R.C. §7429(g)(2).

153. S. REP., *supra* note 11, at 365.

154. In a case where civil tax fraud is an issue the burden of proof is on the government to show fraud by clear and convincing evidence. *See* I.R.C. §7454(a); T.C. RULE 142(b); 10 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION §58 A.35 at 103 (1976). But the burden with respect to whether there is a deficiency in tax is on the taxpayer. CONF. COMM. REP., *supra* note 133, at 485.

the assessment being essentially that the making of such an assessment creates more severe consequences to the taxpayer than a normal assessment.[155] Lest this analogy by the Senate Finance Committee mislead, the Conference Committee report indicated that the analogy was utilized only to explain the division and was not intended to create the impression that the government must carry its burden by clear and convincing evidence; instead, the normal standard of proof applies.[156]

Section 7429: District Court Order After Determination: Finality. If it determines either that the making of the assessment is unreasonable or that the amount assessed or demanded is inappropriate, the district court may order the Service to abate the assessment or redetermine the amount of the assessment, or it may order any other appropriate action.[157] According to the Senate Finance Committee report, it was intended (even though the statute itself does not so state) to give the district court the discretionary power to order abatement of an assessment that is neither inappropriate nor excessive, if it is found that the taxpayer would suffer "unusual hardship."[158]

Unfortunately, the legislative history does not indicate precisely what might fall within the ambit of "unusual hardship." The Finance Committee report, however, was made after *Commissioner v. Shapiro*[159] was decided and did cite that case.[160] It is conceivable that the Committee had in mind the situation faced by Mr. Shapiro in which the effect of the jeopardy assessment might have been to deny him the means to make bail on a non-tax criminal charge so that he could not effectively litigate his tax liability. Other situations possibly qualifying as "unusual hardship" include cases in which the jeopardy assessment may operate to deny a taxpayer the means to hire an accountant or a tax attorney to give expert testimony or represent him in pending civil or criminal tax litigation.[161]

Because the section 7429 civil action provides the jeopardy-assessed or terminated taxpayer with speedy access to a judicial forum which should eliminate much of the procedural hardship arising from the delay factor under prior law, and in view of the fact that this action does not resolve ultimate tax liability, it is understandable that Congress did not intend there to be lengthy, time-consuming appeals of the district court's decision. Accordingly, section 7429 gives the taxpayer a "one-shot," expedited form of judicial review of the I.R.S. action, the statute specifically providing that

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155. S. REP., *supra* note 11, at 365.

156. CONF. COMM. REP., *supra* note 133, at 485. The ordinary quantum of proof necessary to carry the burden is a preponderance of the evidence. *See, e.g.*, L. KEIR & D. ARGUE, TAX COURT PRACTICE 82 (5th ed. 1976).

157. I.R.C. §7429(b)(3).

158. S. REP., *supra* note 11, at 364 n.5.

159. 424 U.S. 614 (1976).

160. *See* S. REP., *supra* note 11, at 363-64.

161. See note 36 *supra*. The difficulty with this constituting "unusual hardship" is that, at the time this contention is made to the district court in a §7429 civil action, it may well be regarded as premature, as was the case in *Lloyd* and *Brodson*.

the "determination made by a district court . . . shall be final and conclusive and shall not be reviewed by any other court."[162]

Section 7429 and Procedural Due Process. As previously discussed, one of the factors motivating Congress to enact section 7429 was doubt about the constitutionality of the existing review procedure with its built-in delay aspect.[163] The issue is whether creation of the new section 7429 civil action remedy dispels this constitutional doubt; specifically, whether this post-assessment remedy is complete enough and fast enough to overcome the objection that the procedure set up by the T.R.A. still permits a taking of property in violation of the Due Process Clause of the Fifth Amendment.

At the outset it seems clear that in the weighing process incident to determining what procedural due process is required,[164] the interest of the government in collecting revenue is "sufficient to justify seizure of a taxpayer's assets without a preseizure hearing . . . ."[165] However, a prompt *post*-seizure inquiry may be required.[166] At the prompt hearing after the I.R.S. action, apparently due process would require a "showing [of] some basis for the seizure."[167]

It would be reasonable to assume that the determination to be made by the district court in the section 7429(b) civil action, under which the government has the burden of proof as to the reasonableness of making the assessment plus the additional requirement of furnishing the taxpayer with information as to how the amount was determined, would satisfy any due process requirement of some basis for or some preliminary showing in support of the assessment.[168]

The issue then becomes whether the resolution of the post-assessment section 7429(b) civil action is "prompt" enough to satisfy procedural due process. In this regard, the dissent in the *Laing* case, written by Justice Blackmun and joined in by Chief Justice Burger and Justice Rehnquist, stated that under the present refund procedure a maximum waiting period of six months to accommodate the administrative process was not unconstitutional per se.[169] Furthermore, in his concurring opinion in *Laing*, Justice Brennan stated:

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162. I.R.C. §7429(f).

163. See notes 111 and 114 *supra* and accompanying text.

164. For the purpose of determining whether a protected property interest exists and, if so, the process of weighing the competing interests in order to determine just what procedural due process requires in the particular case and when, see Board of Regents v. Roth, 408 U.S. 564, 572-84 (1972) and Goss v. Lopez, 419 U.S. 565, 577-87 (1975).

165. Commissioner v. Shapiro, 424 U.S. at 630 n.12.

166. *Id.* (emphasis added).

167. *Id.* at 632. *See* Laing v. United States, 423 U.S. at 183-84 n.26 ("some preliminary showing in support of the assessment").

168. *See* I.R.C. §7429(b)(2), (g)(1)-(2).

169. Laing v. United States, 423 U.S. at 207 n.13, 210-11. Justice Brennan characterized the dissenting opinion as requiring "no justification for even a six-month delay, apparently on the view that tax seizures are somehow different . . . for due process purposes." *Id.* at 188 n.*.

> But present law requires that taxpayers wait up to 60 days before challenging jeopardy assessments by filing suit in the Tax Court. However expeditiously the Tax Court handles the claim, that court is not required to decide the merits within any specified time, and no provision is made for a prompt preliminary evaluation of the basis for the assessment. In my view, such delay would be constitutionally permissible only if there were some overriding governmental interest at stake and the I.R.S. suggested none in either of these cases.[170]

Because the section 7429(b) civil action challenging the reasonableness and appropriateness of the jeopardy assessment can be brought as early as 20 days after the assessment is made,[171] and the district court thereafter has only a very limited amount of time to render its decision,[172] *this* time span would appear to meet Justice Brennan's standards.

In these prior opinions, at least three justices, and probably a fourth, have indicated that a waiting period equivalent to that which Congress has provided for in section 7429 would not be unconstitutional. Accordingly, it seems likely that a majority of the Supreme Court would find this new procedure sufficiently "prompt" to satisfy due process requirements. This follows not only because section 7429 does not replace the normal Code scheme for obtaining resolution of a taxpayer's ultimate liability, but also because the "probable cause" determinations and final decision of the district court under section 7429(b) must be rendered within as few as 40 days after the assessment is made.[173]

Although the issue is not entirely free from doubt, it is probable that the complete post-T.R.A. procedure, including the new section 7429 administrative and judicial remedies, does not, at least facially, amount to a violation of procedural due process.

Related Amendments Under the T.R.A.

Section 6851. While Congress was in the process of considering the problems of and potential solution to the jeopardy situation, the Supreme Court handed down its decision in *Laing-Hall,* in which it was held, as a matter of statutory interpretation, that the Service must mail the notice of deficiency to the taxpayer within 60 days after the termination assessment of section 6851 was made and that the stay-of-sale provisions of section 6863(b)(3) applied.[174] The legislative history indicates that Congress was concerned about this requirement of issuing the deficiency notice within 60 days after the termination assessment because it would necessitate determinations by courts of ultimate tax liability based upon less than a full taxable year,[175] and it seemed inconsistent with the provision permitting

170. *Id.* at 187-88.

171. *See* I.R.C. §7429(a)(1), (b)(1)(B).

172. I.R.C. §7429(b)(2). *See* I.R.C. §7429(c).

173. *See* I.R.C. §7429(a)(1), (b)(1)(B), (b)(2); S. REP., supra note 11, at 366. See also note 144 *supra.*

174. See notes 83-111 *supra* and accompanying text.

175. S. REP., *supra* note 11, at 366. This particular consideration had received short

reopening of the terminated taxable period.[176] Moreover, it was felt that, in addition to causing administrative burdens for the I.R.S., the multiple short taxable years created by a termination might in certain cases result in a higher income tax liability than would otherwise be the case[177] as well as, for example, require the adjustment of limitations on the number of years for carrybacks and carryovers in regard to net operating losses and the investment credit.[178]

Due to these considerations, in combination with new section 7429 which permits prompt taxpayer access to administrative and judicial remedies, Congress in the T.R.A. amended section 6851 in such a manner (1) that a termination assessment will not end a taxable year for any purpose other than the computation of the amount of tax to be assessed and collected, and (2) the issuance of a deficiency notice within 60 days after the termination assessment is not required.[179] Under this revision the normal, full taxable year of the taxpayer will continue to its end despite the termination assessment, and any amounts collected pursuant to section 6851 are, in effect, to be treated as credits on the full year's tax liability, similar to the collection of estimated taxes.[180]

Although that revision of section 6851 having the effect of not requiring the Service to issue a deficiency notice within 60 days after the termination assessment is contrary to the holding of *Laing*, it will presumably be valid in view of the fact that *Laing* was decided on the basis of statutory interpretation of the term "deficiency"[181] and that Congress clearly has the power to change the statute.[182]

Although deciding that the I.R.S. should not have to send a deficiency notice within 60 days after the termination assessment, Congress concluded that a terminated taxpayer should be allowed to contest in the Tax Court the issue of his ultimate tax liability for the normal taxable year similarly to a

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shrift in *Laing*, in which the Supreme Court said that it "saw no reason why the Tax Court, applying normal tax principles, should be less capable of determining the tax owing for the short taxable year than the district court or Court of Claims, which, under the Government's theory, would make that determination." Laing v. United States, 423 U.S. at 175-76 n.21.

176. S. REP., *supra* note 11, at 366. *See* I.R.C. §6851(b) (1958).

177. S. REP., *supra* note 11, at 366-67. The example cited by the Senate Finance Committee report involved gamblers. Under the Code and the applicable regulation, losses from gambling are allowed as deductions only to the extent of the gambling gains during the taxable year. I.R.C. §165(d); Treas. Reg. §1.165-10 (1960). Thus, a terminated gambler with most of his winnings in one short year and most of his losses in another short year could be worse off than if he had had only a single full taxable year. S. REP., *supra* note 11, at 367 n.7.

178. S. REP., *supra* note 11, at 367 n.7. There could also be problems related to annualization of the taxpayer's income. *Id. See* I.R.C. §443.

179. I.R.C. §6851(a)(2), (b); S. REP., *supra* note 11, at 367.

180. I.R.C. §6851(a)(3); S. REP., *supra* note 11, at 367. In addition, the old provision permitting the reopening of the terminated taxable period was eliminated. *See* I.R.C. §6851(b) (1958); S. REP., *supra* note 11, at 367.

181. See notes 105-111 *supra* and accompanying text.

182. For the due process considerations, *see* notes 163-173 *supra* and accompanying text.

jeopardy-assessed taxpayer.[183] Consequently, section 6851 now gives the taxpayer his "ticket to the Tax Court"[184] by requiring the Service to mail a statutory deficiency notice to the taxpayer for the full taxable year with respect to which the termination assessment was made within 60 days after the later of (a) the due date of the taxpayer's return for such taxable year, or (b) the date the taxpayer actually files such return.[185]

Section 6863. In line with the Supreme Court's holding in *Laing-Hall* interpreting the section 6861 jeopardy assessment stay-of-sale provision to apply to a termination, section 6863(b)(3) was amended by the T.R.A. specifically to include section 6851 termination assessments.[186] Moreover, the time span of the stay-of-sale provisions was expanded to encompass the periods during which administrative and judicial review under section 7429 is or may be sought and a final decision rendered.[187] In addition, unlike the law prior to the T.R.A.,[188] property seized for the collection of tax pursuant to a section 6862 jeopardy assessment may now generally not be sold during the aforesaid section 7429 period.[189] Finally, the provision for the filing of a bond to stay collection of a jeopardy assessment has been amended to include termination assessments as well.[190]

Other Conforming Amendments. Various other conforming amendments were made by the T.R.A.,[191] including the repeal of section 443(a)(3) which had required the filing of a return for the short period after a termination assessment had been made,[192] and the revision of the definition of "deficiency" so as not to consider in the determination of the existence of a deficiency any amounts collected under a termination assessment.[193]

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183. S. REP., *supra* note 11, at 367.

184. See note 21 *supra*.

185. I.R.C. §6851(b). Finally, §6851 was amended to make certain jeopardy assessment procedures applicable to terminations. See I.R.C. §6851(e). For example, the I.R.S. now has the discretionary authority to abate a termination assessment where jeopardy does not exist, such authority being separate and distinct from the review process of §7429. *See* S. REP., *supra* note 11, at 367 n.8.

186. I.R.C. §6863(b)(3)(A).

187. I.R.C. §6863(b)(3)(A)(i).

188. *See* text accompanying note 75 *supra*.

189. I.R.C. §6863(c)(1)(A)-(B). The exceptions to the stay-of-sale provision before and after the T.R.A. are the same. See note 75 *supra*; I.R.C. §6863(c)(2). It should be remembered that, in the case of a §6862 jeopardy assessment, although the T.R.A. makes the stay-of-sale provision applicable for purposes of new §7429, the taxpayer still does not have access to the Tax Court for purposes of determining his ultimate tax liability because that court has no jurisdiction over the types of taxes to which §6862 can apply. *See* I.R.C. §§6213(a), 7442. See text accompanying notes 16 and 70 *supra*.

190. I.R.C. §6863(a).

191. See S. REP., *supra* note 11, at 367 n.8.

192. T.R.A., *supra* note 1, §1204(c)(2).

193. I.R.C. §6211(b)(1). This change was made necessary by Congress' decision to require the Service to issue a deficiency notice after the close of the normal taxable year with respect to which a termination assessment had been made. *See* I.R.C. §§6211(a), 6212, 6213(a). See text accompanying notes 183-185 *supra*.

Effective Date

As originally enacted, the new T.R.A. provisions applied to jeopardy assessments and terminations in which notice and demand were made after December 31, 1976.[194] At the behest of the I.R.S., however, the effective date was changed to apply to assessments in which notice and demand are made after February 28, 1977, in order to give the Service adequate preparation time.[195]

MATHEMATICAL OR CLERICAL ERROR ASSESSMENTS: BACKGROUND AND PRIOR LAW

The jeopardy and termination assessment authority constitutes an exception to the deficiency procedures normally applicable in the case of income, estate and gift taxes,[196] the emergency nature of the situations constituting its principal justification.[197] Another long-standing[198] statutory exception exists when additional tax liability results from a "mathematical error appearing on the return,"[199] the rationale being essentially that "there can be no dispute as to a matter of arithmetical computation."[200] In this situation, prior to the T.R.A., the Service was not required to issue any statutory notice of deficiency, and the taxpayer did not have the right to obtain judicial review by way of a petition to the United States Tax Court before being required to pay the tax.[201] Instead, a taxpayer confronted with a mathematical error assessment would be relegated to contesting it either (1) by proceeding under the refund route leading ultimately to a suit for refund in the Court of Claims or federal district court,[202] or (2) by a suit for an injunction in federal district court if the dispute included whether the alleged error was a "mathematical error" within the meaning of the statute.[203] In addition other provisions of the Code allowed the Service to assess, in the same manner as a mathematical error, additional tax attributable to overstatements of credits for income tax withholding or estimated tax payments,[204] for certain uses of

194. T.R.A., *supra* note 1, §1204(d).

195. T.R.A., *supra* note 1, §1204(d) as amended by Pub. L. 94-528, §2(a), 90 Stat. 2483 (1976). *See* S. REP. 94-1317, 94th Cong., 2d. Sess. 1 (1976).

196. See text accompanying notes 4-11 *supra.*

197. *See* note 12 *supra* and accompanying text.

198. See Int. Rev. Code of 1939, §272(f), 53 Stat. 83 (1939).

199. I.R.C. §6213(b)(1) (1954).

200. Repetti v. Jamison, 131 F. Supp. 626, 628 (N.D. Cal. 1955), *aff'd*, 239 F.2d. 901 (9th Cir. 1956). *See* 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION, §49.143 at 270 (1971).

201. See note 199 *supra. See* S. REP., *supra* note 11, at 374; H.R. REP., *supra* note 14, at 288.

202. See note 21 *supra* and accompanying text.

203. If the error upon which the assessment was based was not, in fact, a "mathematical error appearing upon the return," then the normal restrictions upon assessment were applicable and their violation could be enjoined by the very terms of the Code, including the Anti-Injunction Act. I.R.C. §6213(b)(1) (1954). *See* I.R.C. §§6213(a) (last sentence), 7421(a); Repetti v. Jamison, 131 F. Supp. 626, 628 (N.D. Cal. 1955), *aff'd*, 239 F.2d 901 (9th Cir. 1956).

204. I.R.C. §6201(a)(3) (1954). *See, e.g.*, Beckman v. United States, 35 A.F.T.R.2d 75-1373, 75-1378 (D. Kan. 1975); Donald G. Corbett, 41 T.C. 96 (1963).

gasoline, special fuels, and lubricating oil and for earned income.[205] Furthermore, the Service may assess additional tax attributable to excessive refunds arising from tentative carryback adjustments.[206]

I.R.S. Procedural and Interpretation of Mathematical Error

If the I.R.S. decided that a mathematical error had been made on a return, as the result of which additional tax was due, the Service normally would make a summary assessment and send notice of mathematical error containing a description of the apparent failure to the taxpayer.[207] Then the I.R.S. would allow the taxpayer to explain why he believed there to be no actual error before the Service commenced to collect the additional tax attributable to it.[208] Assuming that the taxpayer was able to persuade the I.R.S. that there was in fact no error, it was the policy of the Service to abate any assessment which it might have already made under the summary assessment procedure and to refund any additional tax which the taxpayer might have already paid pursuant thereto.[209]

Despite the precise language of the statute which permitted this summary assessment procedure to be utilized for a "mathematical error appearing upon the return," the I.R.S. had interpreted this phraseology to encompass certain categories of error which were not strictly literal errors in the arithmetical sense.[210] Thus, in addition to errors in arithmetic, the Service included in this language the following:

> [E]rrors in transferring amounts correctly calculated on a schedule, form, or another page of Form 1040 to either page 1 or page 2 of Form 1040; missing schedules, forms, or other substantiating information required for inclusion with Form 1040; inconsistent entries and computations (such as cases where total exemptions claimed do not agree with the total used in computing the tax); and errors where the entry exceeds a statutory numerical or percentage limitation (such as standard deduction claimed in excess of the maximum allowed by the Code).[211]

Judicial Interpretation of Mathematical Error

Notwithstanding the Service's broad interpretation of "mathematical error appearing upon the return," in the relatively few cases decided by the courts

205. I.R.C. §6201(a)(4) (1975).

206. I.R.C. §6213(b)(2) (1954). *See, e.g.*, Nalley v. Ross, 308 F. Supp. 1388 (N.D. Ga. 1969). For a case involving substantially the same provision in the Internal Revenue Code of 1939, see Blansett v. United States, 181 F. Supp. 637 (W.D. Mo.), *rem'd*, 283 F.2d 474 (8th Cir. 1960).

207. S. REP., *supra* note 11, at 374; H.R. REP., *supra* note 14, at 288-89. This notice of mathematical error was (and is) not a statutory notice of deficiency within the meaning of I.R.C. §6213(a) so as to permit the taxpayer to file a petition with the Tax Court. I.R.C. §6213(b)(1) (1954).

208. S. REP., *supra* note 11, at 374; H.R. REP., *supra* note 14, at 289.

209. *Id.*

210. *Id.*

211. S. REP., *supra* note 11, at 375; H.R. REP., *supra* note 14, at 289. *See* CONF. COMM. REP., *supra* note 133, at 486.

the judicial construction has generally been much narrower, limiting this summary assessment procedure "to arithmetic errors involving numbers which are themselves correct."[212] Under this construction, any alleged error on a return not constituting a failure in arithmetic, but which, for example, represented a particular legal position espoused by a taxpayer, would not permit use by the I.R.S. of this summary assessment procedure.[213]

Thus, in *Repetti v. Jamison*,[214] the Service attempted to use the mathematical error summary procedure on the basis that the particular error consisted of claiming a credit with respect to which the permissible statute of limitations for allowance had expired. The court held instead that a statutory notice of deficiency should have been issued and enjoined the assessment, saying:

> [I]t is the opinion of this Court that the term . . . [mathematical error] was meant to refer to errors in arithmetic. This . . . is based primarily on the common meaning given to the phrase 'mathematical error,' and also on the fact that Congress did not provide for a petition by the taxpayer to the . . . [predecessor of the Tax Court] in the case of such error. It would appear that the failure to provide for review of a determination of mathematical error was due to the fact that there can be no dispute as to a matter of arithmetical computation.
>
> The alleged error . . . [here] was not a mistake in arithmetic or an inadvertent entry, and therefore it was not a mathematical error within the meaning of . . . [the statute].[215]

Likewise, in *Farley v. Scanlon*,[216] in which the taxpayers had not included in their return the amount of one monthly pay check on the basis that it had not in fact been received, although the W-2 form prepared by the employer and attached to the return indicated the contrary,[217] the court stated that

> By 'mathematical error' §6213(b)(1) means an error in computing the tax on what the return itself concedes to be income. Disclosed exclusions from gross income even if they seem to the District Director

212. S. REP., *supra* note 11, at 375; H.R. REP., *supra* note 14, at 289.

213. *But see* Phillips v. Stoepler, 421 F.2d 105 (6th Cir. 1970) (failure to mark box on 1962 return as §6201(a)(3) error on 1963 return since the failure resulted in no election to treat 1962 overpayment as credit on 1963 estimated tax); Beckman v. United States, 35 A.F.T.R.2d 75-1373 (D. Kan. 1975) (I.R.S. use of summary assessment procedure proper where taxpayer had made errors in transportation of figures and had utilized negative income figures in computing average base period income for income averaging purposes instead of zero).

214. 131 F. Supp. 626 (N.D. Cal. 1955), *aff'd*, 239 F.2d 901 (9th Cir. 1956).

215. *Id.* at 628.

216. 64-1 U.S. Tax Cas. ¶9371 (E.D.N.Y. 1964).

217. Presumably the taxpayers were on the cash basis method and calendar year period of accounting. *See* I.R.C. §§441(a), (b)(1), (c), 446(a), (c)(1), 451(a). The taxpayers apparently did not receive this monthly pay check because one of them refused to perform an act the employer insisted upon before the employer would release the check. The taxpayers, however, did seem to have disclosed on the return itself the fact of their exclusion of that amount from gross income. 64-1 U.S.T.C. at 91,964.

> to be wrong and wrongheaded, cannot be treated as mathematical error so as to abridge the taxpayers' rights in deficiency procedure. Nor does it matter that the form W-2, prepared by the employer, is affixed to his return by the taxpayer and appears to belie it. That is the employer's view of the facts and not the taxpayers' and . . . it is the view the taxpayers take that determines whether the . . . [Service] is free to assess or is restricted to deficiency procedures.[218]

Congressional Reaction to I.R.S. and Judicial Interpretations

The Committee reports indicate that, in assessing this I.R.S. policy of applying the summary procedure to more than just arithmetical defects, Congress seemingly acknowledged the fact that the scope of the practice was still sufficiently confined so as not to be productive of much taxpayer dispute and so as not to result in substantially reduced administrative costs.[219] On the other hand, there was legitimate concern that the Service's exercise of this power in nonarithmetical cases had exceeded its statutory authorization, the effects of which would have been to deny taxpayers an important procedural right – prepayment judicial review in the Tax Court – and, concomitantly, to create a risk of possible hardship where the I.R.S. action was in error.[220]

In resolving these competing interests Congress concluded that the categories of errors subject to this summary procedure should be expanded and clarified but that taxpayers wishing to contest the I.R.S. action should have access to the Tax Court before having to pay any additional tax alleged to be due.[221] These goals were achieved by broadening the types of errors to encompass those of a nonarithmetical nature, to which the prior Service practice had applied the summary assessment procedure, through the vehicle of including "clerical" error as specifically defined. At the same time, a new special provision for abatement of the assessment was enacted to protect the taxpayer.[222]

MATHEMATICAL OR CLERICAL ERROR ASSESSMENTS UNDER THE T.R.A.

Summary Assessment Procedure

Similar to the prior law, section 6213(b)(1) still permits the I.R.S. to make a summary assessment of additional income, estate or gift tax liability[223] on account of a mathematical error, but the T.R.A. extends this power to a

218. 64-1 U.S.T.C. at 91, 964-65. Similarly, where the question was whether the credit for estimated tax payments made pursuant to a joint declaration of estimated tax should be split equally between the now divorced husband and wife or allocated *in toto* to the husband under their property settlement agreement pursuant to regulation, it was held that the summary assessment procedure was not available because there was a legitimate controversy present. Briscoe v. Phinney, 6 A.F.T.R.2d 5208 (S.D. Tex. 1960), *aff'd*, 297 F.2d 591 (5th Cir. 1962). *See* Treas. Reg. §1.6015(b)-1(b), T.D. 6267, 1957-2 C.B. 797, 802-04.

219. S. REP., *supra* note 11, at 375; H.R. REP., *supra* note 14, at 289.

220. *Id.*

221. *Id.*

222. *See* S. REP., *supra* note 11, at 375-76; H.R. REP., *supra* note 14, at 289-90.

223. See text accompanying notes 4-11 *supra*.

"clerical error" appearing on the return.[224] Under this amended summary procedure the Service must send notice to the taxpayer that such an assessment has been or will be made, the notice being required by the statute to set forth the error alleged and an explanation of it.[225] But, as before,[226] this notice is not to be considered a statutory notice of deficiency, and the taxpayer has no right to file a petition with the Tax Court because of it.[227]

New Procedure for Abatement of Mathematical or Clerical Error Assessment

After the notice of mathematical or clerical error assessment has been sent by the Service, the taxpayer receiving the notice is given the right, within 60 days after the notice was sent,[228] to file a request for abatement of the

224. T.R.A., *supra* note 1, §1206(a)(2).

225. I.R.C. §6213(b)(1) (last sentence). For the details of what the notice should contain by virtue of this statutory requirement, see text accompanying notes 245-246, 251, 262 *infra*.

226. *See* text accompanying note 201 *supra*.

227. I.R.C. §6213(b)(1). But if the taxpayer exercises his rights under the new abatement procedure, the Service will be compelled to issue a statutory deficiency notice if it desires eventually to collect the additional tax, and the taxpayer will then have the opportunity for access to the Tax Court. *See* I.R.C. §6213(b)(2).

228. I.R.C. §6213(b)(1), (2)(A). The statute provides that "[i]f the taxpayer is notified" of the mathematical or clerical error assessment, "such notice shall not be considered as a notice of deficiency for the purposes of [section 6213(a)]." However, the taxpayer may file the abatement request within 60 days after the notice was sent. *Id.* The statutory words "if the taxpayer is notified" would seem to require actual notice, and this conclusion is strengthened by the language of the committee reports referring to the abatement procedure which speaks in terms of a taxpayer "who receives notice of an assessment for additional tax." S. REP., *supra* note 11, at 378; H.R. REP., *supra* note 14, at 292. Query what the effect would be of a notice of mathematical or clerical error assessment which the taxpayer does not receive because of the fault of the I.R.S. (i.e., use of the wrong address due to mistake or negligence as, for example, where the taxpayer has properly notified the Service of a change of address between the time of filing the return and the date the notice was sent). The problem is, of course, how to make the new abatement procedure an effective taxpayer remedy in such a situation. If the taxpayer actually received notice but not within 60 days after the notice was sent, one possible solution would be to allow the taxpayer nonetheless to file his abatement request within 60 days after such actual receipt. This might be based on the theory that the §6213(b)(1) notice of mathematical or clerical error assessment assumes the existence of actual notice and that the abatement request time limit must be construed to start from the date of actual receipt if notice was not timely received due to the fault of the I.R.S. in order to effectuate the abatement remedy. *Cf.* Kennedy v. United States, 403 F. Supp. 619 (W.D. Mich. 1975) ("90 day" letter not sent to last known address and taxpayer did not receive timely actual notice; held that 90 day letter was not null and void, but the date of actual notice should instead be considered the date of mailing).

Because the summary assessment procedure of §6213(b)(1) is an exception to the normal restrictions on assessment of §6213(a), this exception being conditioned by the words "if the taxpayer is notified," if no actual notice is received due to the fault of the I.R.S., reading the Code literally, it would appear that subsequent attempts at collection can be enjoined under §6213(a). This would seem to follow from the fact that the notice of mathematical or clerical error is not considered to be a statutory notice of deficiency "if the taxpayer is notified." If he is not notified, then §6213(a) might literally govern thereby making applicable the "last known address" requirements of §6212(b). See text accompanying note 7 *supra*. But the same language existed in the statute prior to the T.R.A.,

assessment.[229] Upon receipt of such a timely request, the I.R.S. *must* abate the assessment.[230] Thereafter, the Service is relegated to pursuit of the additional tax through the use of the normal deficiency procedures,[231] including the issuance of the statutory deficiency notice constituting the taxpayer's "ticket to the Tax Court" for prepayment judicial review.[232] As a corollary to this abatement procedure, the I.R.S. is prevented from attempting to collect the additional tax summarily assessed during the period that the abatement request can be timely made.[233] Clearly, this procedure should provide a taxpayer confronted with such an assessment adequate protection against either abuses or errors in the use of this summary process because abatement by the Service is mandatory if the statutory prerequisites are met.[234]

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although without the taxpayer's abatement remedy, and it seems unlikely that it would be construed in this manner. Indeed, the committee report phrasing of the abatement procedure in terms of a taxpayer "who receives notice of an assessment for additional tax" could be read as stating a precondition to the exercise of the abatement remedy only and not as bearing upon the validity of the summary assessment procedure. In any event, such a situation would probably arise infrequently in view of the fact that review of returns for this type of error would take place during the initial processing stage which is presumably fairly prompt after the returns are received at the various I.R.S. regional service centers. *See* Report of the U.S. Gen. Acct'g Office to the Joint Comm. on Int. Rev. Tax., How The Internal Revenue Service Selects Individual Income Tax Returns For Audit, p.6 (GGD-76-55; Nov. 5, 1976). This would tend to lessen the chance of timely receipt by the I.R.S. of proper notification of change of address from the taxpayer before the summary assessment was made. But query as to the effect of lack of actual notice, even if the I.R.S. is not at fault, under the above theory?

229. I.R.C. §6213(b)(2)(A). Although the statute does not specifically require it, the committee reports speak of the abatement request in terms of the taxpayer "stating his disagreement with the amount of the assessment." S. REP., *supra* note 11, at 378; H.R. REP., *supra* note 14, at 292.

230. I.R.C. §6213(b)(2)(A). It should be noted that the T.R.A. specifically excepted from this new abatement procedure assessments made on account of erroneous income tax prepayment credits under §6201(a)(3), on account of erroneous credits relating to the use of gasoline, etc. or to earned income under §6201(a)(4), and on account of excessive refunds or credits attributable to tentative carryback adjustments under §6213(b)(3). T.R.A., *supra* note 1, §1206(c)(1)-(2). See text accompanying notes 204-206 *supra*. Accordingly, in case of summary assessments under these special provisions, the taxpayer will not be able to compel abatement. For the effective date of these amendments, see text accompanying note 269 *infra*.

231. See text accompanying note 269 *infra*.

232. See note 21 *supra*.

233. I.R.C. §6213(b)(2)(B). *See* S. REP., *supra* note 11, at 378; H.R. REP., *supra* note 14, at 292.

234. Query as to the consequence of an abatement request made by a taxpayer solely for purposes of delay. This would pose ethical problems for the taxpayer's attorney and would raise the possibility of disciplinary action by the Service against same insofar as practice before the I.R.S. is concerned, at least if the abatement request contains a reason for disagreement with the assessment that is known to be false. *See* Treas. Dept. Circular No. 230, §10.51(b), (i), *as amended through* July 28, 1977. As to the possible consequence of following the abatement request with a petition to the Tax Court solely for delay purposes after the Service has issued the statutory deficiency notice, see I.R.C. §6673 (penalty of up to $500); Lou M. Hatfield, 68 TAX CT. REP. (CCH) 78 (1977).

What Constitutes a Mathematical or Clerical Error and What Should the Notice to the Taxpayer Contain?

In General. As already indicated, the T.R.A. expanded and clarified the categories of errors subject to the summary assessment procedure of section 6213(b)(1) to include not only "mathematical" but also "clerical" error as specifically defined.[235] The touchstone to an understanding of this expansion is an awareness of the legislative belief that in all of the specific categories in question "not only is the error apparent from the face of the return, but [also that] the correct amount is determinable with a high degree of probability from the information that appears on the return."[236] Therefore, in view of this congressional assumption, in cases in which it may not be clear that a particular error comes within the scope of any of these categories, it would seem that it should be required to satisfy both of these general standards before the summary assessment procedure is activated by the I.R.S.

Arithmetical Error. In general accordance with the prior judicial construction of the term "mathematical" error,[237] the summary procedure of section 6213(b)(1) is specifically made applicable to "an error in addition, subtraction, multiplication, or division shown on any return."[238] This category would encompass such errors as, on the gross income side, "$5,000 + $3,000 = $6,000," and, on the deduction side, "$8,000 − $4,000 = $2,000."[239]

235. T.R.A., *supra* note 1, §1206(b).

236. S. REP., *supra* note 11, at 378; H.R. REP., *supra* note 14, at 292. For purposes of the definition of "a mathematical or clerical error appearing on the return," the word "return" means "any return, statement, schedule, or list, or any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 42 or 43." I.R.C. §6213 (f)(1).

237. See text accompanying notes 212-218 *supra*.

238. I.R.C. §6213(f)(2)(A). In a related amendment the Service was given the authority to abate all or part of any *interest* on a deficiency in taxes imposed under chapter 1 of the Code (income tax), but only if the deficiency was attributable in whole or in part to an arithmetical error of the type described in §6213(f)(2)(A), and only if the return was prepared by an officer or employee of the I.R.S. acting in his official capacity to provide assistance to taxpayers in the preparation of income tax returns. I.R.C. §6404(d). The period for which the interest may be abated is up to and including the 30th day following the date of notice and demand by the Service for payment of the underlying deficiency itself. *Id.* It should be emphasized that this abatement of interest authority is apparently only discretionary, not mandatory, and in any event exists only for arithmetical errors within the meaning of §6213(f)(2)(A) and not for the other errors subject to the summary assessment procedure enumerated in §6213(f)(2)(B), (C), (D) and (E). *Id.* The Conference Committee report indicates that abatement should take place only if the amounts in question are below "tolerance levels" to be established by the I.R.S., and the two main factors to be considered in establishing such "tolerance levels" are (1) the costs involved in determining, assessing and collecting the interest, and (2) principles of sound and equitable tax administration. CONF. COMM. REP., *supra* note 133, at 491. Generally, interest on any underpayment of tax runs from the original due date (regardless of any extension) to the date on which payment is received. *Id. See* I.R.C. §§6601, 6621. This provision now permits abatement of that interest in restricted circumstances in which the deficiency arises from the fault of an I.R.S. employee. New §6404(d) is effective for returns filed for taxable years ending after October 4, 1976. T.R.A., *supra* note 1, §1212(b).

239. *See* S. REP., *supra* note 11, at 376; H.R. REP., *supra* note 14, at 290.

The legislative history indicates, however, that the Service should take precautions to make certain that what appears to be an arithmetical error is not simply an error in transcription of a number from another schedule, with the final figure being correct even though the intermediate figure was not.[240] Thus, the committee reports stated that

> [T]here may appear to be an error on the Form 1040 in subtracting itemized deductions . . . from adjusted gross income . . . resulting in an understatement of taxable income. . . . However, examination of the return may show that the correct total of itemized deductions (itemized on Schedule A) would result in the taxable income shown by the taxpayer on the Form 1040.[241]

It is the congressional expectation that prior to commencing the summary assessment process of section 6213(b)(1) the I.R.S. "will check such possible sources of apparent arithmetical errors."[242]

Incorrect Use of I.R.S. Tables. The second type of error coming within the scope of this summary procedure is "an incorrect use of any table provided by the . . . [Service] with respect to any return if such incorrect use is apparent from the existence of other information on the return."[243] This category is illustrated by a taxpayer who checks the filing status box on the front of the Form 1040 for a married individual filing a separate return yet who actually utilizes the lower rates of the tax rate schedule applicable to married individuals filing a joint return in computing his tax liability.[244] Here, although the Service may employ the summary procedure, the notice of mathematical or clerical error to be sent to the taxpayer should not only explain the error and the amount of the additional tax attributable to it but, in addition, include such questions and information as would raise the issue of whether the claiming of a more favorable filing status by the taxpayer would be proper.[245] For example, such a notice might ask if the taxpayer had lived apart from his spouse for the entire taxable year and had a dependent child living with him during that time and for whom the taxpayer claimed the dependency exemption. If such were the case,[246] the taxpayer might be entitled to the head of household tax rates,[247] because the taxpayer would be treated as not being married for that purpose.[248]

240. *Id.*
241. *Id.*
242. *Id.*
243. I.R.C. §6213(f)(2)(B).
244. S. REP., *supra* note 11, at 376; H.R. REP., *supra* note 14, at 290.
245. *Id.*
246. Assuming the return filed was a separate return, the taxpayer would also have had to furnish over one-half of the cost of maintaining his home which was the dependent child's principal place of abode for over one-half of that year in order to be treated as not married. I.R.C. §143(b).
247. The head of household tax rates are more favorable to the taxpayer than those applicable to married individuals filing separately. *Compare* I.R.C. §1(b) *with* I.R.C. §1(d).
248. *See* I.R.C. §§2(b), (c), 143(b); S. REP., *supra* note 11, at 376; H.R. REP., *supra* note 14, at 290-91.

Inconsistent Entries on the Return. The next species of clerical-type error includes "an entry on a return of an item which is inconsistent with another entry of the same or another item on such return."[249] Such an inconsistent entry could occur when the taxpayer on his return details a total of three personal and dependency exemptions correctly added, yet, in determining his taxable income elsewhere on his return, has actually deducted an amount equal to five such exemptions.[250] In this case the I.R.S. could summarily assess the deficiency arising from the apparently excessive deduction, but the notice sent by the Service should, nonetheless, inquire if the taxpayer is in fact entitled to five exemptions.[251]

If it is not apparent from the return itself which of the inconsistent entries is the correct one, then the I.R.S. is not to use the summary assessment procedure initially; the committee reports caution that this category of error does not apply "where the Service is merely resolving an uncertainty against the taxpayer."[252] Thus, if a taxpayer has listed the first names of only two dependent children living with him but has given the total of such children as three (and deducted on that basis), then it is not apparent from the face of the return whether in fact only two such children lived with him or whether three had but the taxpayer simply neglected to list the name of the third.[253] Although the I.R.S. must, of course, resolve the inconsistency, the summary procedure ought not be the vehicle,[254] at least initially; instead, the Service apparently should simply inquire of the taxpayer as to which is correct, and then if the answer is two, it ought to be allowed to assess the deficiency summarily in order to save administrative costs.[255]

Omission of Required Supporting Schedules from the Return. The fourth classification of error to which the summary procedure applies is "an omission of information which is required to be supplied on the return to substantiate an entry on the return."[256] This would cover, for example, the case where an individual taxpayer, who has claimed itemized deductions in lieu of the standard deduction, has neglected to include Schedule A so that his return

249. I.R.C. §6213(f)(2)(C).
250. *See* S. REP., *supra* note 11, at 376-77; H.R. REP., *supra* note 14, at 291.
251. *See* S. REP., *supra* note 11, at 377; H.R. REP., *supra* note 14, at 291.
252. *Id.*
253. *Id.*
254. *Id.*
255. *See generally* S. REP., *supra* note 11, at 375; H.R. REP., *supra* note 14, at 289.
256. I.R.C. §6213(f)(2)(D). The committee reports acknowledged that, on its face, this category of error is not consistent with the general philosophy underlying the definition of "mathematical or clerical error" that the error be apparent from the face of the return and that the correct amount be determinable with a high degree of probability from the information appearing on the return. S. REP., *supra* note 11, at 378 n.1; H.R. REP., *supra* note 14, at 292 n.1. See text accompanying note 236 *supra*. The legislative history indicates, however, that this category of error should be subject to the summary procedure because the taxpayer can adequately protect himself by timely supplying the omitted schedule in response to the I.R.S. notice. In such cases, supplying the omitted schedule constitutes a request for abatement thus making abatement mandatory. *See* S. REP., *supra* note 11, at 377, 378 n.1; H.R. REP., *supra* note 14, at 291, 292 n.1.

as filed shows only a total itemized deduction amount.[257] Likewise, it would apply if a taxpayer claiming either the benefit of income averaging[258] or the maximum tax on earned income[259] has not attached to his return Schedule G or Form 4726, respectively.[260] This provision is clearly intended to apply only when items on the return are required to be supported by schedules which are themselves part of the return and the taxpayer has omitted such a supporting schedule.[261]

Assuming that a taxpayer has failed to attach such a required schedule to his return, the I.R.S. may summarily assess the deficiency attributable to its disallowance of the particular benefit in question, but the notice sent should inform the taxpayer of the particular omitted schedule and encourage him to supply it.[262] If the taxpayer supplies the schedule to the Service in timely fashion, the committee reports indicate that this action is to be automatically treated as a request for abatement under section 6213(b)(2)(A) so that abatement becomes mandatory.[263] Questions as to the sufficiency of any such supplied schedule are to be handled under the usual administrative procedures and not the summary assessment process, except if the schedule makes applicable one of the other categories of "mathematical or clerical error."[264]

Exceeding Statutory Limitations. The final type of mathematical or clerical error is "an entry on a return of a deduction or credit in an amount which exceeds a statutory limit . . . if such limit is expressed (i) as a specified monetary amount, or (ii) as a percentage, ratio, or fraction, and if the items entering into the application of such limit appear on such return."[265] This category thus requires that it be obvious from an examination of the return itself that the statutory limit as to a deduction or credit has been exceeded.[266] Examples would include a single taxpayer claiming more than a $100 dividends received exclusion from gross income for the taxable year[267] and the claiming of a standard deduction in an amount greater than the dollar or percentage limits applicable to that particular individual taxpayer.[268]

257. *See*, S. REP., *supra* note 11, at 377; H.R. REP., *supra* note 14, at 291.
258. *See* I.R.C. §§1301-1305.
259. *See* I.R.C. §1348.
260. S. REP., *supra* note 11, at 377; H.R. REP., *supra* note 14, at 291.
261. *Id.*
262. *Id.*
263. S. REP., *supra* note 11, at 377, 378 n.1; H.R. REP., *supra* note 14, at 291, 292 n.1.
264. *Id.* See note 256 *supra.*
265. I.R.C. §6213(f)(2)(E).
266. *See* S. REP., *supra* note 11, at 377; H.R. REP., *supra* note 14, at 292.
267. *Id. See* I.R.C. §116. The committee reports caution, however, that the Service is not to apply the summary procedure to the situation in which the only dispute is whether the particular dividend qualifies for the §116 exclusion. *See* S. REP., *supra* note 11, at 377-78; H.R. REP., *supra* note 14, at 292. For dividends that do not so qualify, see I.R.C. §§116(b), (c)(1)-(2), (d), 854(a).
268. S. REP., *supra* note 11, at 378; H.R. REP., *supra* note 14, at 292. See I.R.C. §141. Query whether a taxpayer who sustains a casualty loss to property used purely for personal purposes and who claims a deduction thereon in an amount without regard to the $100

Effective Date

These revisions of the summary procedure, including both the expansion of its scope to apply to clerical error and the new abatement provision, are effective with respect to returns (within the meaning of section 6213(f)(1)) filed after December 31, 1976.[269]

CONCLUSION

Although the Tax Reform Act of 1976 has been severely lambasted as being a misguided attempt to simplify and reform the tax laws through the curious device of adding a prodigious number of pages to an already excessively complex and lengthy Internal Revenue Code,[270] the consumer-oriented administrative provisions of the T.R.A. tend to ameliorate this criticism substantially by both creating new, and expanding old, protections for the citizenry in the tax administrative process. This can be seen from such sections as those that increase the confidentiality of returns,[271] permit the public inspection of private letter rulings, determination letters and technical advice memoranda,[272] grant an absolute right of taxpayer intervention (and to stay compliance) in connection with an I.R.S. administrative summons directed to a third-party recordkeeper such as a bank, accountant, lawyer or others as well as limiting the use of the "John Doe" summons,[273] and create a minimum exemption from levy for wages, salary or other income.[274]

Nowhere is this consumer orientation exemplified more clearly than by those changes which increase the procedural protections and remedies available to a taxpayer confronted by a jeopardy, termination or mathematical-clerical error assessment. Indeed, it may be that, unlike prior so-called tax "reform" legislation,[275] the ultimate evaluation of the T.R.A. as a whole will be that it constituted two steps forward and only one step backward, mainly because of the beneficial effects of its administrative provisions.

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non-deductible floor, has committed a §6213(f)(2)(E) error. See I.R.C. §165(c)(3). Although the deduction would be excessive because of the taxpayer's failure to reduce the amount of the loss by the $100 floor, the statute requires that the deduction must exceed a "statutory limit," which seems to imply a maximum limitation, and not a minimum limitation before a deduction is allowed. The only examples given in the committee reports support this interpretation, however much such an error would seem to come within the spirit and intent behind the §6213(f)(2)(E) category.

269. T.R.A., *supra* note 1, §1206(d). For the definition of "return" under section 6213(f)(1), see note 237 *supra*.

270. *See, e.g.*, Arizona Daily Star, Jan. 27, 1977, §A, at 14, col. 6 (Tucson).

271. T.R.A., *supra* note 1, §1202 [I.R.C. §§6103, 7213, 7217].

272. T.R.A., *supra* note 1, §1201 [I.R.C. §6110].

273. T.R.A., *supra* note 1, §1205 [I.R.C. §7609].

274. T.R.A., *supra* note 1, §1209 [I.R.C. §6334(a)(8)-(9), (d)].

275. *See* Andrews & Freeland, *Capital Gains and Losses of Individuals and Related Matters Under the Tax Reform Act of 1969*, 12 ARIZ. L. REV. 627, 689 (1970).