The University of New Hampshire Law Review

Volume 2
Number 2 *Pierce Law Review*

Article 4

June 2004

Tax Simplification: So Necessary and So Elusive

Kenneth H. Ryesky
Solo Practitioner

Tax Simplification: So Necessary and So Elusive

KENNETH H. RYESKY*

> The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought to be clear and plain to the contributor, and to every other person. Where it is otherwise every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favors the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty.[1]

I. INTRODUCTION

Cries for tax simplification have long been heard from presidents,[2] legislators,[3] current and former government officials[4] and the public. The

* B.B.A., Temple University, 1977; M.B.A., La Salle University, 1982; J.D., Temple University, 1986; M.L.S., Queens College CUNY, 1999; member of the Bar, New York, New Jersey and Pennsylvania; currently a solo practitioner Attorney in East Northport, NY, and Adjunct Assistant Professor, Department of Accounting & Information Systems, Queens College CUNY, Flushing, NY; formerly Attorney, Internal Revenue Service, Manhattan District.

Unless otherwise indicated, opinions expressed in this Article are those of the author, and do not necessarily represent the official position of any person, organization or entity with respect to which the author is or has been employed, associated or retained.

1. Adam Smith, *The Wealth of Nations* (Edwin Cannan, ed., Modern Amer. Lib., N.Y., 1937) (originally published in 1789), bk. V, ch. II, pt. II at 778 (Maxim II.).

2. *E.g.* President Ronald W. Reagan, *The President's Tax Proposals to the Congress for Fairness, Growth and Simplicity* at 1 (May 1985) (SuDoc No. Pr 40.2:T19) ("The system is *too complicated* [emphasis in original]"); President Dwight D. Eisenhower, *Annual Budget Message to Congress: Fiscal Year 1960*, 1959 Pub. Papers 36, 41 ("As the budget permits, additional reforms should be undertaken . . . wherever feasible to simplify the [tax] laws.").

3. *See e.g.* 149 Cong. Rec. E851-01 (daily ed. May 1, 2003) (remarks of Rep. Neal); *see also* Dan Balz, *Kerry Blasts Bush's Tax Cuts, Offers Own Plan*, Washington Post A-4 (Dec. 4, 2002) (reporting Senator John F. Kerry's call for, *inter alia*, tax simplification).

judiciary has often expressed its frustrations in comprehending the tax statutes.[5] The Internal Revenue Service ("IRS") itself has had occasion to hesitate and waver in its interpretation and application of the tax statutes,[6] and indeed, several IRS officials have admitted to retaining professional assistance to prepare their personal income tax returns.[7]

Though nearly everyone seems to advocate tax simplification, the goal remains elusive. Tax litigation continues to abound, and sometimes, where

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4. *See e.g.* U.S. Gen. Acctg. Off., *Tax System: Issues in Tax Compliance Burden*, Pub. No. GAO/T-GGD-96-100, 4-5 (Apr. 3, 1996) (finding that of the Internal Revenue Code, coupled with frequent legislative changes, lead to taxpayer confusion, noncompliance, and impediment of IRS's ability to enforce the tax laws.); *Asides: Tax Revision* (Editorials), Wall St. J. 32, col. 1 (Mar. 3, 1987) (quoting Jerome Kurtz, former Internal Revenue Commissioner: "A taxpaying public that doesn't understand the law is a taxpaying public that can't comply with the law."); *Tax Report: Tax-Law Complexity and Poor IRS Service Draw Fire from an IRS Official*, Wall St. J. 1, col. 5 (Feb. 12, 1997) (reporting comments by IRS Taxpayer Advocate Lee R. Monks that tax law complexity is the cause of most taxpayer problems with the IRS); *Tax Schedule D for Dammit!*, Newsday (Long Island, NY) A4 (Feb. 13, 1998) (reporting that the new rules for Schedule D of Form 1040 concededly confused even Robert Kobel, an experienced senior Public Affairs Officer for IRS Brooklyn District).

5. *See e.g.* Judge Learned Hand, *Thomas Walter Swan*, 57 Yale L.J. 167, 169 (1947):

> [T]he words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. *Id*.

See Houston Textile Co. v. Commr., 173 F.2d 464, 464 (5th Cir. 1949) ("This petition brings up for solution one of those difficult jigsaw tax law puzzles all too common in the present deplorable crazy quilt patchwork state of the Internal Revenue."); *Cohen v. U.S.*, 995 F.2d 205, 209 (Fed. Cir. 1993) ("It is rare that tax law bears any recognizable relationship to common sense."); *Tkac v. U.S.*, 2002 U.S. Dist. LEXIS 16657 at *1-2 (Dist. Md. Aug. 1, 2002) ("Government counsel 'dumped' a collection of documents on the record and, in effect, left the Court to sort matters out on its own. Judges (and/or law clerks) unfamiliar with tax matters could find this a daunting task.").

6. *See e.g.* Priv. Ltr. Rul. 5811072330A (Nov. 7, 1958) (reversing prior telegraphic ruling that matches with "unstained wooden sticks, tips of various colors, and . . . contained in a barrel-shaped box" and "long matches with unstained wooden sticks, tips of various colors, and . . . contained in a long cylindrical box" were taxable at the higher 5.5 cents per 1,000 instead of the standard 2 cents per 1,000 under the then applicable I.R.C. § 4211 excise tax on matches (repealed June 21, 1965)).

7. Joy Vestal, *Newsmaker: Carol Landy*, Newsday (Long Island, NY) A22 (Apr. 11, 1995) (quoting Carol Landy, Director of the Internal Revenue Service Center, Brookhaven (Holtsville), NY: "I don't do my own tax return. I'm afraid to make a mistake."); Forbes 30 (Jan. 1, 1996) (reproduced in InfoTrac microfilm reel No. Bus. 84-E-2073 (Information Access Co.)) (reporting that then Internal Revenue Commissioner Fred Goldberg reportedly admitted to Rep. Christopher Cox (R. Calif.) to engaging an accountant to prepare his personal income tax returns); James Toedtman, *Mr. Fix-It to the Rescue: IRS Chief Takes on Agency, Taxpayers, Employees, Critics*, Newsday (Long Island, NY) F8 (Mar. 29, 1998) (reporting that then Internal Revenue Commissioner Charles O. Rossotti admitted to having his taxes prepared by professionals since 1970, when he started his own business); David Cay Johnston, *Need Tax Help? So Do the Experts in Washington*, N.Y. Times § 3, 8, col. 2 (Apr. 14, 1996) (reporting that then Internal Revenue Commissioner Margaret Milner Richardson, a tax lawyer, uses professional help to prepare her income tax return); *see also Daniel v. Commr.*, 74 T.C.M. (CCH) 151 (1997) (reciting that the taxpayer, an IRS collections supervisor, had enlisted the help of a subordinate (albeit a dysfunctional one) in preparing a personal income tax return which reported a casualty loss).

words alone do not suffice, judges augment textual opinions with graphic illustration in order to effectively elucidate their decisions.[8] The tax statutes and regulation books continue to grow ever more voluminous,[9] and the Internal Revenue Code ("IRC")[10] is replete with sections containing exceptions to the stated rule and to the listed exceptions.[11] Not included in the Code proper, however, are several uncodified revenue statutes of significant importance.[12] A single transaction often gives rise to liability for diverse types of taxes.[13]

8. *See* Kenneth H. Ryesky, *From Pens to Pixels: Text-Media Issues in Promulgating, Archiving and Using Judicial Opinions*, 4 J. App. Prac. & Process 354, 360-361 (Fall 2002) and cases cited therein.

9. The familiar U.S.C.C.A.N. annual edition of the Internal Revenue Code (sometimes referred to as the "Red I.R.C.") has grown from a single volume of 1,930 pages in the 1976 edition to two volumes of 1,754 and 1,210 pages, respectively, for the 2003 edition. The U.S.C.C.A.N. companion Federal tax regulations publication ("Red Tax Regs") has grown even more dramatically over the same period, from two volumes totaling 4,508 pages in 1976 to five volumes of 1,964, 1,942, 1,978, 1,891 and 1,641 pages, respectively, in 2003. The foregoing figures do not include the Roman numeral prefatory pages or the index pages.

10. Unless noted otherwise, the statutory section references in this Article will be to the Internal Revenue Code (I.R.C.) of 1986, as amended. The Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2095 (1986), redesignated the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986, retaining consistency in most of the section numbers and providing that except where inappropriate, official reference to one shall entail reference to the other. The 1986 Code was "not intended to change any substantive provision of the [1954 Code] not otherwise modified by [the Tax Reform Act of 1986]," H.R. Conf. Rep. No. 99-841at II-837 (reprinted in 1986 U.S.C.C.A.N. 4925).
Federal taxation is such a specialized area of the law that the Internal Revenue Code, codified at Title 26 of the United States Code, is among tax practitioners and courts widely cited as "I.R.C." instead of "26 U.S.C." *See The Bluebook: A Uniform System of Citation*, § P.5 at 16 and § 12.8.1 at 85 (Columbia L. Rev. Assn., et al., eds., 17th ed., 2000); Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual*, pt. 3, § 14.2(b)(3) at 103 (Aspen L. & Bus. 2000); *see also* Andrea I. Castro, *Overview of the Tax Treatment of Nonprofit Hospitals and Their For-Profit Subsidiaries: A Short-Sighted View Could Be Very Bad Medicine*, 15 Pace L. Rev. 501, 501 n. 1 (1995). By similar convention, regulations issued by the Treasury Department pursuant to the Internal Revenue Code are frequently cited as "Treas. Reg." instead of "26 C.F.R."

11. *See e.g.* I.R.C. § 2035. "Adjustments for certain gifts made within 3 years of decedent's death." *Id.* The general rule in § 2035(a) includes such transfers in a decedent's estate. Sections 2035(b) and 2035(d) are statutory exceptions to the general rule set forth in § 2035(a). Sections 2035(d)(2) and 2035(d)(3), however, set forth exceptions to the exceptions provided in sections 2035(b) and 2035(d); *see also* I.R.C. § 1031 (exception to the general rule that exchange of property is a taxable event, which has several exceptions and qualificatory subparagraphs).

12. *See e.g. In re Hickok*, 552 N.Y.S.2d 49 (N.Y. App. Div. 1990) (dealing with an uncodified tax statute, § 403(3) of Pub. L. 97-34, the Economic Recovery Tax Act of 1981 ("ERTA") relating to wills executed pre-ERTA), leave to appeal denied, 565 N.E.2d 516 (N.Y. 1990); *303 West 42nd St. Ent. Inc. v. IRS*, 181 F.3d 272, 274 (2d Cir. 1999) (determining issues relating to uncodified section of Revenue Act of 1978, Pub. L. No. 95-600 § 530, 92 Stat. 2763, 2885-86 (1978), relating to exemption from penalty for employers who, under certain circumstances, misclassify individuals as other than employees for tax purposes); *Smith v. Commr.*, 275 F.3d 912, 912 (10th Cir. 2001) (ruling on applicability of *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub. L. 105-206, § 3463(a), 112 Stat. 685, 767 (1998), requiring last date to petition Tax Court be included in income tax deficiency notices sent by IRS). Statutes that have not been codified into the Internal Revenue Code nevertheless have the force of law if they appear in the United States Statutes at Large. *Smith*, 275 F.3d 912, 914 n. 1; *see also U.S. Natl. Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

13. *See e.g. Lazarus v. Commr.*, 58 T.C. 854 (1972), *aff'd,* 513 F.2d 824 (9th Cir. 1975).

Several factors conjunctively operate to make and keep our tax system complex. By way of specific examples, this article will discuss some of the dynamics that impede and counteract the tax simplification efforts of the executive and the legislative branches. In doing so, the author does not purport that the cases, statutes, regulations or reports chosen for discussion are the only such examples. Nor does the author intend to woodenly impose any classification system, for the forces at work against tax simplification often appear in many guises and are susceptible to diverse analyses and classifications; moreover, they often interact synergistically with one another.[14] The author seeks here to advance the scholarly and practical understanding as to why taxation continues to resist simplification, by way of identifying and describing the actions of forces that complicate the taxation process.

II. Legislative Enactment of Tax Statutes

A. *Reaction to Judicial Construction of Statutes*

The United States Congress has taken pains to enact confusing, verbose and ambiguous tax statutes requiring complex logical and/or mathematical gymnastics to arrive at the correct tax. Many of these instances are modifications of statutes whose prior incarnations have been interpreted by the courts in a manner not consistent with legislative intent.

Such was the case of the Internal Revenue Code Amendments of 1949 on the heels of the Supreme Court's decision in *Estate of Spiegel v. Commissioner*.[15] There, Chicago merchant Sidney Spiegel placed approximately $1 million in trust for the benefit of his children and grandchildren.[16] There was no provision made for the disposition of the trust in the unlikely event that Spiegel survived all of his children and grandchildren, and so, the possibility of the trust reverting back to Spiegel was actuarially valued at approximately $70 dollars immediately before his death.[17] Nevertheless, because Mr. Spiegel had, by virtue of that remote possibility of reversion, not totally severed his ownership of the trust corpus for tax purposes, the entire amount was included in his estate when he died, increasing the estate tax due by over $450,000.[18] Congress, outraged by the result

14. *See* Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 Wis. L. Rev. 1267 (1990).
15. 335 U.S. 701, 701 (1949).
16. *Id.*; At the time the trust was settled, there was no gift tax applicable and Spiegel's grandchildren were yet to be born. *Id*. at 719-720.
17. *Id.* at 733.
18. *Id.* at 734.

in *Spiegel*, included a provision in that year's IRC amendments that reversionary interests in property must exceed 5% in order to be includible in a decedent's estate.[19] Such Congressional modification of the statute was, to be sure, specifically invited by Justice Burton's dissenting opinion in *Spiegel*.[20] The five percent rule was continued in the IRC's of 1954 and 1986.[21] A qualifying condition was imposed upon what had formerly been a simple rule (albeit a simple rule with a demonstrated potential for harsh draconian consequences). Desirable as it is to prevent situations such as that in *Spiegel* where, comparatively speaking, a miniscule reversionary value would cost the estate a king's ransom, the five percent rule appended to the statute by the 1949 amendment was in a sense a complication, and not a simplification, in the tax statute.

Congressional dissatisfaction with the *Spiegel* decision was easily articulable, but the rationality of Congress's reaction to *Edwards v. Slocum* [22] is not so clear. In 1924, the taxpayer in *Edwards* convinced the United States Supreme Court that Congress did not intend to require complex and reiterative interrelated mathematical calculations in computing the amount of the Federal estate tax.[23] Later that year, when Congress passed the Revenue Act of 1924, it rejected the reasoning in *Edwards* by explicitly requiring that a deductible interest be reduced by any death taxes payable out of it,[24] effectively requiring the reiterative interrelated calculation.[25] The Reve-

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19. Pub. L. No. 81-378, § 7 (1949) (amending the Internal Revenue Code of 1939, § 811(c)). *See also* Sen. Rpt. No. 81-831 (reprinted in 1949 U.S.C.C.A.N. 2172, 2180-2181 (1940)). Also weighing in Congress's action to amend § 811 was the United States Supreme Court decision in *Commr. v. Church's Est.*, 335 U.S. 632 (1949); 1949 U.S.C.C.A.N. at 2179-2180.

20. *Spiegel*, 335 U.S. at 708-709 (Burton, J., dissenting):

> Today's decision adds to the difficulties in this troubled field of estate tax law. It may, however, serve a good purpose if it leads to a simultaneous consideration by Congress of the related fields of income, gift and estate taxation in connection with the creation or transfer of future interests. *Id.*

21. I.R.C. § 2037(a)(2). The subsection reads:

> § 2037(a)(2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property. *Id.*

22. *Edwards v. Slocum*, 264 U.S. 61 (1924), *aff'g,* 287 F. 651, 654 (2d Cir. 1923).

23. *Id.* at 63.

24. Sen. Rpt. 68-398 (1924) (reprinted in 1939-1 C.B. 2, 266, 290 (1924)) (rejecting the *Edwards* case by explicitly requiring that a deductible interest be reduced by any death taxes payable therefrom).

25. *See* Treas. Reg. § 20.2055-3(a)(2); Rev. Rul. 71-232, 1971-1 C.B. 275; s*ee also Hartwick College v. U.S.*, 801 F.2d 608, 611 - 612 (2d Cir. 1986); *Martin v. U.S.*, 923 F.2d 504, 504 (7th Cir. 1991); *Chiles v. U.S.*, 1985 U.S. Dist. LEXIS 12704 **9-14 (Dist. Ore. 1985), *aff'd,* 843 F.2d 367, 367 (9th

nue Act of 1924 was enacted more than two decades before the invention of the automatic sequence electronic computer;[26] accordingly, the "squirrel cage" arithmetic calculations using mutually dependent variables mandated by Congress had to be done manually.

Legislative fixes for problem tax statutes, then, do not always make the taxes simpler.

B. *Political Influence*

This article leaves to others the tasks of setting forth detailed analyses of the political processes that affect tax legislation and/or listing the political artifacts to be found the Internal Revenue Code. There can be no denying, however, that foul or fair, much tax legislation is influenced by special interests.[27]

Some private tax legislation is never codified into the IRC, and thus, has little if any lasting effect upon the tax system. As an example, the Tax Reform Act of 1986 contains an obscure uncodified section known as the Jim Thompson Act.[28] James H. W. Thompson, the legendary American business entrepreneur who developed the silk industry in Thailand, mysteriously disappeared in 1967 while in Malaysia.[29] Thompson's property in Bangkok, initially bequeathed to a nephew, came into the hands of a charitable entity known as the Jim Thompson Foundation, which now operates a museum to preserve Thompson's house and chattels.[30] The indirect transfer to charity apparently did not comply with the requirements for a valid

Cir. 1988); *Est. of Bush v. U.S.*, 618 F.2d 741, 741 (Ct. Cl. 1980); *Est. of Bradford v. Commr.*, 84 T.C.M. (CCH) 337 (2002).

26. In 1946, the United States Army took delivery from the University of Pennsylvania of the Electronic Numerical Integrator and Computer (ENIAC); s*ee e.g. Sperry Rand Corp. v. Bell Tel. Labs., Inc.*, 208 F. Supp. 598, 600-601 (S.D.N.Y. 1962), *appeal dismissed,* 317 F.2d 491, 491 (2d Cir. 1963); Alice R. Burks & Arthur W. Burks, *The First Electronic Computer: The Atanasoff Story* 105 (U. Mich. Press 1988); *see also* Martin H. Weik, "The ENIAC Story," Ordnance, J. of the Am. Ordnance Assn. (Jan-Feb. 1961) (republished at http://ftp.arl.army.mil/~mike/comphist/eniac-story.html) (accessed May 25, 2004).

27. *See e.g.* Philip M. Stern, *The Rape of the Taxpayer* (Random House, 1973); William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy,* 51 Tax L. Rev. 287, 287 (1996); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 Minn. L. Rev. 913 (1987); Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, 37 S. Tex. L. Rev. 15 (1996).

28. *Tax Reform Act of 1986*, P.L. 99-514 § 1423, 100 Stat. 2717.

29. *A U.S. Millionaire Missing in Malaysia*, N.Y. Times 1 (Mar. 28, 1967); The Jim Thompson House, *The Jim Thompson Legacy*, http://www.jimthompsonhouse.org/museum/index.html (accessed May 25, 2004).

30. *Silk Man's Home to Keep His Art,* N.Y. Times 4 (July 8, 1968); The Jim Thompson House, *The James H. W. Thompson Foundation*, http://www.jimthompsonhouse.org/museum/index.html (accessed May 25, 2004).

charitable estate tax deduction,[31] and so, a steep estate tax bill was due to the IRS. With the obvious help of the Thompson family's political connections,[32] the Tax Reform Act of 1986 gave a private remedy to the financial problems of the Thompson's estate and foundation, providing that "[n]otwithstanding any other law or any rule of law (including res judicata, laches, or lapse of time)," the property which was Jim Thompson's and which was transferred to the Foundation would be eligible for the charitable deduction with respect to the Estate Tax.[33]

But some "private relief" tax provisions have actually achieved stealthy codification into the Internal Revenue Code. The old I.R.C. § 1240 is one such example. It read:

> Amounts received from the assignment or release by an employee, after more than 20 years' employment, of all his rights to receive, after termination of his employment and for a period of not less than 5 years (or for a period ending with his death), a percentage of future profits or receipts of his employer shall be considered an amount received from the sale or exchange of a capital asset held for more than 6 months if -
>
> > (1) such rights were included in the terms of the employment of such employee for not less than 12 years,
> > (2) such rights were included in the terms of the employment of such employee before the date of enactment of this title, and
> > (3) the total of the amounts received in one taxable year and after the termination of such employment.[34]

It would seem that very few could fulfill of the conditions of this statutory section, but one person who was able to save approximately $2 million by having his lump sum severance payment taxed as a capital gain instead of ordinary income under the provision was the very person for whom the statute was specifically tailored, Hollywood mogul Louis B.

31. *Cf. e.g. Miss. Valley Trust Co. v. Commr.*, 72 F.2d 197 (8th Cir. 1934) (disallowing charitable deduction from estate for bequest to decedent's sons, subject to prior verbal understanding that sons would give the funds to charities), *cert. denied,* 293 U.S. 604 (1934).

32. Gary Klott, *How Special Breaks Got in the Tax Bill*, N.Y. Times 35 (June 14, 1986). Thompson's maternal grandfather, for whom he was named, was U.S. Civil War general cum diplomat James Harrison Wilson. Jim Thompson House, *Life and Legend*, *Key Influences on Thompson's Early Life*, http://www.jimthompsonhouse.org/life/index.html (accessed May 25, 2004).

33. *Tax Reform Act of 1986*, P.L. 99-514 § 1423**,** 100 Stat. 2717.

34. I.R.C. § 1240, *repealed by Tax Reform Act of 1976*, Pub. L. No. 94-455, § 1911(a)(139), 90 Stat. 1787 (1976).

Mayer.[35] Unlike the Jim Thompson Act, which directly mentions its beneficiary by name,[36] the former I.R.C. § 1240 was totally devoid of any mention of the name of its intended beneficiary.[37]

C. *Statutory Redesignations*

The Bankruptcy Tax Act of 1980[38] made several amendments to the I.R.C. One such amendment respectively redesignated I.R.C. §§ 6103(e)(5) and (e)(6) as I.R.C. §§ 6103(e)(6) and (e)(7).[39] Prior to 24 December 1980, I.R.C. § 6103(e)(6) was the statute that authorized the IRS to permit certain disclosures under the Freedom of Information Act if it were determined "that such disclosure would not seriously impair tax administration."[40] Since 24 December 1980, I.R.C. § 6103(e)(6) has referred to the statutory subsection that permits disclosure to a duly authorized representative of the taxpayer, a provision that had been designated as I.R.C. § 6103(e)(5) before Bankruptcy Tax Act.[41]

The Bankruptcy Tax Act redesignations have made tax research more difficult, confusing and subject to error. A key word search on databases such as LEXIS or Westlaw for I.R.C. § 6103(e)(6), if not properly date restricted, will hit cases that deal with the post-Bankruptcy Tax Act version of the statute[42] and cases that deal with the pre-Bankruptcy Tax Act version of the statute.[43]

Such redesignations can be especially complicative and confusing if they occur during the litigation.[44] As the Fifth Circuit noted in *Chamberlain*,[45]

35. *Stern*, *supra* n. 27, at 40-44; It has been reported that in 1966, Dow Jones CEO Bernard Kilgore fortuitously qualified under all of the conditions set forth in the statute that had been tailored specifically for Louis B. Mayer, and benefited accordingly. *Five-eight and Bald-Headed*, Forbes, June 1, 1987, p. 86.

36. *See supra* nn. 29-33 and accompanying text.

37. The Congressional report on the repeal of I.R.C. § 1240 did, however, mention Louis B. Mayer by name. H.R. Rep. No. 94-658 (1976) (reprinted in 1976 U.S.C.C.A.N. at 3291) ("This amendment repeals the so-called Louis B. Mayer provisions . . . . Since the provision contains narrow restrictions, including the requirement that the rights be created before August 16, 1954, it is believed that it has no applicability today.").

38. P.L. 96-589 (1980).

39. *Id.* at § 3(c)(1).

40. I.R.C. § 6103(e)(7) (2003) (formerly codified at I.R.C. § 6103(e)(6)).

41. I.R.C. § 6103(e)(6) (2003) (formerly codified at I.R.C. § 6103(e)(5)).

42. *Iacoe v. IRS*, 1999 U.S. Dist. LEXIS 12809 at *13 (E.D. Wis. 1999); *Sharer v. U.S.*, 1999 U.S. Dist. LEXIS 2439 at *6 (E.D. Cal. 1999).

43. *E.g. Chamberlain v. Kurtz*, 589 F.2d 827, 834 n. 17 (5th Cir. 1979), *cert. denied,* 444 U.S. 842 (1979); *Kanter v. IRS,* 433 F. Supp. 812, 824 n. 21 (N.D. Ill 1977).

44. *See e.g. Currie v. IRS,* 704 F.2d 523, 526 n. 4 (11th Cir. 1983).

45. *Chamberlain v. Kurtz*, 589 F.2d 827, 834 n. 17 (5th Cir. 1979), *cert. denied,* 444 U.S. 842 (1979).

> After the district court entered its orders herein, Congress substantially amended both the FOIA and the Internal Revenue Code in ways that directly affect this litigation. The Government in the Sunshine Act, enacted September 13, 1976, significantly narrowed the scope of Exemption 3 of the FOIA, while the Tax Reform Act of 1976 enacted October 4, 1976, completely revised section 6103 of the Internal Revenue Code and created a comprehensive scheme for regulating the release of tax returns and information collected to determine tax liability.[46]

Several other paragraphs of I.R.C. § 6103 have similarly been redesignated,[47] as have numerous other paragraphs and subsections of the Code.[48] Moreover, where it makes reference to statutory sections and paragraphs in other titles of the United States Code, the I.R.C's must be amended to reflect redesignations by Congress of such sections and/or paragraphs in the other titles.[49] On account of such Congressional tinkering with statutory redesignations, legal research of the Code for litigation and other purposes is akin to gunning for a moving target from a moving platform.

Diverse factors and forces thus motivate Congress to enact taxation statutes complex in their logic and/or requiring complexities in compliance and administration.

III. COMPLEX REGULATIONS BY THE TREASURY

> Owing to its interaction with more than 250 million taxpayers annually, the Internal Revenue Service . . . has a robust administrative practice, characterized by a panoply of multi-faceted and multi-purposed administrative pronouncements and positions. Among these are Treasury regulations (both interpretative and leg-

46. *Id*.

47. P.L. 100-485, § 701(b)(1) (redesignating I.R.C. § 6103(l)(12) as I.R.C. § 6103(l)(11)); P.L. 98-369, § 453(b)(6) (redesignating I.R.C. § 6103(l)(7) as I.R.C. § 6103(l)(8)); P.L. 97-248, § 356(a) (redesignating I.R.C. § 6103(i)(6) as I.R.C. § 6103(i)(7)); P.L. 97-248, § 358(a) (redesignating I.R.C. § 6103(i)(7)(B) (as redesignated by § 356(a) of the Act) as I.R.C. § 6103(i)(7)(C)).

48. The author's keyword LEXIS search for "redesignated" in the "History" field of 26 U.S.C. cites yielded 588 hits (Jan. 4, 2004).

49. *See e.g.* Museum and Library Services Act of 2003, P.L. 108-81, § 503, 117 Stat. 991, 1003-1004 (Sept. 25, 2003) (amending I.R.C. § 170(e)(6)(b)(i)(III) to reflect the redesignation of 20 U.S.C. § 9122(2)(A) to 20 U.S.C. § 9122(1)(A)).

> islative), revenue rulings, private letter rulings, technical advice memoranda and General Counsel Memoranda.[50]

Federal tax regulations are the product of a relatively complex rule-making process. This is so, in part, on account of the hierarchical structure of and between the IRS and the Treasury Department. The IRS is an organ of the Department of the Treasury, empowered as prescribed by the Secretary of the Treasury (though its chief executive officer, the Commissioner of Internal Revenue, is appointed by the President, subject to approval by the Senate).[51] Nevertheless, it is the Secretary of the Treasury who is ultimately responsible for enforcing and administering the federal tax laws[52] and indeed, many sections of the I.R.C. specifically permit or require "the Secretary" to promulgate regulations.[53]

The process of promulgating federal tax rules and regulations involves personnel from both the IRS and the Treasury Department.[54] Representatives from both the IRS and the Treasury itself collaborate to conduct the public hearings for proposed tax regulations.[55]

Critics have found the tax rulemaking process to be overly complex routine that produces overly complex rules.[56]

> It has now become disgustingly common for young lawyers to spend several years at Treasury working on complex regulations projects—creating obscurity for its own sake—in order to be able later to market their skills at interpreting their own work. The

50. *Vons Companies, Inc. v. U.S.*, 51 Fed. Cl. 1, 3 (Fed. Cl. 2001), *modified,* 2001 U.S. Claims LEXIS 241 (Fed. Cl. 2001). The "panoply of multi-faceted and multi-purposed administrative pronouncements and positions" also includes Determination Letters, Opinion Letters, Information Letters and Closing Agreements. *See e.g.* Treas. Reg. § 601.201. Courts will even give due regard to IRS training materials, and to public or special audience speeches by high-ranking IRS or Treasury officials. *See Vinson & Elkins v. Commr.*, 99 T.C. 9, 58-59 (1992), *aff'd,* 7 F.3d 1235 (5th Cir. 1993).

51. I.R.C. § 7802.

52. I.R.C. § 7801.

53. *E.g.* I.R.C. § 1(f)(1) (mandating that "*the Secretary* shall prescribe" tax tables to phase-out the marriage penalty); I.R.C. §7872(h) ("*The Secretary* shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section") (emphasis added). The author's LEXIS keyword search of the Internal Revenue Code for the phrase "Secretary shall prescribe" yielded 273 hits (Jan. 5, 2004).

54. Treas. Reg. § 601.601; *see also* Carole C. Berry, *Sub S One Class of Stock Requirement: Rulemaking Gone Wrong*, 44 Cath. U.L. Rev. 11, 16–20 (1994).

55. *See e.g.* John E. Hembera, Jr., Witness *Suggests Changes to Proposed Estate Tax Filing Regs*, 90 Tax Notes 583 (Jan. 29, 2001) (reporting that government panel at the Jan. 24, 2001 hearing on proposed changes to Treas. Reg. 20.6081-1, at which the author of this article testified, "consisted of Katherine Mellody and Mary Berman from the IRS and Beth Kaufman from the Treasury Department").

56. *See e.g. Berry*, *supra* n. 54, at 19-20.

> worse the Treasury product, the more valuable the draftsman becomes to private firms and others.[57]

Even a seemingly simple Code section can be made complex by the regulations and pronouncements of the IRS and the Treasury. One example is the 87-word I.R.C. § 107, quite laconic by I.R.C. standards, which reads in its entirety:

> I.R.C. § 107. Rental value of parsonages.
>
> In the case of a minister of the gospel, gross income does not include—
> (1) the rental value of a home furnished to him as part of his compensation; or
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities. [58]

The noun "minister," when not used in the governmental or diplomatic sense, means "[a] person authorized by a *Christian* church to perform religious function."[59] Moreover, the word "gospel" refers collectively to the first four books of the Christian bible.[60] Accordingly, Constitutional issues notwithstanding, a facial reading of the statute would seem to exclude from its ambit a person whose employment consists of carrying out sacerdotal functions of a non-Christian religious denomination whose venerated writings do not include the books of Matthew, Mark, Luke and John.

Thus, a tax attorney who has been retained by a Jewish rabbi would, of course, look first to the applicable Treasury Regulations to determine whether his or her client might benefit from I.R.C. § 107, notwithstanding the language in which the statute has been couched by Congress. The attorney then turns to Treasury Regulation § 1.107-1, relatively wieldable at less than 600 words, which further clarifies that "[I]n order to qualify for the exclusion, the home or rental allowance must be provided as remunera-

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57. Erik M. Jensen, *Food for Thought and Thoughts About Food: Can Meals and Lodging Provided to Domestic Servants be for the Convenience of the Employer?*, 65 Ind. L.J. 639, 645 n. 34 (1990).

58. I.R.C. § 107.

59. *Black's Law Dictionary* 1011 (7th ed., West 1999) (emphasis added). The definition in the 5th and 6th edition reads "[a] person ordained according to the usages of some church or associated body of Christians for the preaching of the gospel and filling the pastoral office." *Black's Law Dictionary* 898-899 (5th ed., West 1979); *Id.* at 996 (6th ed., West 1990).

60. *Merriam-Webster's Collegiate Dictionary* 504 (10th ed., Merriam-Webster, Inc. 1997).

tion for services which are ordinarily the duties of a minister of the gospel. In general, the rules provided in § 1.1402(c)-5 will be applicable to such determination."[61] We are thus directed to Treasury Regulation § 1.1402(c)-5, whose verbosity score tops 1,700 words, and which sets forth various helpful but, by now, complex criteria, including "If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization."[62]

In light of the well known Constitutional prohibitions against religious discrimination, the ambiguous phrase "minister of the gospel" and its elucidation in Treasury Regulation § 1.1402(c)-5(b)(2)(iii) should be construed as a religion-neutral provision allowing a Jewish rabbi and other clergy of other religions the benefit of the parsonage allowance provided in I.R.C. § 107.[63] All doubt on that score was removed in 1978, when the IRS specifically ruled that a Jewish congregational rabbi came within the ambit of I.R.C. § 107,[64] and the IRS subsequently ruled that a Jewish congregational cantor may, under certain circumstances, likewise find shelter in the shadow beneath the wings of § 107.[65] Accordingly, Jewish rabbis and cantors will be pleased to know that they are also considered to be ministers of the gospel, an appellation which would be considered well nigh insulting in any context other than that of I.R.C. § 107.

If the 87 words that comprise I.R.C. § 107 can spawn so much complexity in their supporting regulations, then the potential for trouble posed by Code sections of greater verbosity is as obvious as it is daunting.

IV. COMPLEXITIES IN ADMINISTRATION

In addition to the complexities in identifying taxable events and computing the correct tax, there is also much complexity to be found in tax administration. Even where the taxable event and the amount of the tax are clearly specified, complications can and do arise in the administration of the tax.

61. Treas Reg. § 1.107-1(a).
62. Treas Reg. § 1.1420(c)-5(b)(2)(iii).
63. *See U.S. v. Coombs*, 37 U.S. 72, 76-77 (1838).
64. Rev. Rul. 58-221, 1958-1 C.B. 53.
65. Rev. Rul. 78-301, 1978-2 C.B. 103. This Revenue Ruling was a reversal of the IRS's prior position taken in Rev. Rul. 61-213, 1961-2 C.B. 27, after losing more than once in the Tax Court on the issue. *See Silverman v. Commr.*, 1973 U.S. App. LEXIS 8851 (8th Cir. 1973), *aff'g* 57 T.C. 727 (1972); *Salkov v. Commr.*, 46 T.C. 190 (1966).

The annual half-shekel per capita tax levied while the Temple stood in Jerusalem is instructive. Though this tax was clearly specified as to incidence and amount – one half-shekel to be paid by every man over twenty years of age[66] – there were potentially complicating administrative matters that came into play. The entire amount was to be remitted in a single payment and not in partial payments.[67] A significant number of people paid their tax in coins other than the standard shekel used in the Temple, and provisions were thus necessary to address the exchange of coins.[68] The collected funds were often transmitted via an intermediary, and procedures for doing so were defined,[69] as were consequences for failure of the intermediary to properly pay over the tax.[70] And, of course, given the universal human distaste for paying taxes,[71] there needed to be a tax collection system which efficiently facilitated voluntary compliance but which was prepared to resort to force if necessary to ensure payment of the half-shekel.[72]

Even a conceptually simple tax such as the half-shekel can thus entwine itself in administrative considerations, which, given today's techno-

66. *Exodus* 30:13–15.

67. *Maimonides, Mishneh Torah: Shekalim* ch. 1, ¶ 1 at 94 (Philip Birnbaum, trans., Hebrew Publg. Co., N.Y. 1967) (c. 1180). *Cf.* Ark. Atty. Gen. Op. No. 90-040, 1990 Ark. AG LEXIS 45 (Feb. 1, 1990) (ruling that county tax collectors are not required to accept partial payments of real property taxes); Mich. Atty. Gen. Op. No. 5777, 1979-80 Op. Atty. Gen. Mich. 983, 1980 Mich. AG LEXIS 60 (Sept. 10, 1980) (same).

68. *Talmud (Bab.),* ch. I, Mishnah 6 at 232 (Leo Jung, trans., I. Epstein, ed., Traditional Press, N.Y. 1983) ("The following are liable [to pay] a surcharge [to cover the costs of currency exchange] . . . If a man gave a sela' and received a shekel, he is liable to pay two surcharges."); *cf.* Treas. Reg. §§ 301.6316-1 through 301.6316-8 (setting forth regulations addressing particulars regarding payments, refunds and credits with respect to federal taxes paid in foreign currencies).

69. *See Talmud (Bab.), supra* n. 68, ch. II, Mishnah 1 at 233 ("Shekels may be changed into darics in order to [lighten] the load of the journey [to the Temple]."); *cf.* Treas. Reg. § 1.6302 (setting forth regulations for the use of government depositary banks in connection with certain tax payments).

70. *See Id.*, Mishnah 2 at 235 ("If a man gave his shekel to his fellow to pay it on his behalf, but [his fellow] paid it on behalf of himself . . . [his fellow] is guilty of sacrilege."). *Cf.* I.R.C. § 6672.

71. Ralph Waldo Emerson, *Ralph Waldo Emerson: Essays, Politics* (1844) (reprinted in *Ralph Waldo Emerson: Essays and Lectures* 567 (Joel Porte ed., The Library of America, N.Y. 1983)); *also* in 5 *The Harvard Classics: Essays and English Traits* at 247 (Chas. W. Eliot ed., Collier & Son, N.Y. 1909) ("Of all debts, men are least willing to pay the taxes.").

72. *See Maimonides*, *supra* n. 67, ch. 1, ¶ 9 at 94-95:

> On the first of Adar announcement is made concerning the payment of shekel dues, so that each individual may prepare his half-shekel and be ready to pay it. On the fifteenth of Adar, the money-changers sit down in each town and gently request everyone to pay. They accept from everyone who offers them the half-shekel, without using compulsion against anyone who does not. On the twenty-fifth of Adar, they sit down in the Temple to enforce collection. From then on, payment is obtained by force from those who have not yet paid. Anyone who refuses to pay is subjected to compulsion by levy; a pledge is taken from him forcibly, even the garment he is wearing. *Id.*

logical state of the art, can only further complicate the tax system.[73] Some of these considerations will now be discussed.

A. *Taxpayer Resistance to Taxation*

As previously mentioned, the taxpayer's disdain for the taxation process is nearly always a given.[74] Accordingly, there is normally some degree of resistance to taxation on the part of the payer. Against such a backdrop, fostering the American system of voluntary compliance[75] with the tax laws can be quite a challenge, for it necessarily entails the delicate balance of encouraging the taxpayer to come forward (albeit not necessarily with enthusiasm)[76] against the implicit threat of uncomfortable consequences if the taxpayer fails to discharge his or her duty.[77]

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73. Plastic credit cards as used in modern society were, of course, unknown in the days of the Temple, but one can easily imagine, at such time as the Temple is rebuilt and the half-shekel tax reinstituted, the payment of that tax via credit card. Provisions regulating credit card payments of the half-shekel tax will, no doubt, need to be promulgated. *Cf.* Treas. Reg. § 301.6311-2 (regulating the payment of federal taxes by credit card and debit card).

74. *See Maimonides, supra*, n. 72 and accompanying text.

75. *See e.g. Guide to the Internal Revenue Service for Congressional Staff*, I.R.S. Pub. No. 1273, at 4 (Jan. 1996), SuDoc No. T22.44/2: 1273/996 ("[Voluntary compliance] means that taxpayers are expected to comply with the law without being compelled to do so by action of a federal agent; it does not mean that the taxpayer is free to decide whether or not to comply with the law.").

76. *Belli v. Commr.*, 57 T.C.M. (CCH) 1172, 1181 (1989) ("Expressing one's feelings about the IRS . . . is not an element of tax fraud; if it were, our Federal prisons undoubtedly would be brimming with such 'tax convicts.' We fail to discern any requirement that taxpayers must enjoy or look forward to paying their taxes.").

77. *See* I Edward Gibbon, *History of the Decline and Fall of the Roman Empire*, 493 (John B. Bury, ed., Heritage Press 1946) (originally published 1788) (also available at http://www.earthops.org/gibbons/2dfre10.html (accessed May 25, 2004)):

> The secret wealth of commerce, and the precarious profits of art or labor, are susceptible only of a discretionary valuation, which is seldom disadvantageous to the interest of the treasury; and as the person of the trader supplies the want of a visible and permanent security, the payment of the imposition, which, in the case of a land-tax, may be obtained by the seizure of property, can rarely be extorted by any other means than those of corporal punishments. *Id*

Maimonides, supra n. 67, ch. 1, ¶ 9, at 94-95; Rita Zeidner, *From Grizzly to Cuddly*, Oct. 1992 Govt. Exec. Mag. 12, 17 (quoting Natwar Gandhi, Associate Director for Tax Policy, U.S. General Accounting Office: "Kind words can do a lot, but kind words and a gun can go a lot further."); *see also* Illinois Dept. of Revenue, Letter Ruling IT 92-0191 (GIL) (Oct. 8, 1992), (available at http://www.revenue.state.il.us/legalinformation/letter/rulings/it/1992/920191.pdf (accessed May 25, 2004) ("Penalties and interest are imposed to aid the Department in the timely collection of the proper amount of taxes due. Without the ability to enforce timely payment of tax obligations, the State of Illinois would incur an enormous financial detriment.").

Taxpayer resistance against taxation personnel takes on various forms. At worst, it amounts to physical violence[78] or murder.[79] Not quite reaching such extremes, many individuals known as "tax protesters"[80] engage in all sorts of frivolous and vexatious court actions.[81] Interestingly enough, many of the same frivolous arguments used by tax protesters in the United States have been put to analogous use by tax protesters in other countries.[82] Such tax protest actions do not expedite the taxation process, whether in the United States or elsewhere. Acts of tax resistance, such as refusal to

78. *See e.g. Commonwealth v. Gearing*, 83 Mass. 595 (1861) (Conviction of assault upon deputy sheriff attempting to collect taxes); *Mendenhall v. U.S.*, 119 P. 594 (Okla. Crim. App. 1911) (defendant convicted of assaulting with intent to kill a city marshal in tax collection dispute); *see also Man Shot Official over Stadium Tax*, Pittsburgh Post-Gazette A5 (July 14, 1998) (reporting statements by defendant at sentencing hearing that he had shot a Maricopa County, AZ supervisor because of her support of a sales tax to fund construction of Arizona Diamondbacks baseball stadium).

79. *See e.g. People v. Brown*, 59 Cal. 345, 350-351 (1881) (affirming capital murder conviction in which defendant and other ex-convicts had conspired "to commit larceny, burglary, and robbery, and particularly, to rob the Tax Collector of [Mendocino] county, and to resist by force any who might attempt to interfere with them or to capture them"); *see also* David Lyons, *Trial is in Miami, But Law is Italy's*, Natl. L. J. A8 (May 11, 1998) (reporting trial testimony in Miami, in prosecution of Italian national by Italian judicial system, for murder of Miami sales tax collector who had attempted to collect from defendant's business).

80. *See e.g. Coleman v. Commr.*, 791 F.2d 68, 69 (7th Cir. 1986):

> 'Tax protesters' have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead -- so tax protesters think -- to the elimination of their obligation to pay taxes. The government may not prohibit the holding of these beliefs, but it may penalize people who act on them. *Id.*

81. *See e.g. Burnett v. Commr.*, 68 T.C.M. (CCH) 811, 813 (1994) ("Petitioner testified that he has not filed a tax return since 1980, and plans to litigate each and every notice of deficiency he receives with the same arguments."); *Harrell v. Commr.*, 75 T.C.M. (CCH), 2458, 2460 (1998) ("Petitioner has been before this and other courts on income tax matters on numerous occasions, as shown in table 1."), *aff'd,* 1999 U.S. App. LEXIS 19886 (7th Cir. 1999); *Webb v. Commr.*, 66 T.C.M. (CCH) 1273 (1993), *aff'd,* 95-1 U.S.T.C. (CCH) ¶ 50,127 (9th Cir. 1995); *see also* Marcus Farbenblum, *The IRS and the Freedom of Information and Privacy Acts of 1974* 43-56 (1991) ("The Tax Protest Movement").

82. *Cf. e.g. O'Toole v. Commr.*, 84 T.C.M. (CCH) 471 (2002) (rejecting petitioner's claim that the IRS assessment was invalid because it omitted the apostrophe in his name) with *Commr. of Inland Revenue v. Boyton*, 2001 NZDCR LEXIS 170, D.C. REG. 1126 (Dist. Ct. Upper Hutt, 2001) (rejecting defendant's argument that the New Zealand Inland Revenue assessment was invalid because it spelled his name "Craig Gordon Boyton" instead of ''Craig-Gordon: Boyton''(with hyphen and colon as indicated)); *cf. e.g. Lister v. U.S.*, 2003 U.S. App. LEXIS 20430 (9th Cir. 2003) (rejecting tax protester's arguments that the Federal Income Tax is unconstitutional) *with Matchett v. Dep. Commr. of Taxn.*, [2000] NSWSC 975, 2000 NSW LEXIS 350 (rejecting Australian tax protester's arguments that the Australian Income Tax Act is unconstitutional); *cf. e.g. Marsh v. Commr.*, 79 T.C.M. (CCH) 1327 (2000) (rejecting tax protester argument that native Hawaiians are not obligated to pay taxes), *aff'd*, 2002 U.S. App. LEXIS 1354 (9th Cir. 2002); *Avery-Carter v. Commr.*, 66 T.C.M. (CCH) 1596 (1993) (same, African-American); *Hill v. Commr.*, 70 T.C.M. (CCH) 13 (1995) (same, Native-American) *with Kaihau v. New Zealand Inland Rev. Dept.* [1990] 3 NZLR 344 (Highcourt, Auckland, 1990) (rejecting tax protester's argument that he is exempt from New Zealand taxation because he is a Maori).

divulge a Social Security Number to a prospective employer,[83] or filing altered tax forms[84] obstruct the bureaucracy that administers the taxes. Accordingly, those who seek to simplify our taxes must reckon with resistance to taxation by the taxpayer (or non-payer).

B. *Management of Sociological Considerations*

The IRS (or, for that matter, a state or local taxation authority) is not only a fiscal system and a technical system, but is also a social system; and, as is the case with other business or governmental organizations, the social interactions of the taxation personnel, whether amongst themselves or with the public, cannot be ignored when implementing taxation policy.[85] Positive public perceptions are critical to the performance of the IRS's mission.[86] Thus, IRS employees, and employees of state taxation authorities, must be held to a higher standard in their personal compliance with the tax laws in order to foster tax compliance from the public at large,[87] and to maintain order within the ranks of the taxation authority itself. [88]

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83. *See Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000), *cert. denied*, 531 U.S. 895 (2000); *Baltgalvis v. Newport News Shipbuilding, Inc.*, 132 F. Supp. 2d 414 (E.D. Va. 2001).

84. *Williams v. Commr.*, 114 T.C. 136 (2000).

85. *See e.g.* John V. Murray & Frank A. Stickney, *The Human Factor in Matrix Management*, in *Matrix Mgt. Sys. Handbook* 231–254 (David I. Cleland, ed., Van Nostrand Reinhold Co. 1984).

86. *See e.g.* Pres. Harry S. Truman, *Annual Message to Congress: Fiscal Year 1953*, 1953 Pub. Papers 63, 112 ("The maintenance of public confidence in the tax collection process is essential to our tax system.").

87. *See* Kenneth H. Ryesky, *Of Taxes and Duties: Taxing the System with Public Employees' Tax Obligations*, 31 Akron L. Rev. 349, 357-365 (1998).

88. *See* Brief for Respondent at 55, *Kooi v. Chu*, 517 N.Y.S.2d 601 (N.Y. App. Div. 3d Dept. 1987) (No. 53842) ((microformed on Fiche No. 3-87-466, Micro Copy, Inc., Rochester, NY) (Affidavit of Roderick G. W. Chu, New York State Commissioner of Taxation & Finance, at 8)):

> All individuals employed by the Department [of Taxation & Finance] are either directly or indirectly charged with the responsibility of administering and enforcing the State's tax laws. It is vital to the integrity of the Department and to the equitable, fair, and effective administration of the State's tax laws that all officers and employees of the Department performing such duties be above reproach with respect to the requirement to file New York State personal income tax returns pursuant to Tax Law § 651. Toleration of violation by any such officer or employee carries with it *the risk of a creeping rot within the Department itself*, with a consequent serious adverse effect on the morale of those officers and employees within the Department who are in full compliance with the tax laws [emphasis added]. *Id.*

The disintegration of order and morale amongst taxation personnel has long been known to imperil the stability of any government, democratic or otherwise. *See* 2 M. Rostovtzeff, *The Social & Economic History of the Hellenistic World* 724-726 (Clarendon Press, Oxford, 1967) (discussing how conflict and chaos among tax collection hierarchy contributed to the decline and fall of the Ptolemaic dynasty in Egypt).

Confidentiality of tax return information is necessary "to facilitate tax enforcement by encouraging the taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes."[89] This is especially so where the tax involved is the income tax as we know it in America, because the tax examiner is typically privy to, or else can readily deduce, certain personal information such as names of family members, employer, medical situation, the political, social and religious leanings of the taxpayer's favorite charities (and, by inference, such leanings of the taxpayer), and other personal data that would be unavailable and irrelevant to the administration of an impost such as an excise tax or a sales tax paid at a merchant's cash register. Accordingly, it is hardly surprising that I.R.C. § 6103, dealing with the confidentiality and disclosure of returns and return information, is a very verbose and complex statutory section whose legislative history is replete with frequent amendment and modification.[90] Even where taxpayer information is not disclosed outside the IRS, the widespread "tax snooping"[91] abuse by IRS personnel has so imperiled public confidence in the system that Congress enacted the Taxpayer Browsing Protection Act to criminalize the willful unauthorized access of taxpayer files by IRS employees and others, and to provide a cause of action for damages for taxpayers whose tax information is so accessed.[92]

The effectiveness of the IRS's control against abusive actions by its agents and employees against the taxpayer has oft been questioned.[93] A

89. *Webb v. Standard Oil Co. of Cal.*, 319 P.2d 621, 624 (Cal. 1957).

90. *See supra* nn. 39-46 and accompanying text. There were no confidentiality privileges for taxpayers under the first effective Federal income tax, instituted to help finance the Civil War, which in fact provided that "lists, valuations and enumerations . . . may be examined; and said lists shall remain open for examination for the space of fifteen days after notice shall have been given . . . ." *Act of July 1, 1862*, 12 Stat. 432, 437. From that time until the Tax Reform Act of 1976, the confidentiality of tax returns was subject to the prevailing winds of political and administrative forces and sentiments. For a detailed chronology of the tax return confidentiality practices and theories in force prior to the Tax Reform Act of 1976, see S. Doc. 94-266 at 821-1135 (1975).

91. 143 Cong. Rec. E693 (daily ed. Apr. 15, 1997) (remarks of Rep. Paxon).

92. I.R.C. §§ 7213(a)(2), 7213A and 7431 (enacted under the *Taxpayer Browsing Protection Act of 1997*, P.L. 105-35 (Aug. 5, 1997) 110 Stat. 1104).

93. *See e.g. Dixon v. Commr.*, 316 F.3d 1041, 1046, *opinion editorially corrected at* 2003 U.S. App. LEXIS 4843 (9th Cir. 2003) (noting that the secret settlement deals made by IRS trial attorneys, to the detriment of approximately 1,300 taxpayers "amounted to a fraud on both the taxpayers and the Tax Court"); *Siddiqui v. U.S.*, 359 F.3d 1200, 1201 (9th Cir. 2004) (reciting illegal disclosure of personal tax information by IRS agent at retirement luncheon attended by approximately 100 people); *Straight v. Commr.*, 74 T.C.M. (CCH) 1457, 1466-1467 (1997) (imposing sanctions on IRS for admitted alteration of document, and lying about it, by IRS agent); *Abernathy v. U.S.*, 150 B.R. 688 (Bankr. N.D. Ill. 1993); U.S. Gen. Acctg. Off., *Tax Administration: IRS Inspection Service and Taxpayer Advocate Roles for Ensuring that Taxpayers are Treated Properly*, Pub. No. T-GGD-98-63 (Feb. 5, 1998) (statement of Lynda D. Willis, Director, Tax Policy and Administration Issues, General Government Division).; 137 Cong. Rec. S11813 (Aug. 1, 1991) (statement of Sen. Symms) ("As the pressure on the IRS grows year after year to collect every last dollar due to the Treasury, the incidents of taxpayers abuse by the Service

tax administration agency such as the IRS, which by nature requires in its temperament some attributes of a bulldog in order to be effective,[94] has an indubitable need for statutory, regulatory and judicial leashes. Paradoxically, while such control mechanisms certainly serve to complicate the taxation process; not having such controls would also ultimately cause complications in the taxation process.

C. *Bureaucratic Dysfunction*

The IRS is a bureaucracy, and it functions (and malfunctions) accordingly. Many reported incidents of dysfunction within the IRS occur because it is a bureaucracy, and not because its mission is taxation. For example, there can be significant problems for the taxpayer where the cognizant bureaucrat, [95] such as an Appeals Officer, proposes a particular settlement with the taxpayer but lacks the authority to bind the IRS in such a settlement,[96] or when one office within the IRS refuses to give relevant information to another.[97] Even a conceptually simple matter can cause difficulties, as when a taxpayer timely delivers a payment or document to the IRS, but the cognizant bureaucrat does not actually receive it until after the filing or payment deadline.[98] There are also reported incidents of the IRS and other taxation authorities losing or misplacing tax returns and other documents,[99]

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grow as well."); 126 Cong. Rec. 14415 (1980) (remarks of Sen. Baucus) ("Numerous horror stories have been reported in Montana and elsewhere . . . Fear of the IRS is based . . . on its well-earned reputation for inconsistency and unpredictability"); U. S. Gen. Acctg. Off., *Tax Administration: IRS Can Strengthen Its Efforts to See That Taxpayers Are Treated Properly*, Pub. No. GAO/GGD-95-14 (Oct. 1994); *see generally* Shelley L. Davis, *Unbridled Power* 196 (HarperBusiness 1997).

94. *See supra* n. 77 and accompanying text.

95. The author, a former IRS bureaucrat, imputes no negative or disparaging connotations to the word "bureaucrat" or to public sector career choices.

96. *See e.g. Est. of Jones v. Commr.*, 795 F.2d 566 (6th Cir. 1986); *David v. Commr.*, 66 T.C.M. (CCH) 1774 (1993), *aff'd*, 43 F.3d 788 (2d Cir. 1995).

97. *Berg v. Commr.*, 65 T.C.M. (CCH) 2004 (1993) (finding that IRS did not mail the notice of deficiency to taxpayer's last known address where Special Agent in IRS Criminal Investigation Division knew taxpayer's latest address, but refused to divulge same to Examination Division).

98. *See e.g. Hull v. U.S.*, 146 F.3d 235, 240 (4th Cir. 1998) (ruling that receipt in the mailroom constitutes filing, regardless of the date the document is actually delivered to the cognizant IRS bureaucrat); U.S. Gen. Acctg. Off., *Multiple Collection Notices Sent to Individual Taxpayers*, Pub. No. GAO/GGD-00-55, 5 (Apr. 2000) (describing delays in recording a tax payment after receipt as one cause of multiple collection notices being sent to taxpayers).

99. *Andrew Crispo Gallery, Inc. v. Commr.*, 16 F.3d 1336, 1339 (2d Cir. 1994) (noting that IRS lost evidence, thereby prejudicing taxpayer); *In re Ashe*, 228 B.R. 457 (C.D. Cal. 1998) ("the IRS destroyed the file because the two year mandatory retention period had expired. Nor could IRS Appeals Officer Lee recall any dealings, conversations, or correspondence with Appellee about his case."); *Palihnich v. Commr.*, 86 T.C.M. 488 (CCH) (2003) (abating interest that accrued during the nearly 11 year period when the IRS Brookhaven Service Center lost the taxpayers' tax returns); *Cook v. U.S.*, 52 Fed. Cl. 62, 67 n. 5 (Fed. Cl. 2002), *appeal dismissed*, 2002 U.S. App. LEXIS 17804 (Fed. Cir. 2002); *Downing v. Commr.*, 118 T.C. 22 (2002); U.S. Gen. Acctg. Off., *Tax Administration: Information on IRS' Philadelphia Service Center*, Report B-221000 at 31-40 (Nov. 22, 1985) (reporting, *inter alia*, several sub-

and losing track of tax payments tendered by taxpayers.[100] While these types of incidents are not directly a function of any particular incomprehensible and verbose tax imposition statute, they nevertheless complicate the taxation process.

1. *Incompatibility of the tax bureaucracy with the tax statutes it administers*

Many of IRS's bureaucratic dysfunctions directly result from incompatibility between the bureaucracy and the statute it administers.[101] As an example, an Estate Tax return, filed at the IRS Service Center after its due date, is reviewed by a Service Center bureaucrat who, having inadequate expertise in Estate Tax matters, accepts the taxpayer's explanation and waives the lateness penalties. Later, after the return is sent to an IRS field office away from the Service Center, it again is reviewed by an Estate Tax Attorney who, being equipped with special expertise and training,[102] finds the taxpayer's explanation insufficient and reimposes the lateness penalties.[103] Were the bureaucracy better geared to Estate Tax returns, perhaps

stantiated incidents of unprocessed tax returns and/or remittance checks being placed in trash receptacles); *see also Matter of Stephen Walter Kaminski*, N.Y.L.J. 33, col. 5 (Jan. 22, 1996) (Surrog. Ct. Suffolk Co.) (noting that New York State Department of Taxation and Finance twice lost tax refund submission, thus necessitating a third submission of the paperwork).

100. *E.g. Matter of Christian Lotterer*, N.Y.S. Div. of Tax Appeals, Determination DTA No. 819042 (Nov. 26, 2003) (available at http://www.nysdta.org/Determinations/819042.det.htm) (accessed May 25, 2004) (rejecting denial by New York State Dept. of Taxation and Finance that tax had been paid, in light of taxpayer's canceled check drawn to New York State Department of Taxation and Finance, and entry of same in bank statement).

101. *Cf.* U.S. Gen. Acctg. Off., *Tax Administration: Ways to Simplify the Estimated Tax Penalty Calculation*, Pub. No. GAO/T-GGD-98-96, 11 (1998) (concurring in the IRS Commissioner's position that Form 2210 should not be revised until recommended legislative action is implemented to amend the relevant statute).

102. *See Sack v. Bentsen*, 1995 U.S. App. LEXIS 5714, n. 12 (1st Cir. 1995) (upholding, *inter alia*, IRS practices calculated to recruit persons having "up-to-date knowledge of legal principles and agency practices" in Estate Tax Attorney positions); *Collins v. Commr.*, 32 T.C.M. (CCH) 890 (1973) (noting that the IRS had at one point upgraded its employment qualifications to require a law degree for new hires for examination of Estate and Gift Tax returns); *see also Bass v. Bragalini*, 207 Misc. 1055, 1057, 143 N.Y.S.2d 490, 493 (Sup. Ct. Albany Co. 1955) (noting specialized nature of Estate Tax Attorney position in the New York State Department of Taxation and Finance bureaucracy), *aff'd,* 286 App. Div. 944, 143 N.Y.S.2d 494 (3d Dept. 1955), *appeal denied* 309 N.Y. 1032 (1955); *Internal Revenue Service, Estate and Gift Tax Law for Attorneys, Student Text* Unit 1, ch. 1, Forward at page 1-1 (IRS Training Material 3129-22, TPDS 85576 (Jan. 1986)) ("You are about to embark on a career which deals with one of the most specialized areas of the tax law.").

103. *See e.g. Est. of Wilbanks v. Commr.*, 94 T.C. 306, 311-312 (1990) ("Wilbanks I") (denying summary judgment to the taxpayer), *reconsideration denied,* 59 T.C.M. (CCH) 896 (1990) ("Wilbanks II"), *judgment on merits for respondent*, 61 T.C.M. (CCH) 1779 (1991) ("Wilbanks III"), *aff'd,* 953 F.2d 651 (11th Cir. 1992); *Serv. Bolt & Nut Co. Trust v. Commr.*, 724 F.2d 519, 524-525 (6th Cir. 1984); *Reynolds v. Saadi*, 2003 Cal. App. Unpub. LEXIS 10489 at *4 (Cal. App. 2003) (reciting fact that IRS reimposed previously abated late payment penalty on estate tax return); Priv. Ltr. Rul. 9111005 (Dec. 6, 1990); Priv. Ltr. Rul. 83-11-004 (Nov. 18, 1982).

by having a more specifically trained bureaucrat review the Estate Tax Return for lateness penalties at the Service Center in the first place, then the bureaucrat might have imposed the penalty initially, thus avoiding the bureaucratic flip-flop.

The IRS's bureaucracy has had significant compatibility problems with the statute that provides for the filing of joint personal income tax returns by married couples.[104] Though there are two individual taxpayers involved in a joint income tax return filing, each with his or her own individual tax situation, the IRS bureaucracy treats each tax return as it would one individual taxpayer.

> The standard procedure of the IRS is to use the social security number of the first taxpayer listed on a return as the means of tracking information about that return and that taxpayer in the IRS computer system. Specifically, the standard procedure of the IRS is to use the social security number of the first taxpayer as the means for determining the last known address for a taxpayer that is available in the IRS computer system. The social security number of the second taxpayer listed on a joint return is generally not used by the IRS for tracking purposes in its computer system.[105]

In tracking only one "primary" taxpayer[106] when there actually are two taxpayers who filed the return, the IRS can and does easily malfunction if the marriage disintegrates. Refund checks have been issued to one ex (or soon-to-be ex) spouse when the income to which the refunded tax was at-

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During the author's service with the IRS as an Estate Tax Attorney, he had several occasions to reimpose lateness penalties that had previously been abated by another bureaucrat at the Service Center when the returns were initially filed. The particulars of those cases are not matters of public record, accordingly, identification here of the taxpayers involved would be highly inappropriate. *See* I.R.C. § 7213(a)(1) (prohibiting, *inter alia*, former IRS employees from disclosing taxpayer information, under pain of $5,000 fine and/or 5 years imprisonment, together with costs of prosecution).

104. I.R.C. § 6013. It is ironic that the joint spousal personal income tax return was initially intended to be a solution to another problem. Prior to its institution, married couples residing in community property states could evenly split their income between the two spouses and take advantage of the lower tax brackets. Accordingly, oil millionaires and other magnates in non-community property states such as Oklahoma were relocating to community property states such as Texas, causing political, social and economic turmoil. *See Stern*, *supra* n. 27, at 119-134. Moreover, the problems of a clueless spouse's joint liability with his or (usually) her wrongdoing mate (or ex-mate) in tax matters have prompted Congress to enact a statutory protection for innocent spouses, I.R.C. § 6015, which has spawned its own complicated regulations and litigation.

105. *U.S. v. Shafer*, 1996 U.S. Dist. LEXIS 5616, finding of fact no. 18 at *5 (E.D. Pa. 1996) (citations to transcript omitted).

106. The first taxpayer listed on the joint income tax return, whose Social Security Number is used to track the return through the IRS bureaucracy, is often referred to as the "primary" taxpayer. *See e.g. U.S. v. Nielsen*, 1 F.3d 855, 857 (9th Cir. 1993), *cert. denied,* 525 U.S. 827 (1998) *Wallin v. Commr.*, 744 F.2d 674, 677 (9th Cir. 1984). More often than not, the "primary" is the husband.

tributable was income of the other spouse or ex-spouse.[107] Interest paid by the IRS has been reflected on the Form 1099 issued to the inappropriate spouse.[108]

An IRS disclosure officer has admitted that disclosing whether a prospective juror in a criminal tax trial has been the subject of an IRS tax audit[109] may be more difficult for the IRS by "a change of name and the fact that a prospective juror may have filed joint returns, while the records reflect the other spouse's social security number as primary."[110] Yet, in another criminal tax case, an IRS disclosure officer testified that it was "*not* necessary that the name and social security number of the potential juror's spouse be provided in order for the IRS to accomplish a search of its records"[111] [emphasis added]. Reconciling the two incidents, one can deduce that while it the IRS may have trouble tracking the tax history of a non-primary spouse, the information nonetheless exists in its database and, through creative and diligent data searching techniques, it is *possible* to find the non-primary spouse information. Indeed, the Ninth Circuit found that

> [a] taxpayer's social security number appears in only one of two locations on the tax return—in the primary taxpayer's box or in the spousal taxpayer's box . . . . The IRS has the ability to perform a computer search of both sets of social security numbers in order to discover a subsequent return filed under a different name or in a different state.[112]

The IRS's collection system, "keyed exclusively to the name and Social Security number of the spouse who appears first on the joint return,"[113] has gotten the IRS into trouble for violating the automatic stay in a bankruptcy proceeding[114] by levying a debtor's wages.[115] And the bureaucracy is so fixated with the Social Security Numbers ("primary" or otherwise) that the IRS lost a Tax Court case in which it argued that a custodial par-

107. *U.S. v. MacPhail*, 2003 U.S. Dist. LEXIS 11545 (S.D. Ohio 2003); *Hathaway v. U.S.*, 1993 U.S. Dist. LEXIS 5791 (W.D. Wash. 1993); *Williamson v. U.S.*, 1979 U.S. Dist. LEXIS 11450 (D.N.J. 1979).
108. *Grimland v. Commr.*, 66 T.C.M. (CCH) 402 (1993).
109. I.R.C. § 6103(h)(5) formerly required that the IRS disclose whether a prospective juror in, *inter alia*, a criminal tax trial has been the subject of an IRS tax audit. That provision has since been repealed. P.L. 105-34, § 1238, 111 Stat. 788, 1038 (Aug. 5, 1997).
110. *U.S. v. Nielsen*, 1 F.3d 855, 857 (9th Cir. 1993), *cert. denied,* 525 U.S. 827 (1994).
111. *U.S. v. Howell*, 1996 U.S. Dist. LEXIS 10515 at *26 (D. Kans. 1996).
112. *Wallin v. Commr.*, 744 F.2d 674, 677 (9th Cir. 1984).
113. *In re Washington*, 172 B.R. 415, 419 (Bankr. S.D. Ga. 1994).
114. 11 U.S.C. § 362(a) (2000).
115. *In re Washington*, 172 B.R. at 418.

ent's written declaration releasing a claim to a dependency exemption [116] must have the Social Security Numbers of both parents.[117]

2. *Transactions between bureaucracies*

Bureaucratic dysfunction can also occur when two bureaucracies interface with one another. One bureaucracy with which the IRS has significant interface is the United States Postal Service, a bureaucracy that certainly is not immune to dysfunction. Postmarks applied by the Postal Service are relevant and often critical to facilitating a taxpayer's compliance with the tax laws,[118] but the Postal Service has applied illegible postmarks to mailpieces,[119] postmarks printed partially off the mailpiece,[120] and have delivered mailpieces with no postmark at all.[121] A postmaster has been known to change a taxpayer's mailing address twice in a thirteen month period.[122] Additionally, the detinue of mail to the IRS by the Postal Service has caused "potentially serious ramifications" for some taxpayers.[123]

In 1966, well before the Internet, Congress intended that the public would use the postal system to file tax returns and other documents with the IRS.[124] Three decades later, as new technologies became reality, Congress tasked the Treasury Department to develop a "return-free tax system" in which electronic filing became the norm.[125] But if electronic tax filing simplifies the return filing by circumventing the Postal Service and its dysfunctions, it has also created a whole new administrative necessity,

116. I.R.C. § 152(e)(2).

117. *Boltinghouse v. Commr.*, 85 T.C.M. (CCH) 1277 (2003).

118. I.R.C. § 7502. Proof of a postmark is further discussed *infra* at notes 187 through 197 and accompanying text.

119. *See e.g. Skolski v. Commr.*, 351 F.2d 485, 487 (3d Cir. 1965); *Berry v. Commr.*, 67 T.C.M. (CCH) 2983, 2983 (1994); *Dorsey v. Commr.*, 65 T.C.M. (CCH) 2474, 2476 (1993); *Minuto v. Commr.*, 66 T.C. 616, 617 (1976); *Augustin v. Gilot*, 606 N.Y.S.2d 514, 515 (N.Y. App. Term. 1993); *In re Joshua T.*, 2001 Cal. App. Unpub. LEXIS 553, n. 4 at *5 (Cal. App. 2001); *Migliore v. Migliore*, 717 So. 2d 1077, 1078 (Fla. App. 1998).

120. *See Selvaggi v. Dir. of Revenue*, Delaware Tax App. Bd., Docket No. 952 (July 12, 1991).

121. *See e.g. Fallen v. U.S.*, 378 U.S. 139 (1964); *Casqueira v. Commr.*, 42 T.C.M. (CCH) 656, 657 (1981); *Sylvan v. Commr.*, 65 T.C. 548 (1975); *Higby v. Commr.*, T.C. 1973-176, (1973); *Rappaport v. Commr.*, 55 T.C. 709, 710 (1971), *aff'd*, 456 F.2d 1335 (2d Cir. 1972).

122. *Sicari v. Commr.*, 136 F.3d 925 (2d Cir. 1998).

123. *See* Arnold Abrams, *A Taxing Situation; IRS Says Postal Service Held Up Its Mail*, Newsday (Long Island, N.Y.) 2 (July 28, 1990) (reporting the IRS District Director's protest that the Garden City, NY Post Office detained mail to the newly opened Garden City office of the IRS).

124. *See e.g*. Sen. Rpt. 89-1625 at 1-2 (1966) (reprinted in 1966 U.S.C.C.A.N. 3676, 3683-3684) (permitting Treasury Department to require tax returns to be mailed to service center).

125. Pub. L. No. 105-206, §§ 2001 et seq. (July 22, 1998). The term "return-free tax system" is a misnomer, inasmuch as taxpayers will continue to be required to provide the Government a report of computations for the taxes owed. A more accurate terminology for the Congressional ideal would be "paper-free tax return system."

namely, developing and enforcing qualification criteria for those who are authorized to offer electronic filing services to the public. Indeed, the IRS already has had occasion to suspend or exclude some vendors from its Electronic Filing Program.[126]

It is clear, then, that tax simplification means more than removing the excess verbiage associated with conjunctive logical operators such as "if", "and," "or," "subject to," and "except as provided" from the taxation statutes and regulations.[127] There can be no real tax simplification if the bureaucratic apparatus that administers the tax is not compatible and consonant with the statutory taxation scheme, and with the other bureaucracies with which it must interface in administering the tax.

D. *Administrative Discretion of the IRS*

1. *Discretion in collecting delinquent taxes*

Notwithstanding the dangers of reposing discretion in the tax collector as to the *amount* of the tax,[128] it is necessary that individuals in the taxation bureaucracy have discretion in certain administrative matters. Indeed, the much despised IRS tax audit is based upon the principle that the Secretary of the Treasury, able to personally accomplish only so much in a 24-hour day, has been given authority and discretion which, in turn, are delegated all the way down to the IRS agent in the field.[129]

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126. *Brenner Income Tax Ctrs., Inc. v. Dir. of Practice for the IRS*, 87 F. Supp. 2d 252 (S.D.N.Y. 2000) (upholding IRS suspension from Electronic Filing Program of a tax preparer); *Forehand v. IRS*, 877 F. Supp. 592 (M.D. Ala.1995) (same); *Ekanem v. IRS*, 98-1 U.S.T.C. (CCH) ¶ 50,257, 1998 U.S. Dist. LEXIS 2866 (D. Md.1998) (same); *Sabat v. IRS*, 2000 U.S. Dist. LEXIS 3974; 200-1 U.S.T.C. (CCH) ¶ 50,328 (W.D. Pa. 2000) (same); *Compro-Tax, Inc. v. IRS*, 2000 U.S. Dist. LEXIS 8155, 2000-1 U.S.T.C. (CCH) ¶ 50,406 (S.D. Tex. 2000), *aff'd,* 273 F.3d 1095; 2001 U.S. App. LEXIS 22621 (5th Cir. 2001), *cert. denied,* 535 U.S. 1053 (2002) (same).

127. The author's keyword LEXIS search of the Internal Revenue Code for the phrase "except as provided" yielded 624 hits (Jan. 12, 2004).

128. *See* epigraph to this article, *supra* n. 1 and accompanying text.

129. I.R.C. § 7601(a):

> The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed. *Id.*

Treas. Reg. § 301.7601-1:

> Each district director shall, to the extent he deems it practicable, cause officers or employees under his supervision and control to proceed, from time to time, through his district and inquire after and concerning all persons therein who may be liable to pay

The federal budget's revenue is largely comprised of the all-too-familiar paycheck deductions that employers collect from America's work-force and, in turn, remit to the IRS.[130] In the event that the employer fails to remit such funds to the IRS, I.R.C. § 6672 provides that all persons who were responsible for collecting, accounting for, and paying over the "trust funds"[131] are liable for the amount of the taxes due,[132] and that liability is joint and several.[133]

The IRS has broad discretion as to which responsible party it may pursue, [134] and often directs its efforts without regard to relative degree of responsibility.[135] Thus, where even the most egregiously responsible person has disappeared or is insolvent, the IRS can and does go after the party who, like the low-hanging fruit in the orchard, is most conveniently available. [136] The broad collection discretion provided to the IRS through I.R.C. § 6672 often yields inequitable results, akin to forcing "a cabin boy on a sinking ship" to "follow it to the bottom of the sea while the admiral was

> any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed. *Id.*

130. *See* I.R.C. §§ 3401 et seq. One seldom discussed administrative consideration behind requiring employers to withhold income taxes from employees' pay, and in requiring merchants to add sales taxes to customer purchases, is that it keeps the government's taxation personnel out of the direct line of fire (often literally) from hostile and unwilling employees, customers, or other such unenthusiastic taxpayers. *See e.g.* Elizabeth Mehren, *Massachusetts Man Convicted of Office Massacre*, L.A. Times A1 (Apr. 25, 2002) (describing a workplace massacre that was the result of a tax withholding dispute between employer and the defendant employee); Michael Cooper, *Suspect Is Arrested in Threat to Store That Was Set Ablaze*, N.Y. Times B3 (Apr. 28, 1998) (reporting alleged threat to burn down store, made by firebombing suspect, in course of dispute with store owner over sales tax on purchase of a hat).

131. Taxes held by employers (and others) for the government are commonly known as "trust funds." *See e.g. Slodov v. U.S.*, 436 U.S. 238, 243 (1978); *Fran Corp. v. U.S.*, 164 F.3d 814, 817 (2d Cir. 1999).

132. I.R.C. § 6672. For more detailed discussions regarding parties who may be responsible under I.R.C. § 6672, see Corrie Lynn Lyle, *The Wrath of I.R.C. § 6672: The Renewed Call for Change – Is Anyone Listening? If You Are a Corporate Official, You had Better Be,* 74 S. Cal. L. Rev. 1133, 1140 - 1143 (2001); Mary A. Bedikian, *The Pernicious Reach of 26 U.S.C. § 6672*, 13 Va. Tax Rev. 225 (1993). Many states and localities have provisions similar if not verbatim to I.R.C. § 6672. *E.g.* Conn. Gen. Stat. § 12-736; Minn. Stat. § 270.101; NY Tax Law § 685(g); *see also* N.Y.C. Admin. Code §§ T46-65.0 (g) and U46-35.0 (g).

133. S*ee e.g. Thosteson v. U.S.*, 304 F.3d 1312, 1318, 1320 (11th Cir. 2002), *aff'g,* 182 F. Supp. 2d 1189 (M.D. Ala. 2001).

134. *U.S. v. Pomponio*, 635 F.2d 293 (4th Cir. 1980); *Kelly v. Lethert*, 362 F.2d 629, 635 (8th Cir. 1966); *Hornsby v. U.S.*, 588 F.2d 952, 954 (5th Cir. 1979); *see also Abramson v. U.S.*, 39 B.R. 237, 239 (Bankr. E.D.N.Y., 1984).

135. *Howard v. U.S.*, 711 F.2d 729, 737 (5th Cir. 1983) ("And section 6672(a) looks only to 'responsible persons,' not to 'the most responsible person,' for satisfaction.").

136. *See e.g. Thosteson*, *supra,* n. 133, at 1315; *Grizaffi v. U.S.*, 1987 U.S. Dist. LEXIS 6951 (N.D. Ill. 1987); *Unger v. U.S.*, 1999 U.S. Dist. LEXIS 10932, 84 A.F.T.R.2d (RIA) 6817 (S.D.N.Y. 1999), *on remand from U.S. v. Landau*, 155 F.3d 93 (2d Cir. 1998), *cert. denied,* 526 U.S. 1130 (1999).

picked up by helicopter and safely put ashore."[137] In one situation, the "cabin boy," Nathan Unger, "was twenty-eight years old when the tax delinquency occurred. Since then he has been stripped of all his assets (including a life insurance policy) and is faced with an undischargable debt of more than one million dollars."[138]

To partially remedy the inequities of the IRS's administration of § 6672, Congress included, as part of the Taxpayer Bill of Rights 2, a federal statutory right of contribution in favor of responsible persons who actually pay more than their proportionate share of trust fund penalties.[139] But a right of contribution is of limited value unless the persons against whom the right may be asserted are known, so Congress also had to amend its disclosure statute, I.R.C. § 6103, to enable persons pursued by the IRS to know the identity of, and collection efforts made against, other persons responsible for the same funds.[140] Thus, the discretion of the IRS to collect trust fund taxes from any available source has had a complicating effect upon the taxation system, and beyond.

The IRS also has the discretion to allocate payments from the taxpayer where the taxpayer has outstanding obligations to the IRS arising from more than one tax year or type of tax. A taxpayer may direct the allocation

137. *Unger v. U.S.*, 1997 U.S. Dist. LEXIS 190 *1 (S.D.N.Y. 1997).

138. *Unger v. U.S.*, 956 F. Supp. 1152, 1154 (S.D.N.Y. 1997). The *Unger* litigation would wend its way through the courts for many years, and included a remand after denial of certiorari by the United States Supreme Court on one issue; s*ee Unger v. U.S.*, 1999 U.S. Dist. LEXIS 10932, 84 A.F.T.R.2d (RIA) 6817 (S.D.N.Y. 1999), *on remand from U.S. v. Landau*, 155 F.3d 93 (2d Cir. 1998), *cert. denied,* 526 U.S. 1130 (1999). Mr. Unger's "cabin boy" position would also oblige him to the New York State Department of Taxation and Finance for trust fund penalties with respect to unremitted sales taxes. *Matter of Unger*, N.Y.S. Tax App. Tribunal, DTA Nos. 805351 and 805353 (Mar. 24, 1994) (available at http://www.nysdta.org/Decisions/805351.dec.pdf) (accessed May 25, 2004).

139. I.R.C. § 6672(d) (enacted under the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 903, 110 Stat. 1452, 1466 (1996).

140. I.R.C. § 6103(e)(9) (enacted under the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 902, 110 Stat. 1452, 1466 (1996).
The new subsection reads:

> (9) Disclosure of certain information where more than one person subject to penalty under section 6672. -- If the Secretary determines that a person is liable for a penalty under section 6672(a) with respect to any failure, upon request in writing of such person, the Secretary shall disclose in writing to such person--
> (A) the name of any other person whom the Secretary has determined to be liable for such penalty with respect to such failure, and
> (B) whether the Secretary has attempted to collect such penalty from such other person, the general nature of such collection activities, and the amount collected. *Id.*

TBOR2 also made other amendments to I.R.C. § 6672, largely irrelevant to the discussion in this Article, relating to preliminary notice requirements and to immunity for voluntary board members of tax-exempt organizations. TBOR2 § 901, 110 Stat. 1452, 1465-1466 (codified at I.R.C. § 6672(b)) & TBOR2 § 904, 110 Stat. 1452, 1467 (codified at I.R.C. § 6672(e)).

of payments made voluntarily, but the IRS has broad discretion to apply involuntary payments, or voluntary remittances without specific taxpayer directions, to such outstanding taxpayer obligations as the IRS deems appropriate.[141] Thus, one party responsible for "trust fund" penalties[142] can benefit or lose, depending upon whether the IRS allocates the payments made by another responsible party with respect to the same underlying taxes.[143] Additionally, IRS bureaucrats are given relatively broad discretion to enter into closing agreements with taxpayers,[144] compromise in civil or criminal liability of the taxpayer[145] and pay "snitch" bounties to informants who apprise the IRS of tax law violations by others.[146]

2. *Discretion in applying and interpreting the tax statutes*

Some administrative discretion most certainly facilitates the orderly function of the taxation system, but such breadth of discretionary powers can complicate taxes to the extent that similarly situated taxpayers are treated differently. The courts more strictly scrutinize decisions of administrative agencies where the agencies have inconsistently applied the statutes and their own regulations.[147] Thus, appeals of agency decisions not rooted in consistency are more uncertain, which, in the case of the IRS, does little to impart tax simplicity.

Private IRS rulings for particular taxpayers give the IRS great latitude to duck its duty to accord similar treatments to taxpayers in similar predicaments. Private rulings have no precedential value, and the IRS thus has no obligation to follow them with subsequent, similarly situated taxpayers.[148] They are now available to the public, albeit sanitized of specific

141. *See e.g.* Rev. Proc. 2002-26, 2002-1 C.B. 746; *Muntwyler v. U.S.*, 703 F.2d 1030, 1032 (7th Cir. 1983); *Liddon v. U.S.*, 448 F.2d 509, 513 (5th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

142. *See supra* nn. 131-138 and accompanying text.

143. *See e.g. In re Energy Resources Co., Inc.*, 871 F.2d 223, 230 (1st Cir. 1989), *aff'd sub nom. U.S. v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990). Suppose, for example, that certain third parties that included "responsible" individuals were willing to advance enough money to rehabilitate the corporation only if the court would assure them that the reorganized corporation would pay its "trust fund" tax debts first. That assurance would diminish the likelihood that the third parties would have to pay the debts personally; without it they might prefer immediate liquidation, which could mean total payment of all tax debt, and "a guarantee that no tax penalty will be assessed against them personally [internal citations omitted]." *Id.*

144. I.R.C. § 7121.

145. I.R.C. § 7122; Treas. Reg. § 301.7122-1.

146. *See e.g. Carelli v IRS*, 668 F.2d 902 (6th Cir. 1982); *Schein v U.S.* (E.D.N.Y. 1972) 352 F. Supp. 182 (E.D.N.Y. 1972).

147. *See U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

148. I.R.C. § 6110(k)(3).

identifying information,[149] thanks to the Tax Reform Act of 1976.[150] Prior to 1976, the IRS took zealous measures to resist disclosing its private rulings.[151]

The *Sklar* case[152] demonstrates how the IRS's inconsistent application of the allowability of charitable deductions for payments of tuition for religious education has led to uncertainty, litigation and complication. In *Sklar*, taxpayers allocated the tuition payments made to the religious private school in which their children were enrolled, and claimed a charitable deduction on their 1994 personal income tax return for the portion allocated to religious studies.[153] The IRS *had* allowed similar expenses with respect to the Church of Scientology,[154] and had in fact "obsoleted" a previous revenue ruling specifically determining that such deductions for Church of Scientology "audits" were *not* deductible.[155] Though critical of the IRS's special treatment of the Church of Scientology, the court held that the Sklars could not claim the deduction.[156] In a concurring opinion, Judge Silverman wrote:

> If the IRS does, in fact, give preferential treatment to members of the Church of Scientology—allowing them a special right to claim deductions that are contrary to law and rightly disallowed to everybody else—then the proper course of action is a lawsuit to stop to that policy. The remedy is not to require the IRS to let others claim the improper deduction, too.[157]

Well-wishers, many of whom foot the bill for private religious day school tuition, from diverse religious backgrounds were quite disappointed by the ruling against the Sklars.[158] The Sklars have resumed litigation

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149. I.R.C. § 6110(c).

150. *Tax Reform Act of 1976*, Pub. L. No. 94-455, § 1201(a) (codified at I.R.C. § 6110).

151. *See e.g. Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974); *see also Fruehauf Corp. v. IRS*, 522 F.2d 284 (6th Cir. 1975), *vacated* on other grounds, 429 U.S. 1085 (1977). The Supreme Court vacated *Fruehauf* subsequent to the Circuit Court's ruling to require disclosure based on 1976 legislation that added I.R.C. § 6110 to open private letter rulings and other written IRS determinations to public inspection. *IRS v. Fruehauf Corp.*, 429 U.S. 1085 (1977).

152. *See Sklar v. Commr.*, 282 F.3d 610 (9th Cir. 2002), *aff'g*, 79 T.C.M. (CCH) 1815 (2000)).

153. *Id.* at 612.

154. The IRS refused to disclose the details of its closing agreement with the Church of Scientology to the taxpayer, the Department of Justice, or the Court, claiming that it was confidential, and thus the court assumed that they had allowed the deductions. *Id.* at 614. Nevertheless, purported copies of the agreement had been published in unofficial sources. *See e.g. Scientologists and IRS Settle for $ 12.5 Million*, Wall St. J. A12 (Dec. 30, 1997).

155. Rev. Rul. 93-73, 1993-2 C.B. 75 (*obsoleting* Rev. Rul. 78-189**,** 1978-1 C.B. 68).

156. *Sklar*, 282 F.3d at 619, 622.

157. *Id*. at 623.

158. *See e.g.* Agudath Israel of America, Press Release, Feb. 1, 2002 (available at http://www.jlaw.com/Recent/religtuition.html) (accessed May 25, 2004); *see also* Christianity Today magazine, Weblog, (week of Aug. 21, 2000) (available at http://www.christianitytoday.com/ct/

against the IRS on the same issue, with respect to their 1995 tax year.[159] *Sklar* illustrates how secrecies and inconsistencies in the IRS's use and abuse of its broad discretion have complicated taxes in America.

V. MULTIPLE TAXATION AUTHORITIES

This article does not strive to set forth any detailed analysis of the interplay that occurs when an event or transaction is subject to the taxes imposed by multiple authorities. Such interplay, however, works contrary to tax simplification.

In an effort to simplify tax returns, many states conform their income tax schemes to the federal scheme.[160] Such coordination has simplified the lives of taxpayers who, already burdened with the distasteful task of preparing their federal income tax returns, can realize economies of labor in

2000/134/32.0.html (accessed May 25, 2004) ("[The *Sklar*] case will be an interesting one to watch.")). The Agudath Israel of America, a religious Jewish organization, filed a brief *amicus curiae* in support of the Sklars in their appeal to the 9th Circuit.

159. David Cay Johnston, *Scientologists' Tax Break Cited in Suit Against I.R.S.*, N.Y. Times C-6, col. 5 (Mar. 24, 2004). Serious questions persist as to whether the Sklars are the ideal taxpayers to bring a test case against the IRS on the issue. Michael Sklar is a Certified Public Accountant who prepares personal income tax returns of others. *See* Michael Sklar, *Homepage of Michael Sklar, an Accountancy Corporation*, http://pages.prodigy.com/netcpa (accessed May 25, 2004). Sklar filed his own 1994 personal income tax return late, even after two extensions of time were granted, tendering the excuse "that he was simply too busy to file his Federal income tax return for 1994 by October 15, 1995." *Sklar*, 79 T.C.M. (CCH) 1815 at 1817, *aff'd*, 282 F.3d 610 (9th Cir. 2002). Just as IRS agents are held to a higher standard by the IRS and the courts to comply with their tax obligations, *see supra* notes 87 and 88 and accompanying text, so, too, do the IRS and the courts have special heightened expectations that accountants and others who prepare the tax returns for the public file their own returns in a timely manner and otherwise comply with the tax laws. *See e.g. Blocker v. Commr.*, 64 T.C.M. (CCH) 1586 (1992), *aff'd*, 25 F.3d 1043 (5th Cir. 1994); *Keene v. Commr.*, 44 T.C.M. (CCH) 1335 (1982), *aff'd,* 734 F.2d 21 (9th Cir. 1984); *Dustin v. Commr.*, 53 T.C. 491, 507 (1969), *aff'd,* 467 F.2d 47 (9th Cir. 1972); *see also U.S. v. Fritzson*, 979 F.2d 21 (2d Cir. 1992) (affirming upward adjustment of offense level due to defendant's use of his special skills as accountant to perpetuate a fraud upon the IRS); *Director, Off. Prof. Resp. v. Banister,* Complaint No. 2003-2, Dept. of Treasury (Dec. 29, 2003) (available at http://www.irs.gov/pub/irs-utl/banister.pdf (accessed May 25, 2004)) (disbarring respondent from practicing before IRS, and finding respondent's status as a C.P.A. and past position as an IRS agent to be aggravating factors).
Sklar's lateness may well have placed him and his wife at a disadvantage against the system's inherent biases against untimely tax return filers.

160. *See e.g.* 72 P.S. § 7330(a) (synchronizing the filing due date of the Pennsylvania personal income tax return with the due date for the federal return); Cal Rev & Tax Code § 17008.5 (2004) (applying the I.R.C. § 7704 provisions treating publicly traded partnerships as corporations under California tax law); Ohio Code § 5747.01 (2003) (providing that with respect to Ohio state income taxes, "[e]xcept as otherwise expressly provided or clearly appearing from the context, any term used in this chapter has the same meaning as when used in a comparable context in the Internal Revenue Code").

contemporaneously preparing and filing their state (and sometimes local) income tax returns using much of the same basic information.[161]

But when state statutes make adjustments to the federal numbers for state tax purposes, the process gets more complicated. For example, though New York generally follows the federal scheme for income,[162] it departs from it in several respects, including its treatment of interest income on state and local bonds issued by non-New York State entities.[163] Taxpayers thus need to make the appropriate calculations to the federal income entries to adjust them for the New York State Income Tax return.[164]

State tax authorities also complicate the administration of taxes when they apply different standards to the process than the IRS. For example, a state may impose a lateness penalty on a tardy state income tax return even when the IRS has waived the analogous federal penalty.[165] Indeed, to rebut the IRS's presumably correct findings, the taxpayer need only prove the tax auditor's findings incorrect by a preponderance of evidence,[166] but is held to the more stringent "clear and convincing evidence" standard when the same records are examined by the New York State Department of taxation and finance.[167] And the standards to which the New York City taxpayer is held are not necessarily the same as those imposed for analogous taxes at the state level.[168]

The I.R.C. § 2011 credit for state death taxes illustrates another complicating interplay between federal and state tax administration. Subject to a graduated table of limitations, when I.R.C. § 2011 was in full effect,[169] it

161. *Cf. Adam Smith, supra* n. 1 ("[Maxim number] III. Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it."). Most if not all of the commercially available tax return preparation software have provisions for generating both federal and state income tax returns. *See e.g.* Bruce V. Bigelow, *It May not be April, but it's Quite Taxing*, San Diego Union-Tribune C-1 (Dec. 2, 2003) ("In addition to the federal tax software, Intuit has developed different TurboTax versions for filing individual returns in 45 states.").

162. N.Y. CLS Tax § 612 (2003).

163. N.Y. CLS Tax § 612(b)(2) (2003).

164. N.Y. State Dept. of Taxation & Finance, Form 201 Resident Income Tax Return (2003), Line 19.

165. *See e.g. Hallmac Walls & Ceilings, Inc. v. St. of Wash.*, Dkt. No. 46828-24 (Wash. St. Bd. of Tax App. 1995), http://bta.state.wa.us/search.htm (accessed May 25, 2004).

166. *Brewster v. Commr.*, 607 F.2d 1369, 1374-1375 (D.C. Cir. 1979).

167. *Blodnick v. N.Y. State Tax Commn*., 124 A.D.2d 437, 438 (N.Y. App. Div. 3d Dept. 1986), *appeal withdrawn* 514 N.E.2d 1375 (1987).

168. Carolyn J. Lee & Joseph Lipari*, Tax Departments, Tribunals Differ on Combined Reporting Cases*, 231 N.Y.L.J. 3, col. 1 (Mar. 5, 2004) (discussing inconsistent authorities used by New York State Tax Appeals Tribunal and New York City Tax Appeals Tribunal).

169. The state death tax credit will not be available to the estates of decedents dying after December 31, 2004. I.R.C. § 2011(f). This article will not detail the complexities and uncertainties associated with the possibly temporary phaseout/repeal of the federal estate tax as provided by the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") of 2001, Pub. L. No. 107-16, 115 Stat. 38. Suffice it to say that EGTRRA itself has contributed nothing at all towards the cause of tax simplifica-

allowed estates a dollar for dollar credit against the federal estate tax for taxes paid to states by reason of the decedent's death. "The state death tax credit was designed to preserve for states an historic source of revenue without incurring additional expense to their citizens."[170]

Many states simply fixed their death taxes at the I.R.C. § 2011 credit amount.[171] Such a tax is sometimes referred to as a "sponge tax" because it absorbs, for the state treasury, funds which otherwise would go to the IRS.[172] Where the state death tax exceeds the I.R.C. § 2011 credit amount, however, the state can no longer merely require the estate representative to inform the state taxation authority of any federal audit changes in the federal tax (and therefore the state tax), but must independently audit estate tax returns. Moreover, the additional state death taxes over and above the I.R.C. § 2011 credit pass to the state and not to a decedent's spouse of a charity (?); accordingly, the amount of the additional tax does not qualify for a federal marital or charitable deduction.[173]

Where a taxpayer relocates from one state to another during the year, or otherwise is not a full year resident of any one state, the taxpayer may have multiple state and/or local tax obligations in addition to the federal. The situation is all the more complex if the taxpayer or the transactions go international. Increased mobility of people and goods, together with its consequent expansion of businesses into or between multiple jurisdictions, can only complicate the taxes.[174]

It is clear, then, that merely overhauling the Internal Revenue Code is not going to win the battle to simplify America's taxes. The state and local tax statutes, and the taxation authorities that enforce those statutes, must also be given their due regard if not actually included in the effort.

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tion. *See generally,* Karen C. Burke & Grayson M. P. McCouch, *Estate Tax Repeal: Through the Looking Glass,* 22 Va. Tax Rev. 187 (2002).

170. *Second Natl. Bank of New Haven v. U.S.*, 297 F. Supp. 1080, 1083 (D. Conn. 1969).

171. *E.g.* 36 M.R.S. § 4063 (2003) (Maine tax on estate of resident); Idaho Code § 14-403 (2003) (same, Idaho).

172. *See e.g.* Sara R. Stadler, *A Cure for the Creeping Palm Tree Disease*, Conn. L. Tribune S4 (Feb. 12, 1996) (referring to Florida's tax, equal to the I.R.C. § 2011, as a "sponge tax"); *see also* Joshua S. Rubenstein & Eileen Caulfield Schwab, *Historic New York Estate and Gift Tax Reform,* 218 N.Y.L.J. 1 (Aug. 20, 1997) (referring to such tax as a "sop tax").

173. *Chiles v. U.S.*, 843 F.2d 367 (9th Cir. 1988).

174. *See e.g.* Tom Herman, *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments*, Wall St. J. 1 (Sept. 29, 1999) (reporting that AT&T must file an estimated 39,912 state and local tax returns each year); *Alaska Dept. of Revenue v. Dyncorp & Subsidiaries*, 14 P.3d 981, 983 (Alaska 2000) (reciting that Dyncorp was required to file over 300 amended state tax returns on account of its business activities in most states).

VI. JUDICIARY'S TREATMENT OF TAX CASES

A. *The Unreported Opinion Controversy*

One great burning controversy among the bench and bar is the limitation, in many jurisdictions, of the precedential value of unreported judicial opinions.[175] "[U]nder a regime in which judges may choose *ex ante* whether to publish decisions, judges might bury hard questions in unpublished decisions. Judges might also seek to deviate from precedent in unpublished decisions, knowing that an unpublished decision will not draw as much attention as a published decision."[176] One appellate judge reportedly acknowledged the bar's "legitimate concern" that unreported opinions can be an abusive means for "sweeping tough decisions under the rug."[177]

Combined with the notoriously arcane complexity of American taxation, unreported opinions have had some curious effects upon the development and administration of American tax law. Generalist judges, often relatively unfamiliar with the particulars of the tax statutes and regulations, can be tempted to deliver an unreported opinion as a means of limiting the precedential value of, and therefore the potential damage and fallout from, a questionably reasoned decision.[178] Judge Patricia Wald, a Chief Judge of the U. S. Court of Appeals for District of Columbia Circuit before moving on to the International Criminal Tribunal for the Former Yugoslavia,[179] has noted that "[t]here is always risk in generalist judges construing the intricate interrelationships of words and phrases in specialized legislation, and that danger is heightened in the case of the Internal Revenue Code."[180] Judge

175. *See e.g. Anastasoff v. U. S.*, 223 F.3d 898 (8th Cir. 2000), *vacated en banc & remanded*, 235 F.3d 1054 (8th Cir. 2000); *Developments and Practice Notes: Anastasoff, Unpublished Opinions, and "No-Citation" Rules*, 3 J. App. Prac. & Process 169 (2001) (Mini-Symposium); Memo. from Hon. Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, *Report of Advisory Committee on Appellate Rules* 30-39 (May 22, 2003) (available at http://www.uscourts.gov/rules/ Reports/AP5-2003.pdf (accessed May 25, 2004); Tony Mauro, *Difference of Opinion; Should Judges Make More Rulings Available as Precedent? How an Obscure Proposal is Dividing the Federal Bench*, Legal Times 1 (Apr. 12, 2004).

176. *RECENT CASES: Constitutional Law – Article III Judicial Power - Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect*, 114 Harv. L. Rev. 940, 945 (2001).

177. Edward A. Adams, *Increased Use of Unpublished Rulings Faulted*, 212 N.Y.L.J. 1 (Aug. 2, 1994) (quoting Second Circuit Judge Wilfred Feinberg).

178. *See supra* nn.176-177 and accompanying text; *cf.* John J. Tigue, Jr. & Jeremy H. Temkin, *Second Circuit Tax Cases in 2003*, 231 N.Y.L.J. 3 (Jan. 15, 2004) ("All of these [tax law] decisions were issued in the form of summary orders, signaling some reluctance on the court's part to imbue them with application beyond the case at hand.").

179. Federal Judges Biographical Database, Patricia McGowan Wald, http://air.fjc.gov/servlet/ tGetInfo?jid=2475 (accessed May 25, 2004).

180. *Ryan v. Bureau of Alcohol, Tobacco & Firearms*, 715 F.2d 644, 651 (D.C. Cir. 1983) (Wald, J., dissenting).

Richard A. Posner, an accomplished academician and prolific author on legal, monetary and economic issues,[181] has opined that in technical areas of the tax laws, "we generalist judges should be loath to lay down the law on the question without the Treasury's view."[182] If jurists in the league of Posner or Wald tread with caution in adjudicating tax cases, then many judges of lesser caliber, reluctant to second-guess the IRS, are surely tempted to seek refuge in the unreported opinion when confronted with the task of applying the tax statutes.

Carrying the caution of such refugee a step further, a judge who is unsure of the tax laws may take the path of least resistance in a tax litigation situation by giving too much deference to the tax collector's views of the law, which can hardly be called objective.[183] Moreover, by keeping disproportionately large numbers of taxation opinions out of the mainstream, judges fail to facilitate the development of bodies of case law on the various sections of the Internal Revenue Code. As Justice Douglas has lamented, the United States Supreme Court seems "particularly ill-equipped to resolve income tax disputes between the Commissioner and the taxpayers [because it] . . . seldom see[s] enough of them to develop any expertise in the area."[184] Collectively and synergistically, the judiciary impacts the system by failing to objectively police the IRS or effectively create viable tax law precedent.

B. *Unreported Opinions and I.R.C. § 7502*

Judge Arnold's ruling in *Anastasoff*[185] has touched off renewed and intensified debate and interest in the unreported opinion controversy.[186] Though *Anastasoff* will likely be remembered for its considerable contribu-

181. *See Judge Richard A. Posner Brief Biographical Sketch*, http://home.uchicago.edu/~rposner/biography (accessed May 25, 2004).

182. *Rebecca K. Crown Income Charitable Fund v. Commr.,* 8 F.3d 571, 576 (7th Cir. 1993).

183. *See e.g. Lykes v. U.S.*, 343 U.S. 118, 128-129 (1952) (Jackson, J., dissenting) ("The Treasury may feel that it is good public policy to discourage taxpayers from contesting its unjustified demands for taxes and thus justify penalizing resistance. It is hard to imagine any instance in which the Treasury could have a stronger self-interest in its regulation."). Justice Jackson's accomplished career included, prior to his ascension to the Supreme Court bench, a stint as General Counsel of the Bureau of Internal Revenue. Federal Judges Biographical Database, Robert Houghwout Jackson, http://air.fjc.gov/servlet/tGetInfo?jid=1160 (accessed May 25, 2004).

184. *Commr. v. Idaho Power Co*., 418 U.S. 1, 19 (1974) (Douglas, J, dissenting).

185. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

186. *See e.g. Developments and Practice Notes: Anastasoff, Unpublished Opinions, and "No-Citation" Rules*, *supra,* n. 175; Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. Rev. 695 (2001); John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate over Unpublished Opinions*, 36 Tort & Ins. L.J. 899 (2001); Bruce M. Wexler & F. Christopher Mizzo, *Unpublished Opinions Rising, But Do They Help?*, 227 N.Y.L.J. S8 (Feb. 11,2002).

tion to the unpublished opinion controversy, it was a tax case; specifically, a case about the timely postmark rule under §7502 of the Internal Revenue Code.[187] There is split authority among the Circuits in connection with I.R.C. § 7502.[188] As this author has previously observed,

> Consistent with its institutional bias to maximize tax assessments, the IRS, whenever possible, routinely takes the position that where the IRS does not note an actual postmark on the envelope, I.R.C. § 7502 only allows a taxpayer to prove a timely mailing by producing a receipt for registered or certified mail. Because federal taxation is such a complex, specialized, and esoteric area of the law, even the most learned judges have conceded difficulty in interpreting the taxation statutes. Therefore, the judiciary often finds adopting the IRS's position inherently simpler than overruling it. Under such circumstances, the IRS has throughout the years persuaded various courts to accept its interpretation of I.R.C. § 7502, creating, in effect, a "Big Lie" that Congress specifically intended to limit proof of a postmark to registered or certified mailings. Courts in circuits where the "Big Lie" has been accepted as truth now blindly follow circuit precedent and, indeed, with robotic predictability, go to great lengths to negate, deny and disregard any interpretation inconsistent with the IRS's position under section 7502.[189]

I.R.C. § 7502 is, at best, ambiguous as to whether a mailing via registered or certified mail is the sole means to prove a postmark on a tax return or other mailing to the IRS or to the Tax Court. The split among the Circuits on that issue is evidence of that ambiguity. Taxation statutes are to be strictly and narrowly construed, and "[i]n case of doubt they are construed most strongly against the government, and in favor of the citizen."[190] The legislative history of I.R.C. § 7502 is totally devoid of any language to indicate that Congress intended a registered or certified mailing to be the *exclusive* means of proving a postmark.[191] Indeed, the House and Senate Reports specifically state with respect to an amendment to I.R.C. § 7502 that "[t]he taxpayer, of course, could also establish the date of mailing by

187. I.R.C. § 7502; *Anastasoff*, 223 F.3d at 899.

188. *Compare e.g. Surowka v. U.S.*, 909 F.2d 148, 150 (6th Cir. 1990) (disallowing evidence other than an official postal receipt to prove a postmark) *with Est. of Wood v. Commr.*, 909 F.2d 1155, 1161-1162 (8th Cir. 1990) (allowing other extrinsic evidence).

189. Kenneth H. Ryesky, *Analysis of the Split Authority on Proof of a Postmark under Internal Revenue Code § 7502*, 21 U. Dayton L. Rev. 379, 395-396 (1996) (citations omitted).

190. *Ocean Drilling & Exploration Co. v. U.S.*, 988 F.2d 1135, 1156 (Fed. Cir. 1993) (quoting *Gould v. Gould*, 245 U.S. 151, 153 (1917)).

191. *See Wood*, 909 F.2d at 1160.

other competent evidence [besides registered or certified mail receipts]."[192] Yet, in some Circuits, a judiciary intimidated by the Internal Revenue Code has abdicated its responsibility to prevent excesses on the part of the tax collector by blindly accepting the IRS party line, even though the IRS position flies in the face of explicit Congressional sentiment.[193]

Had the judiciary done its job, the IRS would be required to live by the provisions of I.R.C. § 7502, and by its own duly promulgated regulations. The IRS may well have the authority to prescribe, by regulation that the sole means of proving a postmark under I.R.C. § 7502 is by proof of a registered or certified mailing. The Federal Acquisitions Regulations had contained just such a provision (and indeed a more stringent one) to prove the timely mailing of a bid for a Federal procurement contract.[194] A Federal agency can thus be strict in its application of the statutes it must enforce, provided that it properly promulgates clear and explicit rules.

The IRS, however, has revised neither its own regulations nor its official instructions for its tax forms to explicitly limit the proof of a timely postmark to a registered or certified mailing. On the contrary, the IRS continues to successfully assert its "Big Lie" in most of the Federal Circuits,[195] where the judiciary, having swallowed, hook, line and sinker, the IRS's questionable interpretation of I.R.C. § 7502, lacks the will to depart from its own faulty rationale to contradict the tax collector.

The Federal judiciary has failed to provide effective checks and balances upon an Executive agency, and is ultimately responsible for the IRS's abuse of § 7502. In one egregious example, the Sixth Circuit in *BMC Bankcorp*[196] cowered behind unreported opinions while it all but conceded the righteousness of the taxpayer's position. Like the whining prisoner who holds the key to the jail cell in his or her very own pocket, it declared itself constrained by its own precedent to affirm the District Court

192. Sen. Rpt. 90-1014, at 19 (Mar. 15, 1968) (reprinted in 1968 U.S.C.C.A.N. 2354, 2373); H. R. Rpt. 90-1104, at 14 (Feb. 23, 1968) (reprinted in 1968 U.S.C.C.A.N. 2341, 2354).

193. *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.*

194. *See* former 48 C.F.R. § 14.304-1(b) (removed 64 Fed. Reg. 51837, 51838 (Sept. 24, 1999)). The old 48 C.F.R. § 14.304-1(b) was first promulgated in 48 Fed. Reg. 42171 (Sept. 19, 1983), and was derived from the old Defense Acquisition Regulation (DAR) (formerly known as the Armed Services Procurement Regulation (ASPR)) § 2-303.2 (formerly codified at 32 C.F.R. Subpart A).

195. *E.g. Moore v. IRS*, 2003 U.S. Dist. LEXIS 13446, 2003-2 U.S.T.C. (CCH) ¶ 50,599 (M.D. Fla. 2003); *Goldcorp v. U.S.*, 2002 U.S. Dist. LEXIS 6486, 2002-1 U.S.T.C. (CCH) ¶ 50,413 (E.D. Mich. 2002).

196. *BMC Bankcorp, Inc. v. U.S.*, 1994 U.S. Dist. LEXIS 8404, 94-2 U.S.T.C. (CCH) ¶ 50,335 (W.D. Ky. 1994), *aff'd,* 1995 U.S. App. LEXIS 15147, 2000-1 U.S.T.C. (CCH) ¶ 50,368 (6th Cir. 1995), r*eh'g denied* 1995 U.S. App. LEXIS 32716 (6th Cir. 1995).

decision against the taxpayer.[197] We thus see how judicial proceedings can complicate the process of taxation.

VII. CONCLUSION

The Internal Revenue Code of 1954 was touted by Congress as a "long overdue reform measure . . . developed through extensive and lengthy study of ways and means of removing tax inequities and tax restraints" whose "passage will lead to increased employment and a higher standard of living."[198] The 1954 Code revision purportedly included "a rearrangement of the provisions to place them in a more logical sequence, the deletion of obsolete material, and an attempt to express the internal revenue laws in a more understandable manner,"[199] "to remove inequities, to end harassment of the taxpayer, and to reduce tax barriers to future expansion of production and employment."[200] *Plus ça change, plus c'est la même chose.*

Taxation is a dynamic process that interacts with the environment and the times. It not only is susceptible to political, social and economic events and practices, but also impacts itself upon those political, social and economic events and practices, often in a manner quite unrelated to the purpose behind imposing the tax in the first place.[201] It requires hands-on

197. *BMC Bankcorp*, 1995 U.S. App. LEXIS 15147, 2000-1 U.S.T.C. (CCH) ¶ 50,368 (6th Cir. 1995).

> We must affirm the judgment of the district court. While we express no opinion on either the strength of the proof offered by BMC to show that the 1988 refund claim was timely mailed to the IRS or the soundness of the decisions of the Eighth and Ninth Circuits holding contrary to our decisions in *Miller* and Surowka, *we* are constrained to follow the clear precedent of *this* Circuit [emphasis added]. In both *Miller* and *Surowka*, we squarely rejected the plaintiffs' 'attempts to introduce extrinsic evidence other than the postmark or mail receipts to prove timely filing, and concluded that the only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502. *Miller,* 784 F.2d at 730-731; *Surowka,* 909 F.2d 148 at 150. That rule is dispositive of this case [footnotes omitted]. *Id.*

198. H.R. Rpt. 83-1337, at 1-2(Mar. 9, 1954) (reprinted in 1954 U.S.C.C.A.N. 4017, 4025); Sen. Rpt. 83-1622, 1-2 (Apr. 5, 1954), *Sen. Fin. Comm. Report on Internal Revenue Code of 1954* (1954) (reprinted in 1954 U.S.C.C.A.N. 4621, 4629). The introductory materials to the respective House and Senate documents were mostly verbatim to one another.

199. H.R. Rpt. 83-1337, at 1-2 (Mar. 9, 1954); Sen. Rpt. 83-1622, 1-2 (Apr. 5, 1954)

200. *Id.*

201. David Ricardo, *The Principles of Political Economy and Taxation*, ch. 16, 157 (Everyman's Library, no. 590, J. M. Dent & Sons, London, 1969) (orginally published 1817) ("[Taxation] frequently operates very differently from the intention of the legislature by its indirect effects."). Taxation statutes sometimes operate *diametrically opposite* from their legislative intent. *See e.g. In re Rockefeller*, 773 N.Y.S.2d 529, 555 (Surrog. Ct. N.Y. Co. 2003).

management, and oftentimes the tax administrators must focus special attention on particular types of taxes or taxpayers, issues, or problems.[202] Accordingly, any system of taxation will inevitably grow inefficient and dysfunctional over time, as artifacts from ongoing events accumulate in the statutes, regulations, administrative practices, the culture of the bureaucracy, and society as a whole.[203] Increased international trade and commerce, and the growing regulation of such commerce, by treaty or otherwise, inevitably accelerates the rate at which such artifacts accumulate. Changes in federal taxation, even if made in the name of tax simplification, cannot help but complicate state taxation schemes crafted in light of and geared toward the previous federal scheme.[204]

Much as houses periodically require painting, automobile engines brakes require servicing, pianos and other musical instruments recurrently require tuning, lawns must be mowed and hedges need pruning, a taxation scheme likewise requires a periodic overhaul. A half century after the basic Internal Revenue Code we use today made its debut,[205] those who now

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The income tax benefit obtainable by the substitution of [a non-New York resident trustee] is clearly in the interests of the beneficiaries. Indeed, the frequency with which such applications are made reflects an understandable eagerness on the part of persons interested in trusts to be rid of the high tax price payable where the fiduciary is a New Yorker. Although no formal tally has been made of the number of such applications, it is clear that their combined result — a loss of trust business by this State — is sufficiently serious to suggest that New York's high fiduciary income tax may be counterproductive to the State's overall economic interests. The New York legislature is urged to evaluate the present fiduciary income tax scheme in light of its negative repercussions, including the trend embodied by applications such as the one presently before the court. *Id.*

202. *See e.g. Kooi v. Chu*, 129 A.D.2d 393 (N.Y. App. Div. 3d Dept, 1987) (upholding an enforcement initiative by a new taxation administration against New York State Department of Taxation & Finance employees who failed to file their own income tax returns); *McGee v. Hester*, 815 F.2d 1193, 1194 (8th Cir. 1987) ("In 1979, [the Tennessee Alcoholic Beverage Commission] commenced a crackdown upon the illegal import of untaxed out-of-state liquor into the State of Tennessee. The object of the crackdown was to arrest Tennessee residents importing such liquor into the State."), *cert. denied,* 484 U.S. 963 (1987); *Lerman v. Commr.*, 939 F.2d 44 (3d Cir. 1991) ("This case involves the continuing saga of a crackdown by the Commissioner of Internal Revenue on a tax shelter device we will call the 'option-straddle transaction' and the divers[e] attempts of various taxpayers to avoid the consequences of this crackdown."), *cert. denied,* 502 U.S. 984 (1991); U.S. Dept. of Just., *Justice Department Files Suit To Stop Illegal Tax Scheme*, News Release No. 03-511 (Sept. 17, 2003), http://www.usdoj.gov/ tax/03_tax_511.htm (Sept. 17, 2003) ("The suit is part of the Justice Department's continuing nationwide effort to combat promoters of illegal tax schemes and scams."). Carlton Smith, *State is Planning a Sales-Tax Crackdown*, Seattle Times B-3 (Aug. 15, 1990) (reporting Washington State Department of Revenue's efforts to enforce sales tax compliance among merchants); *see also Mexico Plans Tax Crackdown*, Financial Times (London) 6 (Jan. 16, 1997) (reporting enforcement efforts of Mexican government to pursue tax evaders and their unpaid taxes).

203. *Cf.* 2 Ibn Khaldun, *Muqaddimah* 89 (F. Rosenthal, trans., Bollingen Ser. XLIII, Pantheon Books, 1958) (completed 1377) (pagination in original Arabic version: II, 79) ("It should be known that at the beginning of the dynasty, taxation yields a large revenue from small assessments. At the end of the dynasty, taxation yields a small revenue from large assessments.").

204. *See e.g.* Mark L. Silow, *The Decoupling of Pennsylvania's Estate Tax*, 229 Legal Intelligencer 5 (Nov. 25, 2003); Joshua S. Rubenstein, *Federal 'Repeal' of Estate Tax Puts Burden on States*, 228 N.Y.L.J. 9 (Sept. 9, 2002).

205. *See supra* n. 10.

call for its total revision have no trouble marshalling illustrative exhibits to buttress their arguments.