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Narcotics Offenders and the Internal Revenue Code: Sheathing the Section 6851 Sword

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NOTES

Narcotics Offenders and the Internal Revenue Code: Sheathing the Section 6851 Sword

I. INTRODUCTION: THE RAMBO CASE

On April 6, 1972, Charles Rambo was arrested in Louisville, Kentucky and charged with reckless driving. A search of his car and person uncovered a supply of drugs and 2,200 dollars in cash. On April 24, 1972, the District Director of Internal Revenue for the District of Kentucky informed Mr. Rambo that pursuant to section 6851 of the Internal Revenue Code, his taxable year for the period January 1, 1972-April 24, 1972, was terminated and an income tax of $24,446.88 was immediately due and payable. After making an assessment on April 25, 1972 and filing a notice of federal tax lien, the Internal Revenue Service (IRS) served notices of levy on Mr. Rambo and his bank. The bank turned over to the IRS $12,661.25, and a public sale of three automobiles that had been taken from Mr. Rambo was scheduled for September 14, 1972. On August 14, 1972, Mr. Rambo filed suit in the United States District Court seeking preliminary and permanent injunctions to prohibit the sale and to require that the seized property be returned. The district court granted the relief requested,[1] but the order was stayed pending an appeal by the government. The Sixth Circuit affirmed, holding that Mr. Rambo had been denied the procedural safeguards of the Internal Revenue Code because he had not been issued a deficiency notice as required by section 6861 and thus was denied access to the Tax Court for a redetermination of the tax imposed.[2]

The facts of the *Rambo* case are typical of a growing number of cases being litigated in the federal district and appellate courts and the Tax Court.[3] *Rambo*, however, was the first federal circuit

1. Rambo v. United States, 353 F. Supp. 1021 (W.D. Ky. 1972). The district court enjoined the public sale of the automobiles, and the government filed an interlocutory appeal to the Sixth Circuit Court of Appeals. Before the appeal could be heard, the district court granted summary judgment for Rambo and ordered the government to return all property and to refrain from further attempts to collect the assessed tax. All encumbrances were released from Rambo's property.

2. Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974).

3. *See, e.g.*, Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Clark v. Campbell, 501 F.2d 108 (5th Cir. 1974); Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974); Lewis v.

court decision to grant an injunction and hold that Tax Court review is available to a taxpayer whose taxable year has been terminated pursuant to section 6851. It is particularly significant that equitable relief was granted because the Internal Revenue Code specifically prohibits an injunction to prevent the collection of a tax except under special, enumerated circumstances.[4]

The summary collection procedures used by the IRS in *Rambo* in effect have become another arm of the criminal justice system for they have been applied with increasing frequency to suspected criminal offenders, particularly narcotics dealers. An Internal Revenue Service Manual Supplement dated November 10, 1971, entitled "IRS Narcotics Project—Intelligence Division Procedures," stated that the purpose of the Project is to "disrupt the distribution of narcotics through the enforcement of all available tax statutes . . . ."[5] Thus, the IRS is actively and openly engaged in the war against illicit drug traffic and the section 6851 procedures are swift, decisive, and extremely effective weapons.

The procedures followed by the IRS are simple. The IRS is alerted when a suspected narcotics dealer is arrested. Often revenue agents are notified earlier and may even be present at the time of arrest. Subsequent to the arrest, the taxpayer is given a "Termination Notice" in the form of a letter informing him that all taxes for the terminated period are immediately due and payable and demanding payment of a specified amount.[6] If the taxpayer refuses or

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Sandler, 498 F.2d 395 (4th Cir. 1974); Laing v. United States, 496 F.2d 853 (2d Cir. 1974); Hall v. United States, 493 F.2d 1211 (6th Cir. 1974); Irving v. Gray, 479 F.2d 20 (2d Cir. 1974); Preble v. United States, Civ. No. 73-3072-F (D. Mass. May 23, 1974); Boyd v. United States, 33 Am. Fed. Tax R.2d 1246 (E.D. Pa. 1974); Shaw v. McKeever, 33 Am. Fed. Tax R.2d 1027 (D. Ariz. 1974); Williams v. United States, 373 F. Supp. 71 (D. Nev. 1973); Woods v. McKeever, 32 Am. Fed. Tax R.2d 5967 (D. Ariz. 1973); Millington v. Conley, Civ. No. 15,729 (D. Conn. June 20, 1973); Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973); Parrish v. Daly, 350 F. Supp. 735 (S.D. Ind. 1972); Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969).

4. INT. REV. CODE OF 1954, § 7421(a). *See* note 20 *infra*.

5. This document was an exhibit in Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973), *appeal docketed*, Nos. 73-2037 & 73-2038, 9th Cir. June 8, 1973. Silver, *Terminating the Taxpayer's Taxable Year: How IRS Uses It Against Narcotics Suspects*, 40 J. TAX. 110 & n.1 (1974).

6. This letter reads as follows:

NOTICE OF TERMINATION OF TAXABLE PERIOD

Dear Taxpayer:

Pursuant to section 6851 of the Internal Revenue Code, you are notified that I have found you have acted in a manner indicating that you may conceal assets thereby tending to prejudice or render ineffectual collection of income tax for the period ____.

Accordingly, I have declared the taxable period of ____ through ____ terminated; and, consequently, the income tax for the terminated period has become immediately due

is unable to pay, an assessment is made,[7] a tax lien is filed, and the assets of the taxpayer are seized.[8] These steps may occur virtually simultaneously and within a matter of hours of the arrest. The reported cases indicate that the IRS has often seized suspects' assets even though it has little evidence of either tax evasion or drug dealing.[9] Moreover, the amounts assessed often appear totally arbitrary,[10] and the possibility that the suspect subsequently may be cleared of the criminal charges[11] apparently is an irrelevant consid-

and payable. Demand is hereby made for the tax for the terminated period in the following amount.

Taxable Period	Tax	Penalty

Any portion of the tax for the terminated period which is unpaid shall be assessed against you, and administrative or judicial action to collect the assessment shall be taken immediately.

Silver, *supra* note 5, at 112.

7. Sometimes this is done following the preparation of a return by the IRS for the taxpayer pursuant to § 6020(b). Section 6020(b) allows the IRS to make a return for a taxpayer whenever a return is "required" and the taxpayer fails to do so. Whether a return is required following termination is not clear. Section 443(a)(3) states that a return "shall" be filed following termination, but the regulations do not outline any procedures for this. In practice, the IRS will not terminate the tax year, then wait for the taxpayer to file under § 443(a)(3). Termination, assessment, levy, and seizure all occur within a short time-frame. *See* Clark v. Campbell, 501 F.2d 108, 117-18 n.28 (5th Cir. 1974); Lisner v. McCanless, 356 F. Supp. 398, 403 n.9 (D. Ariz. 1973); O'Dell, *Assessments: What Are They—Ordinary? Immediate? Jeopardy?*, N.Y.U. 31st Inst. on Fed. Tax. 1495, 1520, 1522 n.86 (1973); Meyers, *Termination of Taxable Year: Procedures in Jeopardy*, 26 Tax L. Rev. 829, 835-38 (1971). The relationship of §§ 443(a)(3), 6020(b), 6012 (dealing with persons required to make returns of income) and 6851 is extremely complex and has not been addressed in the cases to any great extent. Textwriters have heen quite vocal in contending that the question of the necessity of a return is extremely significant.

8. *See generally* Meyers, *supra* note 7, at 829, 831-33; Comment, *Code Section 6851—Termination of Taxable Year—Application and Function Within the Internal Revenue Code of 1954*, 9 Wake Forest L. Rev. 381, 381-82 (1973).

9. *See, e.g.*, Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974).

10. The taxpayer in a termination case is not given a copy of the Revenue Agent's Report setting forth the method by which the IRS arrives at its assessment. Making this report available is standard procedure in nonjeopardy cases. Silver, *supra* note 5, at 110. In Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973), the assessment of over $100,000 was reached by taking a 2 month period of alleged marijuana sales as an average for the entire terminated period. No tangible evidence of the actual level of dealing was produced at the trial. In Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974), the assessment of $25,549 was based upon alleged sales of 6 kilos of cocaine. No proof of these sales was presented at the injunction hearing. In Agnilar v. United States, 501 F.2d 127 (5th Cir. 1974), a Mexican citizen's truck and $11,000 cash were seized. No drugs were found and charges were never brought against him for drug-related activity. An assessment for over $11,000 was made against the taxpayer, however. *See* Williams v. United States, 373 F. Supp. 71 (D. Nev. 1973) (assessment based on multiple hearsay that taxpayer had been selling $900 worth of narcotics per day).

11. *See* note 10 *supra*. Charles Rambo was never prosecuted for any charge related to his arrest on April 6, 1972.

eration. In the two and one half year period ending December 31, 1973, the Narcotics Project, which operates in about 90 cities, resulted in the seizure of approximately 27,000,000 dollars and assessments of an additional 101,000,000 dollars against 3475 suspects. Fewer than one hundred of these taxpayers have been convicted of tax fraud, and tax evasion charges actually have been brought against only a small percentage of the suspects.[12] In short, the section 6851 procedures are a summary means of enforcing the narcotics laws by depriving a suspected dealer of most, if not all, of his assets and then making recovery extremely burdensome and time consuming.[13]

This Note first will analyze the Internal Revenue Code provisions supporting the current crackdown by the IRS on suspected narcotics dealers. Secondly, it will examine the split in the federal circuit courts of appeal on the issues of the availability of Tax Court review of an assessment made pursuant to a section 6851 termination of a taxable year and the availability of equitable or statutory protections to prevent the seizure and sale of property belonging to the taxpayer. Lastly, a discussion of the propriety of such conduct by the IRS and its constitutionality in light of recent Supreme Court decisions concerning due process of law and prejudgment seizure of property will be followed by specific criticisms of the activity and suggestions for congressional or Supreme Court intervention.[14]

II. The Statutory Background

A. 1954 Code Provisions

Charles Rambo's tax was found to be "in jeopardy" within the meaning of section 6851 of the Code which follows in part:

SEC. 6851. TERMINATION OF TAXABLE YEAR
(a) Income Tax in Jeopardy.—
(1) In general.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall

12. Wall Street J., Apr. 10, 1974, at 1, col. 1.

13. Several years may elapse between the seizure of the taxpayer's property and any judicial relief that may be afforded.

14. On October 15, 1974, the Supreme Court granted certiorari to the government in Hall v. United States, 493 F.2d 1211 (6th Cir. 1974) (following *Rambo*), and to the taxpayer in Laing v. United States, 496 F.2d 853 (2d Cir. 1974). In tbe petition for certioari in *Hall*, it was stated that 600 § 6851 terminations occurred in fiscal year 1972, and over 1800 in fiscal 1973. 9 CCH 1974 STAND. FED. TAX REP. ¶ 8056.

cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.[15]

Persons in the position of Rambo are told by form letter in general terms that they have acted in a manner indicating that they may conceal assets and thereby prejudice or render ineffectual the collection of income taxes. The termination letter does not contain the specific facts that led the district director to that conclusion.[16]

Section 6851 does not contain any independent assessment authority,[17] and before a tax may be collected it must be assessed.[18] The contention of the government in *Rambo* and other recent cases has been that the assessment following a section 6851 termination is made pursuant to section 6201, which in general terms authorizes the IRS to make assessments of taxes.[19] After making an assessment, the IRS has extensive power under sections 6331-36 to levy on the taxpayer's property and hold a public sale to satisfy the assessment. Moreover, section 7421 of the Code further protects the government's interests by severely restricting the taxpayer's right to an injunction to restrain the assessment and collection of the tax.[20] The section follows in part:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

In a normal, nonjeopardy case, after a taxpayer has filed a return at the close of a taxable year, the IRS will determine that a

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15. INT. REV. CODE OF 1954, § 6851(a)(1).

16. *See* note 6 *supra*.

17. In Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969), the government contended that § 6851 impliedly contained its own assessment authority. *See* text accompanying note 59 *infra*.

18. "An assessment is an administrative determination that a certain amount is currently due and owing as a tax. It makes the taxpayer a debtor in much the same way as would a judgment." Rambo v. United States, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974).

19. INT. REV. CODE OF 1954, § 6201(a) reads in part as follows:

The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes . . . imposed by this title . . . .

20. *Id.* § 7421(a).

"deficiency" exists if it has reason to suspect that he has failed to pay all or a portion of the taxes due.[21] In order to recover this deficiency, the IRS must send a formal notice of deficiency by certified or registered mail.[22] The taxpayer then has a choice of forums in which to contest the validity of the deficiency. The taxpayer may file a petition for a redetermination of the tax in the Tax Court within ninety days of his receipt of the deficiency notice,[23] or the taxpayer may choose to pay the alleged deficiency and file suit for a refund in the district court.[24] The suit for refund takes longer and requires prepayment of the deficiency by the taxpayer, but has the attraction of affording the taxpayer the right to a jury trial.[25]

The Tax Court's jurisdiction to redetermine tax liability is conditioned on the prior issuance of a deficiency notice.[26] The significance of the IRS contention that section 6201 is the assessment authority following a section 6851 termination is that section 6201 itself makes no mention of a deficiency notice or letter. The IRS contends that an assessment made pursuant to section 6201 is not an assessment for a "deficiency" and therefore no deficiency notice is required. The taxpayer thus would be denied access to the Tax Court. Under the government's view in *Rambo* and similar section 6851 cases, the only remedy of the taxpayer is to pay the tax, file a return at the end of the normal taxable year, and then bring an action for a refund in the district court.[27]

Conversely, Mr. Rambo contended that assessment authority following a jeopardy termination under section 6851 is not contained in section 6201, but is conferred by section 6861, which specifically applies to "jeopardy" assessments.[28] A section 6861 jeopardy assess-

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21. *Id.* § 6211(a). "A deficiency is neither a legal theory nor an intangible concept. It is an *amount* of tax due representing the difference between the amount returned by the taxpayer and the amount which, in fact and law, is due the Government." 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION [hereinafter cited as MERTENS], § 49.129 (1974).

22. INT. REV. CODE OF 1954, § 6212(a).

23. *Id.* § 6213(a).

24. *Id.* §§ 1346, 7422.

25. "[T]he action for refund of taxes is in the nature of a common law action for money had and received . . . ." 10 MERTENS § 58A.35, at 113 (1974). 28 U.S.C. § 2402 (1970) grants either party in a refund suit the right to request a jury trial.

26. INT. REV. CODE OF 1954, § 6213(a). The formal deficiency notice has been described as a "ticket to the tax court." Corbett v. Frank, 293 F.2d 501, 502 (9th Cir. 1961).

27. INT. REV. CODE OF 1954, §§ 6511, 6535, 7422.

28. *Id.* § 6861 provides:

(a) Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency . . . and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in

ment is designed to cover jeopardy situations that arise after a taxpayer has filed a return at the end of his normal tax year. Section 6861(b) requires a deficiency letter, which is a prerequisite to the right to petition the Tax Court for a redetermination of the assessment and contest the validity of the tax before it is paid. If the IRS fails to issue the required deficiency notice within sixty days of the jeopardy assessment, the taxpayer may seek an injunction prohibiting the collection of the tax and invalidating any levy.[29] If a deficiency letter is sent, the taxpayer may delay collection proceedings[30] if he posts an adequate bond,[31] and even if he is unable to post a bond, seized property may not be sold at auction except under enumerated, limited circumstances.[32] The receipt of a deficiency notice is obviously of great importance to a taxpayer whose taxable year has been terminated because the ability to petition the Tax Court before payment can mean the difference between economic survival and disaster.[33]

The principal question raised in recent section 6851 cases is whether the IRS must issue a section 6861 deficiency letter subsequent to a section 6851 termination. Section 6851 itself neither mentions the assessment authority following termination nor specifies whether a deficiency is created when a section 6851 tax is imposed.[34] A literal reading of the Code, without resort to other considerations, seems to lead to the conclusion that assessment authority is to be found in section 6201 because it is a general provision designed to cover most situations. Taxpayers have contended, however, that Congress could not have intended to treat section 6851 taxpayers differently than section 6861 taxpayers since both sections involve jeopardy assessments. The statutory history of the relevant Code provisions is often cited for support by both sides in section 6851 cases.

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respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

29. *Id.* § 6213(a).

30. *Id.* §§ 6331-36.

31. *Id.* § 6863(a).

32. *Id.* § 6863(b)(3)(A).

33. Nevertheless, the § 6861 procedures have come under heavy attack in recent years, with many of the same criticisms being made of § 6861 as have been made of § 6851. *See, e.g.*, Gould, *Jeopardy Assessments—When They May Be Levied and What To Do About Them*, N.Y.U. 18TH INST. ON FED. TAX. 937 (1960); Hochman & Tack, *Jeopardy Assessments—A System in Jeopardy*, 45 TAXES 418 (1967); Kaminsky, *Administrative Law and Judicial Review of Jeopardy Assessments Under the Internal Revenue Code*, 14 TAX L. REV. 545 (1959); O'Dell, *supra* note 7, at 1495; Note, *Jeopardy Assessment: The Sovereign's Stranglehold*, 55 GEO. L. J. 701 (1967).

34. *See* notes 26 & 27 and accompanying text *supra*.

B. *Statutory History*

The Revenue Acts of 1916 and 1918 did not provide any prepayment procedure by which a taxpayer could challenge an IRS assessment; the only review provided was in a suit for a refund after paying the tax. Assessment authority for section 250(g) of the 1918 Act, which was the predecessor of section 6851 and was almost identical to it, was, as for all taxes imposed, found in section 3176 of the Revised Statutes, a general assessment provision similar to today's section 6201.

In 1924 Congress established a prepayment review forum, the Board of Tax Appeals,[35] which was given non-exclusive jurisdiction because sections 274(b) and 279(b) of the 1924 Act gave both the government and the taxpayer the right to further suit in the district courts. The government's power of immediate assessment in the normal, nonjeopardy situation was limited by section 274(a), which required the IRS to send the taxpayer a deficiency notice informing him that a deficiency was due and that the IRS intended to assess and collect it. Following receipt of this notice, however, the taxpayer had sixty days within which to petition the Board for a redetermination of the deficiency.[36] When the IRS made a jeopardy assessment under section 274(d),[37] no deficiency notice was required and a taxpayer could get to the Board only by posting a bond and bringing a claim in abatement.[38] Thus, prior to 1926, neither section 6851 nor 6861 taxpayers (as they would now be called) had a right to prepayment review before the Board of Tax Appeals, which has since become the Tax Court.

The Revenue Act of 1926 changed the rights of both normal and jeopardy taxpayers and brought the statutory scheme to its present form. No recourse was available to a federal district court after suit was brought before the Board, and direct appeal from the Board to the circuit courts of appeal was provided. The normal taxpayer could now seek judicial review of an assessment either by going before the Board without first paying the tax or by paying the tax and then suing for a refund. The 1926 Act also extended the deficiency notice requirement to section 6861 jeopardy taxpayers,[39] which gave them the right to a redetermination by the Board. If the jeopardy assessment[40] preceded the notice of deficiency, the IRS was

35. In the Revenue Act of 1942 the Board of Tax Appeals became the Tax Court.

36. Revenue Act of 1924, ch. 234, § 274(a),(c), 43 Stat. 296.

37. Revenue Act of 1924, ch. 234, § 274(d), 43 Stat. 296 (now INT. REV. CODE OF 1954, § 6861).

38. Revenue Act of 1924, ch. 234, § 279(a)-(b), 43 Stat. 300.

39. Revenue Act of 1926, ch. 27, § 279(b), tit. II, 44 Stat. 9.

40. Jeopardy assessment authority was expressly granted by § 279(a).

required to send a deficiency notice within sixty days after the date of the assessment,[41] at which time the taxpayer could petition the Board for an adjudication.[42] These procedures are now contained in sections 6861, 6212(a) and 6213(b) of the 1954 Code.[43]

Since 1926 the only difference between a section 6861 jeopardy taxpayer and a normal taxpayer has been that the latter has the right to petition for and receive a determination by the Tax Court before the assessment, although the section 6861 taxpayer can be made to wait up to sixty days after the jeopardy assessment before being sent the deficiency notice. If the government does not send a deficiency notice, both normal and jeopardy taxpayers may obtain injunctive relief under section 6213(a).[44]

The IRS, in interpreting the statutory history outlined above,[45] takes the position that assessment authority for section 6851 cannot be found in section 6861 since section 6851 was enacted prior to section 6861 and the creation of the Board of Tax Appeals. In 1926, the IRS argues, when section 6861 took its present form (and section 6851 remained unchanged), the Act specifically gave Board review to a taxpayer upon whom a jeopardy assessment had been imposed without giving a corresponding right to a taxpayer whose taxable year had been terminated. Therefore, the argument goes, Congress must have intended for the termination taxpayer to have no more rights than he did prior to the creation of the Board.

Although this argument is technically attractive, it is inconsistent with the basic theory and purpose of the Tax Court. *Rambo* and several other recent cases[46] have examined the intent of Congress in creating the Board and have found that Congress could not have designed to treat a section 6851 taxpayer differently than a section 6861 taxpayer. The following quotation from the legislative history of the 1924 Act offers strong, if not "compelling,"[47] evidence of the validity of this position:

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41. Revenue Act of 1926, ch. 27, § 279(b), tit. II, 44 Stat. 9.

42. *Id.* § 274(a).

43. A jeopardy taxpayer now has 90 days to petition the Tax Court after receiving a deficiency letter, which is commonly called a "90-day letter." INT. REV. CODE OF 1954, § 6213(a).

44. "Thus . . . section 6213 clearly grants the district court jurisdiction to enjoin the assessments and levies . . . *unless* such assessment was imposed in accordance with the authority granted in the jeopardy assessment provisions of section 6861. Section 6861 by contrast reflects the Congressional recognition that in the limited circumstances where the collection of revenue seems to be in jeopardy, any hardship resulting from levying on a taxpayer's assets prior to judicial review is outweighed by the Government's need to protect revenue which would otherwise be lost." Sherman v. Nash, 488 F.2d 1081, 1084 (3d Cir. 1973).

45. *See* Schreck v. United States, 301 F. Supp. 1265, 1271 (D. Md. 1969).

46. *See, e.g.*, Clark v. Campbell, 501 F.2d 108, 122 (5th Cir. 1974).

47. *Id.*

> The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.[48]

III. THE JUDICIAL BACKGROUND

A. *The Littauer Case*

In 1938 the Board of Tax Appeals in *Ludwig Littauer & Co. v. Commissioner*[49] first considered whether the procedural safeguards of section 273 (now section 6861) were applicable to a termination of taxable year under section 146 (now section 6851). The taxpayer contended that the termination notice itself constituted a notice of deficiency supporting a proceeding for redetermination of liability by the Board. The Board rejected this contention, observing that section 146 supplements sections 272 (now section 6212) and 273 "to provide a means of protecting the Government from the loss of tax through the imminent disappearance of the means of payment."[50] The Board recognized that both sections 146 and 273 dealt with jeopardy situations, but concluded that section 146 contemplated more critical circumstances than section 273[51] and therefore the deficiency notice procedure of section 273 did not apply to section 146. The section 146 taxpayer was deemed adequately protected by his ability to post a bond to avoid immediate payment and his right to file a full-year return and sue for a refund in the district court.[52] Finally, and most significantly, the Board determined that the "thing" created by a section 146 termination was not a deficiency as defined in the Code, but was "a provisional statement of the amount which must be presently paid as against the possibility of collection."[53]

48. H.R. REP. No. 179, 68th Cong., 1st Sess. (1924).

49. 37 B.T.A. 840 (1938).

50. *Id.* at 841.

51. "In the body of the subdivision the word jeopardy is not used, but the subdivision is entitled 'TAX IN JEOPARDY.' Both the substance of the subdivision and its title indicate an intention to supply a remedy in emergency more extreme than that covered by section 273." *Id.*

52. 37 B.T.A. at 842-43.

53. *Id.* at 842. "In *Littauer* the Board of Tax Appeals viewed this event (termination of tax year) not as the final imposition of a tax but rather as a type of mandatorily imposed bond to ensure payment at the end of the normal taxable period." Clark v. Campbell, 501 F.2d 108, 118 (5th Cir. 1974).

Littauer was followed in *Puritan Church of America v. Commissioner*,[54] and until 1969 the law thus was firmly established that a taxpayer whose taxable year was terminated pursuant to section 6851 was not entitled to a deficiency notice and, hence, was not entitled to review of the termination assessment in the Tax Court.

B. The Schreck Case

In 1969 the *Littauer* holding that Tax Court review was unavailable was challenged anew in *Schreck v. United States*.[55] Every case since *Schreck* has lauded the thoroughness of the opinion by Judge Kaufman although many have disapproved of his final conclusions and holding.[56] While *Schreck* was a district court decision, in effect it has become the leading case with which subsequent cases have had to contend.

In *Schreck*—a case factually similar to *Rambo*—a large sum of cash and other personal property belonging to Schreck were seized by federal agents in a nontax-related search on October 23, 1967. Two weeks later, the IRS sent Schreck a letter advising him that pursuant to section 6851 the IRS had terminated his taxable year and that his income tax for the short tax year January 1, 1967-October 25, 1967, was immediately due and payable. After assessing a tax of 20,730 dollars, the IRS filed a notice of tax lien and a notice of levy against the property seized. Schreck sought an injunction under section 6213(a), which expressly allows injunctive relief against the assessment, levy, or collection of a tax when the IRS does not send the deficiency notice required by section 6861.[57] Thus, to apply section 6213, the court first had to determine that section 6861 was triggered by a section 6851 termination. The issue as stated by Judge Kaufman was simply "whether a taxpayer has a right to have adjudicated in the Tax Court the validity of an assessment in a jeopardy situation made for a short year period."[58]

In *Schreck*, the government contended that section 6851 itself is the assessing authority following termination of a taxable year, although the section does not mention any such authorization. The

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54. 20 P-H Tax Ct. Mem. 453 (1951), *aff'd per curiam*, 209 F.2d 306 (1953), *cert. denied*, 347 U.S. 975 (1954). There are indications that the Tax Court is no longer comfortable with its *Littauer* decision. *See* Nino Sanzogno, 60 T.C. 321, 330 (1973) (Simpson, J., concurring).

55. 301 F. Supp. 1265 (D. Md. 1969).

56. *E.g.*, Irving v. Gray, 479 F.2d 20, 23-24 (1973).

57. INT. REV. CODE OF 1954, § 6213(a) provides an exception to the general anti-injunction provision of § 7421. *See* notes 20 & 44 *supra* and accompanying text.

58. 301 F. Supp. at 1268.

government further argued, as it later did in *Rambo*, that no deficiency notice was required since the assessment was not made pursuant to section 6861. Following an exhaustive analysis of the statutory and case history of the relevant Code provisions, Judge Kaufman, holding in favor of the taxpayer, refuted the government's arguments. In reaching the conclusion that the authority for a jeopardy assessment for a short-year period is section 6861, Judge Kaufman admitted that "the words of the statutes do not irresistably lead to either of the conflicting constructions urged in this case,"[59] but he opined that the very purpose of the Tax Court was to provide a prepayment forum to protect the taxpayer from great financial hardship and sacrifice caused by requiring him to pay an incorrectly assessed tax. Moreover, he reasoned that the more "natural" reading of the legislation and its chronology supported the plaintiff's theory:

> Congress seemed to be saying to the IRS:
> Before the 1926 Act, you could use tbe predecessor of section 6851 to terminate the taxable year and accelerate the due date of payment, but to assess you had to use the general authorizing statute. Now, in the 1926 Act, you may still use the predecessor of section 6851 for the same purposes as before, but to assess you must utilize the statute authorizing jeopardy assessments, i.e., the predecessor of section 6861.[60]

On the second major question of statutory interpretation, whether the "thing" created by a section 6851 termination was a deficiency, Judge Kaufman found that although a "contrary reading [of the government's position] is not compelled,"[61] reading the Code in the light of all factors, "including administrative action, legal developments in Congress and the courts, and opposing considerations of policy,"[62] led to the conclusion that a deficiency was created and Tax Court review was available.

Thus, since the section 6851 termination assessment had created a deficiency and since the deficiency letter required by section 6861, which is the assessment authority for such a termination, had not been sent, an injunction under section 6213 was warranted. This rationale, with only slight variation, was later adopted by the Sixth Circuit in *Rambo*.[63]

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59. *Id.* at 1284.
60. *Id.* at 1273.
61. *Id.* at 1275. "According to the Government, a section 6861 assessment is appropriate where there is a predetermined and preexisting income tax deficiency, and subsequent activity of the taxpayer threatens to prejudice its collection; whereas, on the other hand, a section 6851 assessment is available when there is no predetermined or preexisting tax deficiency but only a probable deficiency and current activity of the taxpayer threatens the future collectibility of that probable deficiency." *Id.* at 1271.
62. *Id.* at 1275.
63. The decision of the district court in Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex.

C. *The Irving and Williamson Cases*

In 1973 the Second Circuit in *Irving v. Gray*[64] held that the IRS was *not* required to issue a section 6861 deficiency notice in conjunction with the termination of a taxpayer's taxable year pursuant to section 6851. In another case, *Williamson v. United States*,[65] the Seventh Circuit reached the same conclusion.

In *Irving*, the IRS sent termination notices to Clifford and Edith Irving, and Richard Suskind on February 4, 1972, informing them that taxes for the period January 1, 1971-December 31, 1971, were immediately due and payable.[66] At that time, plaintiffs were under investigation by state and federal grand juries for the now-famous Howard Hughes biography hoax.[67] Pursuant to section 6201(a), a total of 512,111 dollars was assessed against the three. On the same date, the IRS served notices of levy on a brokerage firm, demanding payment of the amounts held in the taxpayers' securities accounts; the firm handed over $91,322.92 to the IRS. Alleging that section 6861 was the authority for the assessment and that section 6213(a) permitted an injunction when no deficiency notice was issued as required by section 6861, plaintiffs brought suit for an injunction to restrain the collection of the taxes.

The court cited the anti-injunction provisions of section 7421[68] and affirmed the lower court decision in favor of the IRS.[69] Reasoning that no deficiency had been determined, the court found section 6861 inapplicable. Because the Tax Court existed for the purpose of

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1972), *aff'd*, 501 F.2d 108 (5th Cir. 1974), the first case to follow *Schreck*, was followed by Rambo v. United States, 353 F. Supp. 1021 (W.D. Ky. 1972), *aff'd*, 492 F.2d 1060 (6th Cir. 1974), and then Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973).

64. 479 F.2d 20 (2d Cir. 1973).

65. 31 Am. Fed. Tax. R.2d 800 (7th Cir. 1971).

66. *Irving* is different from most other § 6851 cases in that the IRS terminated a taxable year that had already ended.

> Section 6851(a)(1) results in the tax hecoming due and payable, not merely "owing" at that time; the distinction is significant. For example, in the usual case of a calendar year taxpayer, his previous year's income tax is a debt owing January 1, but is not due and payable until April 15. An assessment would not be proper until the tax has first become due and payable.

Meyers, *supra* note 7, at 833.

67. "This, as everyone knows, was a scheme by Clifford Irving and Richard Suskind to write and sell an 'authorized' version of the life of billionaire recluse Howard Hughes, when in fact there was no authorization therefor by Hughes." 479 F.2d at 21. Section 6851 has been utilized against at least one other famous person, former heavyweight boxing champion Ingemar Johansson. *See* United States v. Johansson, 62-1 U.S. Tax Cas. ¶ 9130 (S.D. Fla. 1961), *aff'd in part and remanded in part*, 336 F.2d 809 (5th Cir. 1964), *on remand*, 67-2 U.S. Tax Cas. ¶ 9505 (S.D. Fla. 1967), *aff'd sub nom.*, Feature Sports, Inc. v. United States, 374 F.2d 89 (5th Cir. 1967).

68. *See* note 20 *supra* and accompanying text.

69. Irving v. Gray, 344 F. Supp. 567 (S.D.N.Y. 1972).

reviewing deficiency assessments, the Second Circuit concluded that plaintiffs did not have the right to petition the Tax Court for review. The contrary holding in *Schreck* was deemed erroneous for two reasons. First, the court found that the assessment following the termination was validly made pursuant to the general assessment authority of section 6201, which requires no deficiency letter and permits the IRS to make an assessment before the taxpayer makes a deficient payment of his income taxes.[70] Secondly, plaintiffs were not without a remedy because they had the alternative of filing regular returns after paying the assessment and then suing for a refund in the district court six months later.[71] The court concluded by making the following observation:

> The taxpayers may, of course, eventually prevail in their claim that the IRS has claimed more to be due than actually is due. But this is a question to be litigated in due course after the taxpayers have filed their tax returns. As stated by the court below in rejecting the taxpayer's request for equitable relief, "[i]t is bearable in equity that those whose 'bold plans' are frustrated may suffer potentially costly inconveniences." 344 F. Supp. at 573. In any event, because the taxpayers have an adequate legal remedy to recover any excessive taxes charged by the IRS, because there was no deficiency assessment made, and because they do not come before us with clean hands we would not be able to grant them injunctive relief even if we believe that they had been assessed too much by the IRS.[72]

In *Williamson*, the IRS relied on information concerning Williamson's arrest and indictment for conspiracy and the sale of narcotics as a basis for its seizure of the contents of his safe deposit box. Suspecting that the money represented proceeds from the sale of narcotics, it acted under section 6851. Williamson subsequently filed a return and sued for a refund in the district court. He refused to answer written interrogatories in that litigation, claiming the fifth amendment protection against self-incrimination. The district judge dismissed the case because of this refusal, but the Seventh Circuit reversed on the ground that the fifth amendment privilege applies to civil property forfeitures that are criminal in nature.[73]

One of Williamson's contentions in the district court was that the IRS failed to send him a deficiency letter pursuant to section 6861. Although not necessary to its decision, the appeals court addressed this issue as follows:

> There is nothing in the Code which provides for a deficiency notice in a short

70. 479 F.2d at 24.

71. This argument has been consistently asserted by the IRS in all section 6851 cases. *See* note 96 *infra* and accompanying text.

72. 479 F.2d at 25.

73. 31 Am. Fed. Tax. R.2d 800 (7th Cir. 1971). On the fifth amendment issue see United States v. United States Coin and Currency, 401 U.S. 715 (1971).

term jeopardy case . . . . We believe, however, that the deficiency notice requirement cannot be read into section 6851 because the assessment made under that section is not a deficiency as defined in section 6211. That section defines a deficiency as the amount by which the tax imposed exceeds the amount shown on the tax return. The assessment in this case is not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable.[74]

Although *Williamson* has been cited as placing the Seventh Circuit on the side of the Second Circuit in *Irving*, the factual context in which the section 6851 question arose renders doubtful the precedential value of the court's statement.

D. *The Clark Case*

The Court of Appeals for the Fifth Circuit in *Clark v. Campbell*[75] accepted the *Rambo* and *Schreck* analysis of section 6851 terminations and held that a section 6851 termination required a section 6861 deficiency notice. On June 11, 1969, a search of two buildings in Dallas by the Bureau of Narcotics and Dangerous Drugs (BNND) resulted in the seizure of a substantial amount of personal property belonging to the taxpayer. On July 14th the District Director of Internal Revenue notified the taxpayer that his taxable year had been terminated. Alleging that the taxpayer owed taxes in the amount of $104,697.20, the IRS served notices of levy on several banks, the sheriff who conducted the search, and the regional director of the BNDD. Notices of levy were also posted on real estate owned by the taxpayer. The IRS collected 61,000 dollars pursuant to the levies and after the taxpayer sued for an injunction, the IRS reassessed him and reduced the original assessment by $57,701.55.

The taxpayer first contended that the section 6851 termination was made at the request of law enforcement officers for the purpose of harassing and punishing him; he further challenged the facts upon which the district director made his finding of jeopardy.[76] Secondly, the taxpayer repeated the argument of *Schreck* that when a taxable year is terminated pursuant to section 6851, section 6861 is the assessment authority and requires the issuance of a deficiency notice, which in turn becomes the taxpayer's "ticket" to the Tax Court. The IRS contended that assessment authority was found in

74. 31 Am. Fed. Tax R.2d at 800.

75. 501 F.2d 108 (5th Cir. 1974).

76. Clark v. Campbell, 341 F. Supp. 171, 173 (N.D. Tex. 1972). Plaintiff cited Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966) and United States v. Bonaguro, 294 F. Supp. 750 (E.D.N.Y. 1968) for this proposition.

section 6201[77] and that section 7421 was a bar to the granting of an injunction.

The district court granted the relief sought by the plaintiff[78] although taxpayer's first argument was rejected because of "the general rule that courts will not inquire into the circumstances surrounding the Director's determination of liability."[79] The court held that the assessing authority was section 6861, which required a deficiency letter, and that an injunction under section 6213 was appropriate in the absence of such a letter. It concluded that the purpose of jeopardy assessments is to assure that the government's interests are protected. By giving the taxpayer a ticket to the Tax Court, the government's interests were still adequately protected and "serious constitutional questions" were avoided.[80]

The Fifth Circuit affirmed the judgment in the most exhaustive opinion to date on the subject of section 6851 terminations. It began with the following perceptive statement by Judge Brown:

> A weapon, little known and previously not too often employed, having atomic potentialities in the arsenal of the tax gatherer is the power of the IRS to order quick termination of a taxpayer's tax year with summary demand for immediate payment with the sanction of levy, seizure and sale. The issue in this appeal in a now much contested area as this technique is found to be an effective tool in the relentless struggle against the traffic in drugs, is whether these awesome consequences can be consummated without a deficiency notice. If one is required, the present appellee taxpayer wins at least for the time being. But the result far transcends immediate relief to this litigant. For a holding against the necessity for a deficiency notice deprives the "victim" of this summary administrative procedure of any right of prepayment judicial review by petition to the Tax Court and remits him to payment, filing of claim for refund, and suit in the district court for refund.[81]

Judge Brown first concluded that the "thing" created by a section 6851 termination was a deficiency within the meaning of Code section 6211,[82] which contemplated the normal situation in

77. This case arose after Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969), and is apparently the first instance in which the IRS contended that section 6201 was the assessment authority. In *Schreck* the contention had heen that § 6851 impliedly provided its own assessment authority.

78. 341 F. Supp. at 176. The court held that an injunction would issue under section 6213(a) unless the IRS sent a deficiency letter. Thus the levy and assessment could remain in effect if the deficiency letter was sent.

79. *Id.* at 171. Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957), was cited for this proposition. Since *Lloyd* was a section 6861 case, it is not clear that the court's conclusion was mandated. See text accompanying notes 166-70 *infra*.

80. 341 F. Supp. at 176.

81. 501 F.2d at 110.

82. INT. REV. CODE OF 1954, § 6211(a) defines "deficiency" as:

> the amount by which the tax imposed . . . exceeds the excess of — (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B)

which after the taxpayer has filed a return at the end of the tax year, the IRS determines that the tax liability exceeds the amount set forth in the return. The regulations recognize, however, that the IRS may determine a deficiency even in the absence of a return.[83] When the IRS terminates the tax year of a taxpayer, he is informed that the tax for the terminated period is immediately due. "In short, where the day before he literally did not then owe a tax, he is on receipt of this demand required to pay *more* than he was (the day before) obligated to do."[84] Judge Brown thus reasoned that the tax imposed pursuant to a section 6851 termination becomes a "deficiency" when not paid upon demand and that a prepayment determination of the liability is within the jurisdiction of the Tax Court.

Secondly, Judge Brown determined that the assessment authority for the tax imposed under section 6851 was section 6861. This conclusion was again reached by careful examination of the Code provisions. Section 6201 is the authority for assessing uncontested taxes, but when liability is disputed in the normal, nonjeopardy situation, section 6212 and the following Code provisions come into play. Under section 6861, when a jeopardy assessment is made, a deficiency notice similar to that of section 6212 is required,[85] the chief difference being that under section 6861 the right to petition the Tax Court follows the tax assessment. As a matter of construction, Judge Brown contended that it would be "unsound" to treat sections 6851 and 6861 differently since they both appeared in the subchapter entitled "JEOPARDY" and were "equally potent and similarly oriented provisions."[86]

> Section 6851 clearly covers a jeopardy situation and the assessment subsequent to a § 6851 quick termination is as to all of its practical consequences a jeopardy assessment . . . . To find the assessment power for a § 6851 assessment in the ordinary assessment provision (§ 6201) rather than the jeopardy assessment provision would be a complete derogation of the obvious and carefully considered pattern of the Code.[87]

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the amounts previously assessed (or collected without assessment) as a deficiency, over — (2) the amount of rebates . . . made.

83. The Treasury Regulations further amplify the definition of a deficiency:

> If no return is made, or if the return . . . does not show any tax, for the purpose of the definition 'the amount shown as the tax by the taxpayer upon his return' shall be considered as zero. Accordingly, in any such case . . . *the deficiency is the amount of the tax imposed. . . .* (emphasis added)

Treas. Reg. § 301.6211-1 (1974).

84. 501 F.2d at 117-18.

85. *See* notes 21-22 *supra* and accompanying text.

86. 501 F.2d at 121.

87. *Id.* Judge Brown feared that if assessment authority for a short year termination were found in § 6201, tbe IRS could effectively cut off Tax Court review for all jeopardy taxpayers by relying on § 6851 procedures in all jeopardy situations, including those that would previously have been handled under § 6861. *Id.* at 122.

Finally, Judge Brown analyzed Congress' intent in providing the Tax Court as a prepayment forum and found it to be a "compelling factor." The establishment of the Board of Tax Appeals in 1926 provided taxpayers with a court for judicial determination of tax liability prior to payment and forced the contesting taxpayer to choose between prepayment or post-payment litigation. At the same time, the predecessor of section 6861 granted the taxpayer subjected to a jeopardy assessment the right to petition the Board. Judge Brown stated:

> We fail to see how any legitimate government interest will be prejudiced by construing the law to permit the § 6851 quick termination taxpayer to seek a redetermination in the Tax Court before his assets are involuntarily applied to the liability. The opportunity for prompt review will hardly dry up the sources of revenue or stop the government in its tracks since virtually all other taxpayers (§ 6861 jeopardy or otherwise) who desire to contest income tax liability prior to payment are currently allowed to do so.[88]

IV. Injunctions and Other Safeguards

The termination of a taxpayer's taxable year coupled with an assessment for taxes immediately due and payable can have catastrophic consequences for the individual and his or her family. He or she may become indigent overnight and be left without resources to afford even an attorney. It is clear that the IRS at times has abused the powerful weapons at its disposal, particularly in drug-related cases. Taxpayers have been deprived of Tax Court review because of jurisdictional infirmities associated with the requirement of a deficiency notice[89] and precluded from district court consideration in suits for an injunction because of section 7421.[90] At this point an examination will be undertaken of the safeguards and procedural remedies provided by the Code and judicial interpretations thereof.

In *Schreck v. United States*, Judge Kaufman listed four protections afforded a section 6861 jeopardy taxpayer by the Code: (1) the requirement of a deficiency letter that enables the taxpayer to litigate in the Tax Court; (2) the posting of a bond under section 6863(b)(3)(A), which stays collection actions by the IRS; (3) the prohibition against sales of property during litigation in the Tax Court; and, (4) "abatement" of a jeopardy assessment if jeopardy is found not to exist.[91] Additionally, a section 6861 taxpayer has

88. *Id.* at 126.

89. *E.g.*, Jones v. Commissioner, 62 T.C. No. 1 (April 1, 1974); Riley v. Commissioner, 32 CCH Tax Ct. Mem. 847 (1973); Musso v. Commissioner, 32 CCH Tax Ct. Mem. 849 (1973).

90. *See, e.g.*, Lewis v. Sandler, 498 F.2d 395 (4th Cir. 1974); Boyd v. United States, Civil No. 73-2406 (E.D. Pa. April 16, 1974); Willits v. Richardson, 362 F. Supp. 456 (S.D. Fla. 1973).

91. 301 F. Supp. 1265, 1279 (D. Md. 1969).

access to the district court in a suit for refund. Of these five statutory protections, a section 6851 taxpayer is afforded only two. After discussing these two protections, the possibilities of obtaining injunctive relief will be considered.

A. *Posting a Bond*

Posting a bond pursuant to section 6851(e)[92] protects a taxpayer's property from forced sale during the period between the assessment after termination and the end of the normal tax year. The relief afforded by this section is somewhat illusory, however, since a taxpayer who has had all of his assets summarily seized pursuant to levy on the same day that a termination notice is given will hardly be able to afford a bond. As one court in a section 6861 case[93] remarked, "[t]he right to post a bond under these circumstances is meaningless and actually a mockery." Only when the taxpayer's assets far exceed his assessment will the right to a bond be meaningful. As the cases demonstrate, this does not occur often. The court in *Clark*, for example, noted that in the cases in which the IRS was working in conjunction with the BNDD, "[t]he IRS assesses a tax nearly equal to or in excess of the taxpayer's available assets."[94] Moreover, professional sureties are not enthusiastic about posting bonds for taxpayers who are suspected of criminal activities, particularly narcotics violations. If a taxpayer's assets do exceed the tax liability, he will still be unable to secure a bond because everything he owns is subject to the tax lien and the surety would have no assets from which he could recover in the event the taxpayer defaulted. In short, the risks to a bonding company are simply too great to make the bond a practical safeguard.[95]

B. *Suit for Refund*

The taxpayer always has the alternative to pay the tax imposed and sue later for a refund in the district court. The district judge in *Willits v. Richardson*[96] stated:

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92. INT. REV. CODE OF 1954, § 6851(e).

93. Kimmel v. Tomlinson, 151 F. Supp. 901, 902 (S.D. Fla. 1957).

94. 501 F.2d at 117 n.28. In *Clark* itself, the assessment was $104,697.20—far in excess of the value of the taxpayer's property that was seized. In Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974), the assessment was exactly equal to the amount of cash and the value of the truck that were seized.

95. In Yoke v. Mazzello, 202 F.2d 508 (4th Cir. 1953), the taxpayer in a suit involving the bond provisions of § 273(f) of the former code (now incorporated in § 6863) was given the additional alternative of having 2 friends act as sureties. The friends owned unencumbered real property worth twice the amount of the assessment. Needless to say, this relief will afford small comfort to the average section 6851 taxpayer.

96. 362 F. Supp. 456 (S.D. Fla. 1973), *rev'd*, 497 F.2d 240 (5th Cir. 1974).

> If the plaintiff reopens the taxable period by filing a [full year] tax return, one of several possible situations will arise. First, if the full year return indicates on its face that the taxes owing for the entire year are less than the entire amount previously collected by the Government, then the return will be treated as an informal claim, which if not allowed or acted upon within six months thereafter establishes jurisdiction for a refund suit in the United States District Court. Second, if the taxpayer were to file the return for the entire year showing less tax than that determined by the Internal Revenue Service, the Commissioner would, if he disagrees with the return, determine a deficiency based upon the full taxable year and issue to the taxpayer a statutory notice of deficiency. The taxpayer, would therefore, have an opportunity for redetermination of the deficiency by the United States Tax Court.[97]

The facts of *Willits*, however, belie the substance of the relief afforded by the pay now-litigate later scheme. In that case the taxpayer was arrested in May 1973 and would not have been able to file a return for the full tax year until January 1974, when she would presumably have made a claim for a refund.[98] In the meantime, all of her assets were subject to seizure and sale at auction unless she posted a bond. For example, in *Aguilar v. United States*,[99] the taxpayer's truck was sold within a matter of days of the seizure. And, as Judge Brown stated in *Clark v. Campbell*, "[o]bviously, when all of the taxpayer's assets have been placed beyond his control, the six month waiting period can prove to be an unbearable delay."[100]

Moreover, the IRS could levy on a taxpayer's property and not even apply the property seized to the tax liability assessed. In this interesting situation, which actually occurred in *Schreck v. United States*, the taxpayer cannot sue for a refund because he has not paid anything prior to filing the return.[101] Even if the seized property is applied to the assessment, the taxpayer is faced with the requirement that *full* payment of all tax liability must be made prior to bringing a refund suit.[102] Thus, in cases in which the seized property is inadequate to satisfy the tax liability, the taxpayer cannot bring suit until the total liability is satisfied.

The right to judicial review of the termination assessment via a refund suit a year or more after the seizure of one's property is indeed a hollow remedy. Further, in the unlikely event that a taxpayer could pay the exorbitant assessments in a case similar to the

97. 362 F. Supp. at 461.

98. A refund claim is a condition precedent to bringing suit for a refund. 10 MERTENS, § 58.02 (1974).

99. 501 F.2d 127 (5th Cir. 1974).

100. 501 F.2d at 125.

101. In *Schreck* the property seized was not applied to the taxpayer's taxes because it was held for a forfeiture proceeding. 301 F. Supp. at 1281.

102. Flora v. United States, 362 U.S. 145 (1960). The *Irving* court believed that the full payment rule of *Flora* was inapplicable to the section 6851 taxpayer since no deficiency had yet been determined. 479 F.2d at 25 n.7.

recent drug-related cases, a delay in filing suit of six months pending IRS action on the refund claim plus the time between the seizure of property following termination and the end of the taxpayer's normal tax year always will create unduly harsh delays.[103]

C. Injunctive Relief and Section 7421

Most of the recent cases arising under section 6851 have reached the courts as suits to enjoin the collection efforts of the IRS. Until very recently, the district courts have denied relief because of section 7421.[104] The injunctive relief granted in *Rambo* and *Clark* was based on section 6213, which provides an express exception to section 7421's prohibition when a deficiency letter is not sent.[105] As has been shown, applying the deficiency letter requirement to section 6851 terminations involves a complicated process of statutory interpretation. The Fifth Circuit recently has granted injunctive relief on more general equitable principles unrelated to section 6213, deficiency letters, or assessment authority.[106] In view of the history of section 7421, this practically unprecedented event is extremely significant.

1. Background

For a century after the enactment of the predecessor of section 7421 in 1867, judicial opinion has vascillated between an absolutely literal reading of the statute and the admission that in certain cases an injunction might issue. The seminal case was *Miller v. Standard Nut Margarine Co.*,[107] in which plaintiff, the manufacturer of a margarine substitute composed entirely of vegetable oils, had operated for years on a three cents per pound profit margin in reliance upon treasury rulings and court opinions that the ten cents per pound excise tax on margarine was inapplicable. Alleging that plaintiff was subject to the excise tax, the IRS sought to collect back taxes—a measure that would have ruined the company. The Supreme Court rejected the plaintiff's argument that the tax was a penalty and that section 7421 was therefore inapplicable. The Court granted relief, however, because of the presence of "exceptional circumstances." Having re-examined the history and purpose of the anti-injunction statute, the Court held that the prohibition still embodied tradi-

103. 501 F.2d at 125 n.55.

104. Section 7421 is generally known as the "Anti-injunction Act." *See* note 20 *supra*.

105. *See* note 58 *supra* and accompanying text.

106. Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974).

107. 284 U.S. 498 (1932).

tional equitable principles. Thus, "in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector."[108]

Although *Standard Nut* showed that injunctive relief was at least within the realm of possibility in tax cases, the exceptional circumstances test has not afforded much relief to taxpayers. A 1962 Supreme Court case, *Enochs v. Williams Packing & Navigation Co.*,[109] severely limited the possibilities existing under *Standard Nut*. In *Williams Packing*, the Court stated that "only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained."[110] Otherwise, the "manifest purpose" of the tax provisions—assuring the prompt collection of lawful revenue—would be jeopardized.[111] The traditional requirement for equitable relief—that no adequate remedy at law exists—retained its validity. In subsequent cases, this has been interpreted to mean that a suit for equitable relief could not be maintained when the taxpayer had the remedy of a suit for refund in the district court after paying an assessment.[112]

In its strongest statement to date on the subject, the Supreme Court in *Bob Jones University v. Simon*[113] rejected the plaintiff's contention that an injunction was warranted under the *Standard Nut* and *Williams Packing* exceptions to section 7421. The implication of *Bob Jones* is clearly that an injunction should almost never issue. In *Bob Jones*, the plaintiff, a private university, was notified by the IRS that its tax exempt status was going to be revoked because of its segregated admissions policy.[114] Plaintiff sued for in-

108. *Id.* at 509.

109. 370 U.S. 1 (1962).

110. *Id.* at 7.

111. *Id.*

112. *See, e.g.*, Lewis v. Sandler, 498 F.2d 395 (4th Cir. 1974); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973); Boyd v. United States, Civil No. 73-2406 (E.D. Pa., April 16, 1974); Willits v. Richardson, 362 F. Supp. 456 (S.D. Fla. 1973), *rev'd*, 497 F.2d 240 (5th Cir. 1974). In Williams v. United States, 373 F. Supp. 71 (D. Nev. 1973), the plaintiff/taxpayer argued that all *Williams Packing* required was a showing that the government acted in "bad faith." This argument was rejected. *See also* Thornton v. United States, Civil No. 73-1422 (3d Cir. Feb. 20, 1974); Iannelli v. Long, 487 F.2d 317 (3d Cir. 1973); Sherman v. Nash, 488 F.2d 1081 (3d Cir. 1973); Parenti v. Whinston, 347 F. Supp. 471 (E.D. Pa. 1972).

113. 416 U.S. 725 (1974). The companion case to *Bob Jones* was Alexander v. Americans United, Inc., 416 U.S. 752 (1974). The district court in *Americans United* had denied injunctive relief, whereas in *Bob Jones* relief had been granted. In both cases injunctive relief had been denied by the Court of Appeals.

114. Tax exempt status is governed by § 501(c)(3) of the Code. As a practical matter, however, an organization may not rely on technical compliance with section 501(c)(3) to

junctive relief, alleging irreparable injury in the form of income tax liability and loss of contributions and claiming that the revocation would violate plaintiff's rights to free exercise of religion, free association, and due process and equal protection of the law. The district court granted the relief sought,[115] but the Fourth Circuit reversed.[116] On certiorari, the Supreme Court unanimously affirmed in an opinion written by Justice Powell.[117]

The Court described the judicial history of section 7421 as a "cyclical" development of "allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose."[118] The Court viewed *Standard Nut* as a departure that caused uncertainty[119] and *Williams Packing* as another attempt to "rehabilitate the Act following debilitating departures from its explicit language."[120] Its primary siguificance was in switching the focus of the exceptional circumstances test from the degree of harm to the plaintiff absent an injunction to the requirements of certainty that the plaintiff would prevail and that the IRS's action was plainly without a legal basis. The plaintiff's first amendment, due process, and equal protection contentions were found sufficiently debatable "to foreclose any notion that 'under no circumstances could the government ultimately prevail.' "[121]

The plaintiff contended that the IRS action did not represent a bona fide effort to collect tax revenues, but was an attempt to utilize the revenue laws for nonrevenue purposes—i.e., to regulate the admissions policies of private universities. Since the case did not truly concern taxes, plaintiff argued that section 7421 was inapplicable. The Court soundly rejected this argument, noting that "[p]etitioner's attribution of non-tax-related motives to the Service ignores the fact that petitioner has not shown that the Service's action is without an independent basis in the requirements of the

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achieve that status. The organization must also obtain a "ruling letter" from the IRS declaring that it qualifies under § 501(c)(3). Receipt of such a ruling letter leads to inclusion on the IRS's official roster of tax-exempt organizations. In the instant case, plaintiff was notified that the ruling letter would be revoked.

115. Bob Jones University v. Connally, 341 F. Supp. 277 (D.S.C. 1971).

116. Bob Jones University v. Connally, 472 F.2d 903 (4th Cir. 1973).

117. Mr. Justice Douglas took no part in the decision. Mr. Justice Blackmun filed an opinion concurring in the result.

118. 416 U.S. at 742.

119. "Read literally, the Court's opinion [in *Standard Nut*] effectively repeals the Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded hefore the Act's passage." *Id.* at 744.

120. *Id.* at 745.

121. *Id.* at 749.

Code."[122] Thus, if statutory support can be found for the procedures utilized, it appears to be irrelevant that the IRS acts for nontax reasons. Moreover, the Court found that due process had not been denied because the plaintiff had access to the Tax Court or the district court in a refund suit. Justice Powell stated, however, that if petitioner had had no access to judicial review whatsoever, the Court's conclusion might have been different.[123]

Finally, the Court recognized that harsh results could follow the denial of an injunction and that the Code left room for abuse by the IRS. Nevertheless, those were viewed as problems that were legislative, not judicial, in nature.[124]

2. Recent Section 6851 Cases

In 1974 the Fifth and Sixth Circuits accepted *Schreck's* analysis of jeopardy terminations and the requirement of a deficiency letter. The Fifth Circuit additionally granted injunctive relief under the *Williams Packing* standard when it found that IRS action was "arbitrary and capricious." In view of the Supreme Court's strong language in *Bob Jones*, the Fifth and Sixth Circuits' decisions certainly must be viewed as exceptional. The facts of these cases, perhaps better than any others, illustrate the possibility of abuse under the present practice.

In *Willits v. Richardson*,[125] Sharon Willits, the mistress of a suspected narcotics dealer, was arrested on May 24, 1973, for speeding and taken to police headquarters where a search of her purse uncovered a pistol, four tablets, 4,400 dollars in cash, and some jewelry items. She was charged with possession of narcotic drugs, unlawfully carrying a concealed weapon, and speeding. The next day, Mrs. Willits received a notice from the IRS that her taxable year had been terminated for the period January 1, 1973-May 23, 1973, and that a tax of 25,549 dollars was due and payable. An assessment for that amount was made and she was advised that administrative or judicial action to collect the assessment would be taken immediately. On May 29, 1973, Mrs. Willits filed suit in the district court alleging: first, that the seizure of her property was illegal and no jeopardy assessment had been made against her; secondly, she owed no taxes, and the assessment was based on illegally

122. *Id.* at 740.

123. "We do not say that these avenues of review are the best that can be devised. They present serious problems of delay. . . . But . . . some delay may be an inevitable consequence of the fact that disputes between the Service and a party challenging the Service's actions are not susceptible of instant resolution through litigation." *Id.* at 747.

124. *Id.* at 750.

125. 497 F.2d 240 (5th Cir. 1974).

seized evidence; and lastly, she was entitled to injunctive relief because she had been left virtually penniless by the illegal confiscation of her property and had no adequate remedy at law.[126]

The IRS filed a motion to dismiss based on section 7421 and following a hearing, the district judge granted the government's motion.[127] The Fifth Circuit reversed, with an opinion by Judge Clark strongly denouncing the IRS actions:

> [T]he evidence adduced (at the hearing) established such a gossamer basis for the drastic actions of the Internal Revenue Service that they cannot be sustained. The proof showed that the taxes assessed were based solely upon income which was attributed to Mrs. Willits as a commission to her from the sale of six kilos of illegally imported cocaine . . . . No basis in fact nor foundation for any reasonable assumption was demonstrated in this record that Mrs. Willits was connected with the smuggling or sale of this or any other amount of cocaine or narcotics.[128]

The evidence further showed that Mrs. Willits had a permit to carry the pistol and that the four tablets were a medication for which she had a prescription. Her initial contact with the police for alleged traffic violations was not addressed by the court directly, but the implication clearly arises that those charges were unfounded because of circumstances surrounding the arrest.[129]

Judge Clark commented specifically upon the Narcotics Project and its methods as follows:

> While the overall purposes and procedures of the IRS's Narcotics Project were not spelled out in this record, it is transparently obvious that the action taken as to Mrs. Willits does not represent an isolated instance wherein police information was utilized by the Internal Revenue Service to protect the public fisc. Rather, this record clearly establishes that a seizure pursuant to the quick termination provisions of section 6851—a procedure which according to the contention of the IRS has the harshest possible notice and correction consequences for the purported taxpayer—was instantly clamped upon every meaningful asset of Mrs. Willits, based upon scanty and largely inaccurate information which, at best, amounted to nothing more than a vague suspicion that she must have come by her jewelry and cash by improper means since she admitted that she gambled for a living and was kept by a man who police believed was dealing in narcotics.[130]

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126. Mrs. Willits was a divorcee and responsible for the raising of two children. She received $67.50 per week alimony and $67.50 per week in child support for 5 months following the divorce, until November, 1972. At that time she received a settlement of $400 and no further alimony. She had no other funds or substantial property. During 1973 and part of 1972 she was supported hy Rick Cravero, a suspected narcotics dealer.

127. Willits v. Richardson, 362 F. Supp. 456 (S.D. Fla. 1973).

128. 497 F.2d at 244-45.

129. Mrs. Willits and Mr. Cravero had been stopped in the same automobile by one of the same officers 6 weeks earlier. On the night in question, the plaintiff had observed the unmarked car following her and had pulled over twice before being arrested for speeding. This arrest was made only after she was unable to give a specific address for her residence.

130. 497 F.2d at 245.

Judge Clark then concluded that the power of the IRS to seize the property of taxpayers in order to prevent the loss of tax revenues should not be allowed to be used as "summary punishment" of citizens suspected of criminal wrongdoing. [131]

In *Aguilar v. United States*,[132] a companion case to *Clark v. Campbell*,[133] the plaintiff was a Mexican citizen and resident who engaged in the trucking business solely in Mexico. He was not a "taxpayer" within the meaning of the Code,[134] had no duty to file a return, and had no income subject to taxation by the United States. On July 27, 1972, while two of plaintiff's employees were in Texas for the purpose of purchasing automobile parts for plaintiff, they were stopped by local police for a title check. A discrepancy was discovered and upon examination, the police discovered 11,270 dollars in the vehicle's glove compartment.[135] The truck and money were seized and the two employees walked back to Mexico. The police notified the Customs Bureau of the discovery and the Bureau held the truck and money on suspicion that illicit narcotics activity was involved. When the plaintiff sought the return of his property and was refused, he brought suit in state court.

On August 3, 1972, the IRS terminated plaintiff's taxable year and informed the taxpayer that a tax had been assessed and was immediately due and payable. After notice of levy was served on the state court holding the property, the truck was seized and sold. In December 1972, plaintiff brought suit in federal court to enjoin the IRS from enforcing its assessment and levy on the money seized by the police and to recover the proceeds from the sale of the truck. Citing section 7421, the district court dismissed the action for lack of jurisdiction.[136] The Fifth Circuit granted the injunction based upon its decision in *Clark v. Campbell* that a deficiency notice was required. In addition, it remanded for proceedings not inconsistent with *Willits* on the issue of whether the IRS had acted arbitrarily and capriciously under the circumstances.[137] Noting that the issue of the necessity of a deficiency notice following termination of a taxable year was likely to go before the Supreme Court, the court remanded for a factual determination of whether the IRS action fell

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131. *Id.* at 246.

132. 501 F.2d 127 (5th Cir. 1974).

133. 501 F.2d 108 (5th Cir. 1974). For discussion of this case, see text accompanying notes 75-88 *supra*.

134. "The term 'taxpayer' means any person subject to any internal revenue tax." INT. REV. CODE of 1954, § 7701(a)(14).

135. The court stated that the cash was to be used for the purchase of the automobile parts. 501 F.2d at 129.

136. 359 F. Supp. 269 (S.D. Tex. 1973).

137. 501 F.2d at 130.

within *Willits* and *Williams Packing*. Should the Supreme Court decide against the taxpayer on the deficiency notice issue, the court noted that the plaintiff perhaps could still obtain relief via *Willits*.[138]

It is difficult to reconcile *Bob Jones* with the *Willits* and *Aguilar* cases. *Bob Jones* expressly rejected the "penalty" argument that a tax imposed for non-tax purposes was not a true tax.[139] Yet the argument in *Willits* that the procedures were summary punishment was accepted by Judge Clark. The Supreme Court in *Bob Jones* came close to stating that an injunction should *never* issue, and it has upheld no injunction since *Standard Nut*. Although Mrs. Willits and Mr. Aguilar undoubtedly suffered serious financial losses, *Williams Packing* was interpreted in *Bob Jones* as making the degree of harm to the taxpayer irrelevant. Moreover, although the "arbitrary and capricious" test applied in *Willits* is not mentioned in *Bob Jones*, it must be assumed that Judge Clark intended "arbitrary and capricious" to be synonymous with "no legal basis." The facts of *Willits* seem difficult to reconcile with this construction because the IRS admittedly followed the statutory procedures used in all section 6851 situations. In terminating the taxable year the district director merely was required to believe that the taxpayer intended to avoid payment of income taxes. Under accepted law, this finding of jeopardy is virtually unimpeachable.[140] Although Mrs. Willits and Mr. Aguilar have strongly sympathetic cases, under *Bob Jones* it would be difficult to characterize their success on the merits as "certain;" indeed, it would be difficult to conceive of *any* case that could be so characterized. Even a finding that upon the facts presented at the hearing for an injunction the taxpayer would win in a later suit for refund or redetermination of liability would not be enough to warrant the granting of an injunction. Finally, as a procedural matter, the court in *Willits* stated that upon appeal of the dismissal by the district court, the appeals court should construe "the evidence adduced in the court below most favorably to the plaintiff."[141] This standard of review seems clearly inappropriate upon careful reading of *Bob Jones*.

V. Constitutional Implications of Section 6851

At the end of his *Rambo* decision, Judge Miller made the following observation:

138. *Id.* at 130 & n.9.

139. *See* text accompanying notes 122-23 *supra*.

140. Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957) is cited for this proposition, although it is, in fact, a section 6861 case. *See also* Homan Mfg. Co. v. Long, 242 F.2d 645, 655 (7th Cir. 1957); Shelton v. Gill, 202 F.2d 503 (4th Cir. 1953); Schreck v. United States, 301 F. Supp. 1265, 1279 (D. Md. 1969).

141. 497 F.2d at 244.

Were the code to be interpreted as the IRS suggests, significant constitutional problems would arise. A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law.[142]

The cases arising under section 6851 have not addressed adequately the constitutional implications of the summary termination, levy, and sale proceedings used by the IRS. Rather, the 1931 decision of *Phillips v. Commissioner*[143] has been viewed as dispositive of the issue. In *Phillips*, the taxpayer challenged the collection of a deficiency assessed under section 280(a)(1) of the 1926 Act,[144] which allowed the IRS to recover the full deficiency owed by a dissolved corporation from a shareholder who had received assets upon dissolution. The taxpayer argued that due process was violated because the taxes would be collected before he could have the proper amount determined by a federal district court. The Second Circuit Court of Appeals affirmed[145] the Board of Tax Appeals decision that Phillips' estate was liable for the full amount of a tax deficiency incurred by a dissolved corporation in which Phillips was a twenty-five percent shareholder.[146] The Supreme Court also affirmed,[147] stating that "[t]he right of the United States to collect its internal revenue by summary administrative proceedings . . . to secure prompt performance of pecuniary obligations to the government have been consistently sustained . . . ."[148] Justice Brandeis opined that when dealing with property rights, the "mere postponement" of judicial review was not a denial of due process if the ultimate determination of liability was adequate.[149] Finally, and most siguificantly, Justice Brandeis observed:

the procedure provided in § 280(a)(1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. He may contest his liability by bringing an action . . . to recover the amount paid . . . . Or the transferee may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals . . . . [150]

Phillips is distinguishable from section 6851 cases because it dealt with a different Code provision and an entirely different fac-

142. Rambo v. United States, 492 F.2d 1060, 1064-65 (6tb Cir. 1974).
143. 283 U.S. 589 (1931).
144. Section 280 was the predecessor of present § 6901.
145. Phillips v. Commissioner, 42 F.2d 177 (2d Cir. 1930).
146. Phillips v. Commissioner, 15 B.T.A. 1218 (1929).
147. 283 U.S. 589 (1931).
148. *Id.* at 595.
149. *Id.* at 596-97.
150. *Id.* at 597-98.

tual context. First, the taxpayer had available and made use of prepayment judicial review of the assessment in the Board of Tax Appeals. It is not clear from the opinion whether the result would have been different had jurisdiction not been granted to the Board in these circumstances. Nevertheless, clearly much of Justice Brandeis' opinion, indicating that *any* summary collection proceeding would satisfy due process so long as judicial review was ultimately available, was dicta. Secondly, it is questionable in many current cases whether the ultimate review provided by a refund suit is adequate even under the *Phillips* rationale. By the time a refund suit comes to trial, perhaps over a year after termination and collection proceedings are begun against the taxpayer (and this assumes that he has paid the full tax),[151] he could well be destitute and unable even to afford attorney's fees to pursue the matter.[152]

The most recent Supreme Court decisions dealing with due process limitations on the deprivation of property prior to a hearing seem relevant in evaluating the practices of the IRS in section 6851 cases. In *Sniadach v. Family Finance Corp.*[153] and *Fuentes v. Shevin*,[154] the Court struck down prejudgment garnishment and replevin statutes under which notice and an opportunity for the debtor to be heard were postponed until after property was seized. In *Fuentes* the Court expressly recognized the existence of summary tax collection procedures, but noted that such deviations from the general rule of notice and hearing were "truly unusual" and tightly controlled.[155] In a 1974 case, *Mitchell v. W. T. Grant Co.*,[156] Louisiana's prejudgment replevin statute was upheld. The Court found that the statutory procedures afforded adequate safeguards by requiring the creditor to provide an affidavit in support of his request for a writ of sequestration, which could only be issued upon a judge's authority after the creditor posted a bond. Moreover, the debtor

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151. *See* note 102 *supra* and accompanying text.

152. The assessments in § 6851 cases are often exorbitant, making either payment or the posting of bond impossible. In Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973), the taxpayers were assessed $110,620, which was immediately due and payable. In *Clark* the taxpayer was originally assessed almost $105,000. These assessments were based upon information that was, at best, quite questionable. For an interesting case in which the method of reaching an assessment figure (or the *lack* of any method) came out in testimony see Rinieri v. Scanlon, 254 F. Supp. 469, 474 (S.D.N.Y. 1966) ($247,820 assessment after property worth $247,500 was seized).

153. 395 U.S. 337 (1969).

154. 407 U.S. 67 (1972).

155. *Id.* at 90-92. In dismissing a suit for injunction for lack of jurisdiction, the court in Matthews v. United States, Civil No. 73-H-586 (S.D. Tex. Mar. 15, 1974), determined that *Fuentes* was dispositive of the issue. "*Fuentes* indicates that the Supreme Court intends no retreat from its holding in *Phillips*."

156. 416 U.S. 600 (1974).

could immediately seek dissolution of the writ unless the creditor proved the grounds of its issuance, failing which the court could order return of the property and assess damages, including attorney's fees, against the creditor. A later case, *North Georgia Finishing Inc. v. Di-Chem, Inc.*,[157] reaffirmed *Fuentes* and distinguished *Mitchell* on the basis of the presence of these mitigating factors.

The contrast between the protections afforded a prejudgment debtor in Louisiana and a section 6851 taxpayer is striking. The *minimum* protection sought in section 6851 cases such as *Rambo* and *Clark* is a post-seizure hearing to determine the validity and amount of the tax liability. Assuming arguendo that a taxpayer has no rights prior to the seizure of his property, Tax Court review after termination and levy, with a postponement of the sale of assets pending review, is hardly stretching due process beyond reasonable limits. *Fuentes* does mention that summary seizure of property is permissible under the tax laws, but it certainly does not imply that property may be seized and sold in a process affording no administrative or judicial forum for a determination of the facts behind the district director's assessment until a year or more later in a refund suit. That is exactly what the IRS has contended in the recent cases. It is likely that many section 6851 taxpayers would be very happy to have even those "protections" afforded by the replevin and garnishment statutes challenged successfully in *Fuentes* and *Sniadach*.

Like the due process clause, the equal protection clause has received scant attention in the reported decisions. In *Clark v. Campbell*,[158] for example, equal protection was only briefly discussed in a footnote. Since the court held that a deficiency letter was required via the statutory construction route, constitutional issues were not reached.[159] The equal protection argument is that since both section 6851 and 6861 taxpayers are jeopardy taxpayers, affording the section 6861 taxpayer the right to prepayment review of liability while denying it to the section 6851 taxpayer is a denial of equal protection.[160]

The equal protection issue has arisen in cases involving section 6871, which gives the IRS authority to assess a deficiency immediately when bankruptcy or receivership proceedings are instituted and further denies jurisdiction to the Tax Court to litigate liability once those proceedings begin.[161] Thus, no prepayment forum would

157. 43 U.S.L.W. 4192 (U.S. Jan. 21, 1975).

158. 501 F.2d 108 (5th Cir. 1974).

159. *Id.* at 126 n.57.

160. *See* Schreck v. United States, 301 F. Supp. 1265, 1281 (D. Md. 1969); Clark v. Campbell, 501 F.2d 108, 126 n.57 (5th Cir. 1974).

161. INT. REV. CODE OF 1954, § 6871(b).

be available to a taxpayer in those situations. In *Jamy Corp. v. Riddell*,[162] the court held that the statute should be read to give the taxpayer the right to have a tax claim adjudicated in the receivership court because equal protection problems would otherwise result.[163] The Tax Court has adopted this approach to statutory construction of section 6871 as well, stating that "constitutional problems . . . would be presented in construing section 6871 to preclude Tax Court jurisdiction in the situation where the taxpayer is effectively barred from obtaining a determination on the merits of a tax claim in the bankruptcy proceeding."[164]

The construction of sections 6851 and 6861 as affording Tax Court review to a section 6851 taxpayer is not compelled by the explicit language of the Code. Yet the equal protection problems of denying one taxpayer what another taxpayer receives in almost identical circumstances is obvious. The courts in *Clark*, *Schreck*, *Jamy*, and the Tax Court bankruptcy cases have chosen to adopt a construction of the Code that avoids these constitutional infirmities by granting prepayment review although it is not expressly authorized. This approach is both sound and consistent with recoguized constitutional principles.[165]

VI. Review of Determination of "Jeopardy"

Before the district director may terminate a taxpayer's tax year pursuant to section 6851, a condition of jeopardy must be determined to exist.[166] Although this determination has been held to be nonreviewable in section 6861 situations,[167] the reviewability of section 6851 terminations is not as clear. As discussed above, the taxpayer in *Clark v. Campbell* challenged in the district court the determination of jeopardy made against him, alleging that the termination was made for improper purposes. The district court cited *Lloyd v. Patterson*,[168] a section 6861 case, and refused to consider this ground for relief. The Fifth Circuit did not consider that allega-

162. 337 F.2d 11 (9th Cir. 1964).

163. "We suggest that if all but bankrupts and those in receivership were permitted to contest their taxes without prepayment, serious problems would be presented in the constitutional field of equal protection. Thus we are justified in using all intendments of section 6871 to give the corporation in the receivership court a tax court type of review." *Id.* at 13.

164. Prather v. Commissioner, 50 T.C. 445, 452 (1968). *See also* Orenduff v. Commissioner, 49 T.C. 329 (1968).

165. *See* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

166. Int. Rev. Code of 1954, § 6851(a).

167. Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957); Homan Mfg. Co. v. Long, 242 F.2d 645, 655 (7th Cir. 1957); Shelton v. Gill, 202 F.2d 503 (4th Cir. 1953); Schreck v. United States, 301 F. Supp. 1265, 1279 (D. Md. 1969); 9 Mertens, § 49.145 (1971).

168. 242 F.2d 742 (5th Cir. 1957).

tion on appeal. Some courts have indicated, however, that the district director's discretion in terminating is reviewable to determine whether evidence was present to support the finding of jeopardy.[169] The Code itself merely states that in any collection proceedings the district director's findings are only "presumptive evidence" of jeopardy.[170] Thus, it would seem that a taxpayer in a proper proceeding with sufficient evidence could overcome this presumption. One writer has speculated that since a rebuttable presumption applies in collection proceedings, in a suit for injunction as well,

> . . . the evidence which serves as the basis for the District Director's determination that a proper situation exists for termination of the taxpayer's taxable year would be proper subject matter for review by the court. Therefore, if the evidence were not sufficient to convince a reasonable man of the necessity of termination, injunction might issue against the government.[171]

The Supreme Court's *Bob Jones* decision, however, does not indicate that a reasonable man standard should be applied in injunction suits. Additionally, the cases cited as support for the position that court review of the district director's discretionary actions in section 6851 situations should be allowed are not persuasive. For example, in *United States v. Bonaguro*,[172] the claim arose in a criminal prosecution for counterfeiting, and in *Rinieri v. Scanlon*,[173] the court granted summary judgment for the taxpayer in a refund suit. Thus the facts of both these cases render their significance questionable, although both concerned taxable-year terminations that were almost totally unsupported by the facts.[174]

The question whether review of the district director's discretion is available has not yet been analyzed closely by the courts. If section 6861 analogies are relevant, his discretion will be unreviewable.[175] If *Willits*, *Bonaguro* and *Rinieri* retain their validity in injunction suits notwithstanding *Bob Jones*, the determination of jeopardy may be reviewable when the IRS is alleged to have acted arbitrarily and capriciously. The complicated intermeshing of various Code provisions, ambiguous statutory language (combined with the ab-

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169. *See* United States v. Bonaguro, 294 F. Supp. 750 (E.D.N.Y. 1968); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966).

170. INT. REV. CODE OF 1954, § 6851(a). *See* text accompanying note 15 *supra*.

171. Comment, *supra* note 8, at 388.

172. 294 F. Supp. 750 (E.D.N.Y. 1968).

173. 254 F. Supp. 469 (S.D.N.Y. 1966).

174. In both cases the tax imposed was based upon the amount of cash seized by the IRS and not upon the taxpayers' actual incomes. Thus, in *Rinieri*, $247,500 was found in the taxpayer's possession and a tax of $247,800 was imposed. In *Bonaguro*, $1,978 was seized and a tax of $2,021 imposed.

175. *See* Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957); Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex. 1972), *aff'd*, 501 F.2d 108 (5th Cir. 1974).

sence of clarifying regulations), the *Bob Jones* decision, conflicting lower court interpretations, and the variety of factual contexts in which the issue has arisen, render this area a maze from which drawing conclusions is difficult, if not impossible. If one assumes that review of alleged abuses of discretion should be available, the next question is: what is the proper forum? If a suit for injunction is brought, *Bob Jones* makes the relevance of *Willits*, *Bonaguro* and *Rinieri* questionable. Tax Court review is unavailable to a section 6851 taxpayer if the government's position is accepted; but assuming *Rambo* and *Clark* are correct in granting Tax Court review, what is the extent of that review? May it go behind the validity of the termination itself, or merely inquire into the validity of the assessment and its amount? It is understandable that courts have been loath to tackle this matter.

VII. CONCLUSION

This Note has not attempted to analyze in depth all of the Code provisions that relate to section 6851 jeopardy terminations.[176] Those provisions are a maze of ambiguities and inconsistency, and complete harmonization seems impossible at present. The discussion has focused on recent section 6851 court decisions in an effort to establish the framework within which section 6851 operates and to view the problem not from a purely academic viewpoint but from the viewpoint of federal judges attempting to make sense of a frustrating statutory scheme. As one district judge commented after reluctantly following the *Irving v. Gray* line of reasoning:

> Perhaps Congress, in memory of an overburdened judiciary, will someday give us a Code more amenable to clear interpretation. Until then we will continue to have responsible jurists reaching contrary conclusions on issues such as those involved here, resulting in added confusion to the operation of the tax system.[177]

A reading of the cases does, however, lead to a number of observations and conclusions. First, the section 6851 procedures are a devastatingly effective means of putting a suspected drug dealer into the poorhouse quickly. The taxpayer/suspected criminal may be left with virtually no means of relief. Secondly, the procedures are susceptible to abuse, and in cases such as *Willits* and *Aguilar*, abuse has obviously occurred. Thirdly, some means of redress must be made available that will protect the rights of taxpayers. Even those persons who are guilty of criminal acts have the right to know

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176. For a detailed analysis of the Code sections, see Meyers, *supra* note 7.

177. Prehle v. United States, 74-1 U.S. Tax Cas. ¶¶ 84,222, 84,225 (D. Mass. 1974).

how their tax liability was calculated and to contest that determination prior to the sale of possibly all their assets. Fourthly, because the Tax Court was established for the express purpose of enabling a taxpayer to litigate liability prior to payment of the tax and because both section 6851 and section 6861 involve jeopardy situations, no legitimate reason can be discerned for allowing Tax Court review for the section 6861 taxpayer but not for the section 6851 taxpayer. Factually, the only difference is that the condition of jeopardy in section 6851 cases is discovered and acted upon prior to the end of the normal tax year. Fifthly, serious constitutional issues are raised by denying the taxpayer judicial review prior to the sale of his or her property. The public need for revenues does not warrant such drastic action. Lastly, equitable relief under the *Enochs v. Williams Packing Co.* case appears to be virtually impossible after *Bob Jones*.

These conclusions may seem simplistic, but concern over adherence to the technicalities of the Code must not cloud the human issues presented. *Rambo, Clark* and *Willits* are judicial attempts to bring a measure of fairness into a statutory scheme that may indiscriminately destroy a person's livelihood on the smallest shred of suspicion of wrongdoing. Thus, it is the conclusion of this writer that the courts are justified on both equitable principles and upon a reasonable construction of the Code in providing Tax Court review subsequent to section 6851 terminations. Tax Court review would accomplish two purposes. First, it would probably eliminate unreasonable action on the part of the IRS as in *Willits* and *Aguilar*, by affording early review of the liability imposed upon the taxpayer. The utility of a section 6851 termination as a form of punishment against suspected narcotics offenders lies in its swiftness and in its almost complete freedom from external judicial control. Once prompt judicial review is made available, the IRS almost certainly will become more selective in its actions. Secondly, even in cases in which the Tax Court upholds the determination of jeopardy, the IRS would be required to justify its assessment *before* assets could be sold to satisfy that liability. This minimal protection seems to be required by *Phillips* and *Fuentes*.

The Supreme Court could legitimately affirm the construction of section 6851 outlined in *Rambo* and *Clark*. Neither the government's nor the taxpayers' interpretation of the statutory language is logically compelling, but the exhaustive analyses of *Schreck* and *Clark* are certainly more persuasive than the relatively cursory examinations in *Irving* and *Williamson*. Reading *Rambo* and *Clark* in light of *Bob Jones* makes this conclusion even more attractive. The

Court recognized in *Bob Jones* that harsh results might ensue by applying the literal language of section 7421 and prohibiting injunctions. Affording Tax Court review to a section 6851 taxpayer is a legitimate means of alleviating some of the harshness of the Anti-Injunction Act when the potential for abuse and harm is so great.

Ultimately Congress should act to reform the present statutory scheme. It is suggested that the legislation should include at least the following: first, a provision stating that the jeopardy assessment and deficiency letter provisions of section 6861 apply to section 6851, and that Tax Court review is available on the same terms as in section 6861; and secondly, some method of reviewing the district director's determination of jeopardy. It has been suggested that this review could occur in a collection proceeding if the IRS were required to bring suit rather than use the administrative procedures of levy and distraint as is presently done.[178] The standard of review would be minimal: the IRS must not have acted arbitrarily and capriciously. If the court found that the district director's action was arbitrary, the collection suit would be dismissed. An alternative would be a statutory exception to section 7421 that would allow an injunction if the IRS could not present sufficient evidence to justify its determination of jeopardy.[179]

The section 6851 procedures were designed to afford the IRS a means of protecting tax revenues in situations in which immediate and summary action is necessary. The IRS Narcotics Project created a blanket rule for the application of the procedures to suspected narcotics dealers. These persons may be more likely to evade tax payments, but the IRS should be required to have concrete evidence of both the fact and the extent of drug dealing. At present, review of the district director's discretion in terminating a tax year is probably unavailable. Under these circumstances, the only meaningful relief that a section 6851 taxpayer can possibly obtain is prompt adjudication of the tax liability in the Tax Court. The needs of the government for revenue legitimately owed is not jeopardized by postponing sale of a taxpayer's assets until Tax Court adjudication is concluded, and in the final analysis, this is the only legitimate governmental interest in section 6851 situations. The punishment of criminal wrongdoers should lie in other hands.

JOHN MCQUAGGE FITE

178. *See* Meyers, *supra* note 7, at 843-45.

179. For a much more detailed proposal for legislative reform, see Meyers, *supra* note 7, at 849-53.