1975 Use of I.R.C. Section 6851: Exaction in the Guise of a Tax?

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Use of I.R.C. Section 6851: Exaction in the Guise of a Tax?

If our tax administration is either permitted or encouraged to respond selectively to such socio-political phenomena as are likely to crop up from time to time in our pluralistic nation, or if it permits itself to be used as a selective tool which places criminal enforcement or other criteria before revenue collection and enforcement, we may be jeopardizing our traditional tax administration processes, both from the standpoint of the most effective use of our resources and the public's faith in an impartial, non-political tax system.

Donald Alexander, Commissioner of Internal Revenue\(^1\)

In June, 1971, the Nixon Administration announced an extended effort to combat the menace of drug abuse. Concordantly, the Internal Revenue Service established the high priority Narcotics Traffickers Project.\(^2\) The project's objective is to "use all available civil sanctions to disrupt illicit drug traffic and reduce the profits from this illegal activity."\(^3\) The District Directors of the Internal Revenue Service are advised to make "spontaneous (jeopardy or termination of taxable year) assessments against narcotics violators arrested by other Federal or local law enforcement agencies."\(^4\) Thus, acting pursuant to section 6851\(^5\) of the Internal Revenue Code,\(^6\) the Service terminates

\(^{1}\) Donald Alexander, Commissioner of Internal Revenue, quoted in the text.

\(^{2}\) NARCOTICS TRAFFICKERS PROJECT, INTERNAL REVENUE MANUAL SUPPLEMENT 94G-51 (March 27, 1974).


\(^{4}\) Id.

\(^{5}\) INTERNAL REVENUE CODE OF 1954, 26 U.S.C. (1954) §§ 1 et seq. [hereinafter cited as INT. REV. CODE or CODE].

\(^{6}\) INT. REV. CODE § 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 cause
the taxable year and demands immediate payment of tax due for such
terminated period from any taxpayer suspected of drug involvement,\(^7\)
based on a finding that the taxpayer intends some act tending to preju-
dice, or render wholly or partially ineffectual, the collection of tax for
the current year.

Consequently, a representative pattern emerges: a taxpayer is ar-
rested on suspicion of trafficking in narcotics; his cash is confiscated;
and the Service is notified. Shortly after the arrest, and usually at the
jail, a termination notice in the form of a letter is given to the tax-
payer. Next, if the taxpayer either refuses or is unable to pay the
amount demanded, a spontaneous termination assessment is made, fol-
lowed by the seizure of all the taxpayer's property.\(^8\) The taxpayer
then files a petition, either with the Tax Court to seek review of the as-
sessment, or with the district court to enjoin the assessment and col-
lection of the tax. The Federal Circuit Courts of Appeal have split

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\(7\) The Service's power to terminate taxable years and make corresponding assessments is not limited to situations involving the present Narcotics Traffickers Project. The power under § 6851 can and has been used against any taxpayer who is found by the Service to be in the category of taxpayers to which the section applies. \textit{E.g.}, Irving v. Gray, 479 F.2d 20 (2d Cir. 1973).

\(8\) Silver, \textit{Terminating the taxpayer's taxable year: How IRS uses it against nar-
cotics suspects}, 40 J. TAX 110 (1974) [hereinafter cited as Silver].

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on the question of whether the taxpayer has a right to seek either relief. The purpose of his article is to place that conflict in its statutory framework, to explore the problems of relief which the terminated taxpayer faces, and to examine the constitutional issues which may arise.

**STATUTORY FRAMEWORK**

Normally when an income tax return is filed, it is reviewed for form, execution and mathematical accuracy. If no adjustment is necessary, the amount shown as due is assessed under the general assessment authority of Code section 6201. Once the Service has determined upon audit that a deficiency assessment should be made, a Report of Examination and Agreement Form is sent to the taxpayer. If no agreement is reached between the taxpayer and the Service, a “30-day” letter is sent to the taxpayer, advising him of the proposed adjustments and informing him that he may agree thereto, request a district conference, or request a conference with the Appellate Division of the Regional Commissioner’s Office. Assuming that the taxpayer exhausts his administrative remedies without reaching an agreement, a formal statutory notice of deficiency, the “90-day” letter, will be issued.

The 90-day letter informs the taxpayer that he has ninety days from its mailing date to file a petition with the United States Tax Court.

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9. An assessment is merely the recording of the liability of the taxpayer in the office of the Secretary or his delegate. INT. REV. CODE § 6203. The importance of an assessment is that it is the condition precedent to any collection proceedings.

10. INT. REV. CODE § 6201. ASSESSMENT AUTHORITY.

(a) AUTHORITY OF SECRETARY OR DELEGATE.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN.—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

11. INT. REV. CODE § 6211. DEFINITION OF A DEFICIENCY.

(a) IN GENERAL.—For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 42 and 43, the term “deficiency” means the amount by which the tax imposed by subtitle A or B, or chapter 42 or 43, exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

12. INT. REV. CODE § 6212.

13. Hereinafter cited as Tax Court.
for a redetermination of the proposed deficiency. During the ninety-
day period, no assessment of the deficiency or levy or restraint pro-
ceedings can be instituted by the Service. After the expiration of
that period, the Service is free to assess the deficiency and demand
payment from the taxpayer, unless he has filed a petition with the
Tax Court. A failure to pay upon demand may subject him to dis-
traint and property seizure proceedings.

The Service may, however, shorten the normal assessment procedure
under the provisions of section 6861. If the District Director believes
that the assessment or collection of a deficiency will be jeopardized by
delay, he may immediately assess the deficiency and issue notice and
demand for payment. Note, however, even though the jeopardy tax-
payer has lost time in assessment and levy, he has gained other pro-
cedural safeguards:

1. The Service is required to send a deficiency notice within sixty
days after the assessment, thus enabling the taxpayer to litigate in
the Tax Court.

2. The taxpayer may stay all collection action, pending the Tax
Court's decision, if he is able to post adequate bond.

3. Property seized pursuant to the assessment may not, in general,
be sold during the pendency of litigation in the Tax Court.

4. The Service may abate the jeopardy assessment.

The issuance of a deficiency notice is very important to the tax-
payer: its receipt is a jurisdictional prerequisite to litigation in the
Tax Court contesting the validity of the tax before it is paid. Otherwise, the taxpayer must pay the full tax and bring suit in a federal
district court for a refund. This notice's significance, whether under

14. INT. REV. CODE § 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE,
AND GIFT TAXES.
   (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 (together with all interest, addi-
tional amounts, and additions to the tax provided for by law), 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 no-
tice in 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 assess-
ment.

15. INT. REV. CODE § 6861(b).
16. INT. REV. CODE § 6863(a).
17. INT. REV. CODE § 6863(b)(3)(A).
18. INT. REV. CODE § 6861(g).
normal or jeopardy assessment conditions, is recognized in the statutory exception to the Anti-Injunction Act. Section 7421(a)\textsuperscript{21} prohibits suits to enjoin the assessment or collection of income taxes. However, a statutory exception is provided by section 6213(a).\textsuperscript{22} If the Service determines a deficiency but does not issue a statutory notice of deficiency within sixty days from the date of assessment, the assessment and collection of taxes determined to be owing may be enjoined.

THE ISSUE

The issue that emerges from the above framework is: what is the source of the Service's assessment authority when acting pursuant to a section 6851 termination?\textsuperscript{23} The resolution of this question will determine whether or not the Service must issue a deficiency notice. If, as the Service contends, assessment authority exists within the general assessment provision of section 6201(a), then the Service is not required to issue a deficiency notice. Rather, it may use its extensive statutory power to levy on the taxpayer's property and hold a public sale to satisfy the amount of the tax. The taxpayer, in this case, does not have recourse to the Tax Court because the jurisdictional prerequisite has not been met. He is also barred from seeking an injunction against the assessment and collection of the tax because he does not fall within the statutory exception to the Anti-Injunction Act.

Conversely, if, as contended by taxpayers, the assessment authority exists within the jeopardy assessment provisions of section 6861, the taxpayer is entitled to a deficiency notice, his "ticket to the Tax Court."\textsuperscript{24} And the Service would be subject to injunction under the section 6213(a) exception to the Anti-Injunction Act if it failed to issue the deficiency notice.

The issue was summarized in Schreck v. United States,\textsuperscript{25} where Judge Kaufman stated:

It would appear that the parties have joined issue in whether or not a certain letter must be sent by the IRS to [the taxpayer],

\begin{itemize}
  \item \textbf{21. INT. REV. CODE § 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.}
\begin{itemize}
  \item (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.
\end{itemize}
\item \textbf{22. INT. REV. CODE § 6213(a).}
\item \textbf{23. It is now agreed by both the government and taxpayers that § 6851 does not contain its own assessment authority, although the government previously took the position that § 6851 conferred independent assessment authority upon the Service. See Schreck v. United States, 375 F. Supp. 742 (D. Md. 1973).}
\item \textbf{24. Corbett v. Frank, 293 F.2d 501, 502-03 (9th Cir. 1961).}
\item \textbf{25. 301 F. Supp. 1265 (D. Md. 1969).}
\end{itemize}
which would, at first blush, appear to pose a wholly uninteresting
technical issue. What saves it from this fate is that the deficiency
notice is a jurisdictional prerequisite to the Tax Court . . . Thus,
the real issue in this case is 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.26

LEGISLATIVE HISTORY OF SECTION 6851

The origin of section 6851 is found, almost verbatim, in the Rev-
enue Act of 1918, section 250(g). Section 250(g) does not appear in
the House version of the bill (H.R. 12863) or in the committee report.27
It first appears in a draft bill presented to the Senate as a whole by the
Senate Finance Committee. The following reference is made to it in
the Senate Report:

Authority is given to the Commissioner to take summary pro-
ceedings for the collection of tax in cases where there is evidence
that the taxpayer designs to evade the tax by a sudden departure
from the United States or by removal or concealment of his prop-
erty.28

When the two versions of H.R. 12863 went to conference, the addi-
tion of section 250(g) was designated as Senate Amendment No. 203.
The only other reference to section 250(g) is found in the report to
the House by the House of Representatives' managers of the confer-
ence concerning this bill.29 The managers recommended that the
House accept Amendment No. 203 and followed with an explanation
that the effect of the amendment was to prevent taxpayers from de-
parting or removing their property from the United States before the
close of their regular taxable year in order to avoid payment of income
taxes.

There is a void of any further legislative discussion of section
250(g). The published hearings of the Senate Finance Committee
on H.R. 12863 contain no reference thereto, and there was no dis-
cussion on the floor of the Senate dealing with this section when the
Senate passed its version of H.R. 12863.30

Briefly stated, section 250(g) of the Revenue Act of 1918 conferred
power on the Service, under certain conditions, to terminate the cur-

26. Id. at 1268.
29. Statement of the Managers on the Part of the House of Representatives on H.R.
12863, 65th Cong., 2d Sess. (Feb. 6, 1919).
(1918-19).
rent and/or preceding taxable year of the taxpayer and to demand immediate payment of the tax determined to be due and unpaid for such year or years. This section has remained essentially intact through all of the revenue legislation leading to the Internal Revenue Code of 1954. However, other sections of subsequent revenue legislation created specific procedural safeguards for the taxpayer, and it is the interpretation of their impact on section 250(g) that has engendered the current conflict among the circuits.

SOURCE OF ASSESSMENT AUTHORITY

Apparently, from the Service's viewpoint, section 443(a) requires the terminated taxpayer to file a short-year return, and this return constitutes authority for a section 6201(a) assessment. However, because the taxpayer has not prepared such a return, the Service is empowered to do it for him under section 6020(b). From this proxy return, the Service assesses "all taxes determined by the taxpayer or by the Secretary or his delegate" under its general assessment authority. Thus, no deficiency exists—a "deficiency" being the tax imposed over the tax shown on the return—and levy may be made immediately after notice without delay.

In Lisner v. McCanless, the court replied to the Service's position by pointing out that the taxpayer was given no real opportunity to pre-

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32. INT. REV. CODE § 6020. RETURNS PREPARED FOR OR EXECUTED BY SECRETARY.
(a) PREPARATION OF RETURN BY SECRETARY.—If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary or his delegate may prepare such return, which, being signed by such person, may be received by the Secretary or his delegate as the return of such person.
(b) EXECUTION OF RETURN BY SECRETARY.—
(1) AUTHORITY OF SECRETARY TO EXECUTE RETURN.—If any person fails to make any return (other than a declaration of estimated tax required under section 6015) required by any internal revenue law or regulation made thereunder, and, at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary or his delegate shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
(2) STATUS OF RETURNS.—Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes.
34. Id.
pare a return. In one sequential operation, the Service had terminated the tax year, mailed a notice of termination, determined the amount of assessment and entered the assessment. The court doubted that this procedure contemplates the type of taxpayer’s failure to make a return that would permit the Service to prepare a return for him under section 6020(b).

Moreover, it has been argued that the Service has failed to adequately prescribe the short-year return filing requirements in the regulations under the authority granted by section 443(a) and that it thus lacks authority to prepare the return under section 6020(b) and assess under section 6201(a). As one author notes: “The difficulty with this rationale, however, is that Section 443 requires a return for the short period and the failure of the Regulations to address themselves to this should not abrogate the statutory provision.”

A principal case in favor of the Service is Irving v. Gray. The Second Circuit held that section 6851, along with section 6201(a), existed prior to section 6861, and that this tandem was not affected by the later introduction of section 6861. Thus, the Service’s assessment authority pursuant to a section 6851 termination has always resided in the general assessment authority of section 6201(a) and its predecessors.

The Irving court followed the Seventh Circuit case of Williamson v. United States in finding that the assessment made in a section 6851 termination was not a deficiency as defined in section 6211 but rather, “merely an amount which the Service believed justified the termination of the taxable year.” This argument was, in turn, drawn from Ludwig Littauer & Co., Inc. v. Commissioner, in which the Board of Tax Appeals found that the amount shown as due in the termination notice was “but a provisional statement of the amount which must be presently paid as a protection against the impossibility of collection.”

In Littauer, the Board contended that the predecessor of section 6851 presented a more exigent situation of jeopardy than that cov-

37. 479 F.2d 20 (2d Cir. 1973). See Laing v. United States, 496 F.2d 853 (2d Cir. 1974), in which the Second Circuit reaffirmed their position and rejected subsequent cases to the contrary.
38. 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1971).
40. 37 B.T.A. 840 (1938).
41. Id. at 842.
ere by the predecessor of section 6861. Thus, it would be inconsistent
to suppose that Congress intended more leniency in a section 6851
termination, by requiring a deficiency notice to be issued before as-
sessment and levy, than in a section 6861 situation in which the defi-
ciency notice follows assessment and levy.

The question, however, that was before the Board was not whether
a deficiency notice must be issued under the predecessor of section
6851 but, whether the notice received by the taxpayer was in fact a
deficiency notice. Accordingly, the holding of the Board was a nar-
row one, and the statement that no deficiency notice was required was
merely dicta.\textsuperscript{42}

This interpretation of \textit{Littauer} is supported by subsequent Tax
Court opinions\textsuperscript{43} which conclude that a notice issued to a taxpayer un-
der section 6851 of termination of his taxable year is not a deficiency
notice within the meaning of section 6212 and, therefore, the Tax
Court is without jurisdiction. These decisions have effectively placed
the Tax Court on the sidelines of the section 6851 conflict.

The posture of the \textit{Irving} and \textit{Williamson} courts—that the amount
assessed under section 6851 is not a deficiency and so an assessment
pursuant to section 6851 does not require a deficiency notice—was
adopted in \textit{Parrish v. Daly}\textsuperscript{44} and \textit{Preble v. United States}.\textsuperscript{45} The
outcome of this stance is to classify section 6851 as “merely a seizure
provision allowing a seizure of the taxpayer’s assets until the full tax-
able period has ended.”\textsuperscript{46}

The courts which have found in favor of the taxpayer have endeav-
ored to blend statutory construction with common sense in order to
gain an interpretation of section 6851 that would form a provision
permitting the Service to shorten the tax period, so that an assessment
may be made under the jeopardy assessment provisions of section
6861.\textsuperscript{47} In \textit{Lisner v. McCanless},\textsuperscript{48} the court elucidates the “code-struc-
ture” approach:

\begin{quote}
It is axiomatic that a true code—which Congress intended here to
create—is primarily different from statutes in that a compre-
prehensive, cross-related scheme of laws is presented. No one sec-
tion can be interpreted without reference to its place in the scheme
\end{quote}

\textsuperscript{42} Silver at 112.
\textsuperscript{43} Louis Vincent Musso, Sr., 32 CCH Tax Ct. Mem. 849 (1973); William Jones,
\textsuperscript{44} 350 F. Supp. 735 (S.D. Ind. 1972).
\textsuperscript{46} Odell at 1519.
\textsuperscript{47} \textit{Id}.
of things: witness the numerous cross-reference sections written into the Internal Revenue Code of 1954.49

This approach was followed in Schreck v. United States.50 The court presented an opinion which has been cited in every subsequent case involving section 6851. After an extensive analysis of the statutes and their legislative history, the court concluded that the Service was obligated to send a deficiency notice when the taxpayer's taxable year was terminated.

The Schreck court attempted to demonstrate a specific Congressional intention to mitigate the harshness of the pay first-litigate later rule by rendering accessible to all income taxpayers—normal and jeopardy—the Tax Court as a non-prepayment forum. Judge Kaufman concluded that section 250(g) of the Revenue Act of 1918 was not intended nor did it purport to give assessment authority; that section only furnished authority to terminate the taxable year and accelerate the due date of payment, with all assessment authority deriving from the general authorizing statute.51

The assessment authority of the general authorizing statute is restricted by the 1926 Act and the enactment of section 27452 which require deficiency notices to be sent before assessment or collection can be pursued by the Service. There are five exceptions to the deficiency notice requirement of section 274, three procedural and two substantive. The substantive exceptions are section 279,53 which treats jeopardy assessments, and section 282,54 which treats bankrupts. Both exceptions include specific written authority to assess without prior notice of deficiency. Judge Kaufman points out that section 250(g) allows no such specific assessment authority. Thus, it is reasonable to assume that no such additional authority was intended to be given.

According to the court's reasoning, Congress intended that the 1926 Act continue to permit the use of section 250(g) to terminate the taxable year and accelerate the due date, but denied further use of the general authorizing statute to assess pursuant to the termination. Instead, Congress pointed to the jeopardy assessment section, section 279, as the source of assessment authority when a taxable year was terminated.

49. Id. at 401-02.
51. § 3176 of the 1918 Revenue Act, the predecessor of § 6201 of the INT. REV. CODE OF 1954.
52. The predecessor of §§ 6212(a) and 6213(a) of the INT. REV. CODE OF 1954.
53. The predecessor of § 6861 of the INT. REV. CODE OF 1954.
54. The predecessor of § 6871 of the INT. REV. CODE OF 1954.
The *Schreck* argument was designed primarily to meet the Service's contention that section 6851 possesses its own assessment authority. This argument was impaired by the change in the Service's position that the authority to assess pursuant to a section 6851 termination is found in the general authorizing section, section 6201. Nonetheless, when confronted with the new position upon rehearing the *Schreck* case, Judge Kaufman, after reviewing the subsequent cases, continued to find the same construction in the statutes involved.\(^5\)

The *Lisner* court simplified the argument. The Code provides three assessment procedures: (1) ordinary, under section 6201(a); (2) deficiency, under section 6213; and (3) jeopardy, under section 6861. Since assessment pursuant to a termination must fall within one of these procedures, that procedure must be section 6861 because it is the only section designated "jeopardy." The obvious implication of the placement of section 6851 is that it describes a specific type of jeopardy situation allowing for accelerated application of section 6861. Furthermore, practical "common-sense" arguments were discerned by the court to be in favor of the taxpayer:

What harm can exist to the collection of revenue by allowing a deficiency notice to issue after assessment? The taxpayers' assets are in the hands of the government. The IRS can continue to levy to enforce the assessment. In exchange, the right to sell is curtailed, and ultimately a formal deficiency must be noticed to the taxpayer.\(^6\)

The Sixth Circuit found the *Schreck* and *Lisner* rationale persuasive in *Rambo v. United States*,\(^7\) asserting that it was only reasonable to conclude that Congress intended section 6861 to provide assessment authority for section 6851. The court summarily dismissed the Service's contention that no "deficiency" exists and, thus, no deficiency notice is required under the section 6851 termination procedure. The regulations provide that if no return is filed for a short year, the "deficiency" is the amount of the tax imposed by Subtitle A, Chapter 11 or 12.\(^8\) Thus, the Service has imposed a tax and the taxpayer has denied liability. That imposed tax becomes the deficiency: "The statute [section 6211(a)] in no way limits the definition of a deficiency to a determination made only at the end of the taxable year."\(^9\)

Most recently, the Fifth Circuit, in *Clark v. Campbell*,\(^6\) has taken

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6. 356 F. Supp. at 403 n.11.
7. 492 F.2d 1060 (6th Cir. 1974).
9. 492 F.2d at 1064.
a position consistent with the Sixth Circuit's position in Rambo. The court held that the liability created by a termination falls within the statutory definition of "deficiency." It also found that section 6861 is the source of assessment authority pursuant to a section 6851 termination and, thus, the taxpayer whose year has been terminated is entitled to all of the procedural safeguards mandated by section 6861, including the right to a deficiency notice.

The Clark court specifically endorsed the "code structure" approach taken by the Lisner and Schreck courts. Section 6201 was designed to provide assessment authority for uncontested taxes, a situation that presented no great need for a prepayment forum. On the other hand, section 6861 was to control where a jeopardy situation existed. Section 6861 was designed by Congress to meet the needs of both the taxpayer and the government by providing procedural safeguards for the interests of both. Since section 6851 clearly covered a jeopardy situation, the court found that it would be an unsound construction to treat sections 6851 and 6861 in a disparate manner. Indeed, the court held that to find assessment authority for section 6851 in other than the provisions of section 6861 would be a "complete derogation of the obvious and carefully considered pattern of the Code." 61

The "code structure" approach used by the courts which have found that section 6861 is the source of assessment authority in a termination action may, however, be used to subvert their construction. The substantial cross-referencing in the Code indicates the Congressional awareness of the technique available where it might be required that one section act upon another. No provision is made in section 6851 for a notice of deficiency, as there is in sections 6861 and 6212, nor is there any cross-reference in section 6851 to either section 6861 or 6212.

Moreover, section 6851(e) provides that payment of the taxes due and owing under section 6851 shall not be enforced prior to the time otherwise prescribed for payment of such taxes if the taxpayer furnishes a bond. If the assessment authority pursuant to a section 6851 termination existed in section 6861, there would be little need for section 6851(e), since section 6863 provides for the jeopardy assessment bond. 62

These inconsistencies act to further aggravate the quandary of the terminated taxpayer. In Schreck, Judge Kaufman recognized the di-

61. Id. at 85,235.
62. Peale, Termination of Taxable Years, TAXES 305, 312 (May, 1974) [hereinafter cited as Peale] and Meyers at 840.
lemma when he admitted, that contrary interpretations can be reached in piecing together this "complex and experimental legislation." Accordingly, terminated taxpayers have sought relief by alternative routes. The most frequently used option has been to seek injunctive relief based on the district court's equity jurisdiction which is discussed below.

**INJUNCTIVE RELIEF UNDER THE ENOCHS RULE**

In *Enochs v. Williams Packing and Navigation Co., Inc.*, the Supreme Court announced a two-pronged, narrowly applied test by which a taxpayer may be granted injunctive relief notwithstanding the Anti-Injunction Act. In order to obtain that relief, the taxpayer must show: (1) that on the basis of the information available to the Service at the time of suit, and under the most liberal view of the law and facts, the Service could not ultimately prevail and (2) that equitable jurisdiction otherwise exists. The *Enochs* rule has been invoked by the taxpayer in almost every case involving a section 6851 termination.

In applying the first part of the *Enochs* test, the inquiry must be directed to the bases for the Service's claim of tax liability: the finding of jeopardy and the correctness of the computation. The Code grants a presumption in favor of the Service's findings that the taxpayer designs to do an act tending to prejudice the collection of income tax and on the computation of the amount due. And although a statutory presumption is normally rebuttable by evidence to the contrary, some courts have found the presumptions irrebuttable regardless of the taxpayer's allegations.

In *Fancher v. United States*, a section 6851 termination case, the court specifically found that the taxpayer had not committed any of the acts described in section 6851, but nonetheless held that the Service's finding of jeopardy was conclusive. Similarly, in *Shaw v. McKeever* and *Clark v. Campbell*, although both courts found

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63. 301 F. Supp. at 1275.
64. 370 U.S. 1 (1962).
66. In *Enochs*, liability for unpaid social security and unemployment taxes depended upon the resolution of a factual question. The possibility that the Service might prevail led the Court to the conclusion that the government's claim of liability was not without foundation.
69. Id. at 86,295.
70. 74-1 U.S.T.C. ¶ 9348 (D. Ariz. 1974).
for the taxpayers on the ground that a deficiency notice was required in a section 6851 termination, both first rejected an Enochs application. In Shaw, the court declined to accept equitable jurisdiction under Enochs despite its findings that none of the acts described in section 6851 had occurred and that the termination was "unlawful."\(^2\)

The court in Clark followed the Fifth Circuit case of Lloyd v. Patterson,\(^3\) which held that the Service's determination of jeopardy is not reviewable.\(^4\) These courts apparently have failed to distinguish between the "belief" required by section 6861 and the "finding" necessitated by section 6851. Under section 6861, the Service need only believe that collection is in jeopardy, while under section 6851, the termination may be made on a finding by the Service that the taxpayer designs to do an act tending to prejudice the collection of income tax. Furthermore, these courts have failed to apply the minimal "good faith" standard set forth in Enochs to the Service's actions:

To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund.\(^5\)

Thus it would seem that a court's inquiry in applying the Enochs test to a section 6851 action would necessarily go beyond the section 6861 belief cases, at least to the extent of examining the Service's good faith in its computation of liability and its finding that the taxpayer was about to perform an act described in section 6851.

Some courts have required the Service to provide some evidence that the statutory procedures were followed before applying the presumption. In United States v. Bonaguro,\(^6\) the taxpayer was arrested and charged with possession of counterfeit money. Nearly two thousand dollars in good currency was seized. The Service immediately terminated the taxable year, estimated the income for the short period and made a corresponding assessment. In granting the taxpayer's motion for the return of property, the court found that the Service had failed to produce any proof of "findings" under section 6851 or any evidence that a reasonable "belief" of jeopardy existed. The action

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72. 74-1 U.S.T.C. ¶ 9348 at 83,804.
73. 242 F.2d 742 (5th Cir. 1957).
74. Accord, Transport Manufacturing and Equipment Co. of Del. v. Trainor, 382 F.2d 793 (8th Cir. 1967); Kimmel v. Tomlinson, 151 F. Supp. 901 (S.D. Fla. 1957); Melvin Building Corporation v. Long, 262 F.2d 920 (7th Cir. 1958); Veeder v. Commissioner, 36 F.2d 342 (7th Cir. 1929); James Couzens, 11 B.T.A. 1040 (1928).
75. 370 U.S. at 7-8.
of the Service had not been for the protection of revenue but was rather, "a colorable use of the statutory forms at the suggestion of another agency . . . ." 77

Although Bonaguro can be used to support the proposition that the Service's findings and belief in a section 6851 case are reviewable, the case otherwise has limited applicability. The court, taking jurisdiction incident to a criminal proceeding, did not feel bound by the Enochs test and never reached the "equitable jurisdiction" problem. 78 Moreover, due to the procedural basis of the motion, the Bonaguro court shifted the burden of proof on the invalidity of the assessment 79 from the taxpayer to the Service, requiring the Service to demonstrate a right to the property.

A more viable precedent was established in Pizzarello v. United States, 80 in which the Second Circuit granted an injunction prohibiting the assessment and collection of tax after application of the Enochs test. The taxpayer had been convicted of the criminal offense of failure to pay the wagering tax. The case was later remanded by the Supreme Court, in light of cases in which the Court had held that a failure to comply with the wagerer registration and occupation tax laws could not be punished criminally because of the hazard of self-incrimination. 81 Before a decision was reached on remand, the Service made a jeopardy assessment. The amount was determined by projecting two weeks gambling receipts over a five-year period, and was well in excess of the monies already confiscated.

The court found that the alleged tax liability was unfounded and, consequently, that the Service could not ultimately prevail. The court reasoned that no evidence had been presented to show that the taxpayer had been in the wagering business for the projected five-year period. Furthermore, because the computation of the tax to be assessed was at least partially based on illegally procured evidence, the assessment was invalid. Thus, in Pizzarello, the court's inquiry regarding the first prong of the Enochs test was shifted from the findings required by section 6851 to the Service's basis for the amount as-

77. Id. at 753-54.
78. The court, in dicta, said that it would have jurisdiction under the § 6213(a) exception to the Anti-Injunction Act since no deficiency notice had been issued. This dicta assumes the question of whether or not § 6861 is the source of § 6851 assessment authority.
sessed. The rationale is that unless the Service can demonstrate the validity of the amount assessed, it has no foundation upon which to ultimately prevail.

In *Willits v. Richardson*, the Fifth Circuit, unrestricted by the taint of illegally seized evidence, adopted the *Pizzarello* conclusion in relation to the first part of the *Enochs* test. This court found no evidence to validate the assessment which it characterized as fictitious and speculative. Thus, at least two circuits have permitted the taxpayer to go beyond the legislative presumptions with evidence challenging the Service's actions.

While the holdings in both *Pizzarello* and *Willits* afford some relief beyond the "belief" cases, they are still narrow. The assessment challenged must be entirely excessive, arbitrary, capricious and without factual foundation. Mere excessiveness will not warrant relief. If it appears that the Service can recover any of the tax assessed, injunctive relief will be denied. Therefore, the taxpayer must prove that the computative basis of the assessment is so insufficient as to be an exaction rather than a legitimate protection of revenue.

Furthermore, while the factual basis for the Service's action may be within the court's scope of inquiry under *Enochs*, the Service's motive in the application of section 6851 is not. An attempt to enjoin the Service from proceeding against a taxpayer for reasons other than revenue collection was rejected by the court in *Lewis v. Sandler*. The taxpayer alleged that the Service had launched a campaign to use the Code provisions to suppress narcotics traffic. The court rejected the argument as indistinguishable in principle from the claim rejected by the Supreme Court in *Bob Jones University v. Simon*. There the Court held that as long as the actions of the Service have "some independent basis in the requirements of the Code," the Anti-Injunction Act prohibits pre-enforcement injunctions against the Service's revocation of the tax-exempt status of a university restricting admissions to white students.

Even when the Service cannot ultimately prevail, the taxpayer is not entitled to injunctive relief under *Enochs* where he has an ade-

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82. 497 F.2d 240 (5th Cir. 1974). *See* Lucia v. United States, 474 F.2d 565 (5th Cir. 1973), in which the Fifth Circuit first adopted the *Pizzarello* holding, although not in a § 6851 case.
83. *See* Bowers v. United States, 423 F.2d 1207 (5th Cir. 1970); Thrower v. Miller, 440 F.2d 1186 (9th Cir. 1971); Kelly v. Lethert, 362 F.2d 629 (8th Cir. 1966).
84. 498 F.2d 395 (4th Cir. 1974).
86. *Id.* at 2048.
quate remedy at law. Moreover, if the Anti-Injunction Act does not bar jurisdiction, the district court still has no equitable jurisdiction under traditional equity concepts unless no remedy at law is available to the taxpayer which would adequately protect him from irreparable harm.

Until recently, taxpayers whose years had been terminated under section 6851 contended that no remedy was available because access to the Tax Court had been blocked by the Service's refusal to issue a deficiency notice. Further, unless the value of the seized property was at least as great as the amount assessed, a subsequent suit for refund was impossible under the full-payment rule of *Flora v. United States,*\(^87\) in which the Supreme Court held that payment of the entire amount of an assessment is prerequisite to a suit for refund in the district court. Besides, even if sufficient assets were seized to satisfy the full-payment rule, the Service might not have applied the confiscated property to the assessment.\(^88\)

In *Irving v. Gray,*\(^89\) the Second Circuit responded to that argument by holding the *Flora* rule inapplicable to section 6851 cases. The court concurred with the Service's position that *Flora* was distinguishable on the basis that in *Flora* a deficiency had been assessed, while in a section 6851 case the assessment is not of a deficiency. The *Irving* court thus found that the taxpayer whose year was terminated and property subsequently appropriated had an adequate remedy at law: he could await the end of his full tax year and then file a return reporting overpayment of tax, and he could file suit for a refund\(^90\) if the claim was still pending administrative action at the end of the statutory six-month waiting period. The Fourth Circuit accepted this rationale in *Lewis v. Sandler*\(^91\) when it found that a refund suit was available to the taxpayer whose year had been terminated, even though the full amount of the assessment had not been satisfied.

Although the *Irving* court's determination of the inapplicability of the full-payment rule rests upon a finding that is contested among the circuits — that no deficiency exists subsequent to a section 6851 termination action—it would be futile to debate the issue in a proceeding in which the *Enochs* test is being applied. If a court accepts the

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88. See *Schreck v. United States*, 301 F. Supp. at 1281. The property might be subject to forfeiture proceedings.
89. 479 F.2d 20 (2d Cir. 1973).
90. *Int. Rev. Code § 6532(a).*
construction of section 6851 which holds that a deficiency exists after a termination action, then that court must also find that it has jurisdiction under the statutory exception to the Anti-Injunction Act and would have no reason to utilize the Enochs test.

Even if the Second Circuit's position that no deficiency exists is admitted for purposes of the Enochs test, there still remains the question of whether its reading of Flora is correct. Indeed, upon rehearing, the district court in Schreck took issue with that interpretation, noting the jurisdictional construction of 28 U.S.C. § 1346(a) set forth in Flora, where assessment was not qualified by the term "deficiency" in the statement of the question:

[W]hether a Federal District Court has jurisdiction under 28 U.S.C. § 1346(a) (1) of a suit by a taxpayer for the refund of income tax payments which do not discharge the entire amount of the assessment.

Even though a deficiency assessment was at issue in the case, the Court did not limit its jurisdictional construction of the statute. Rather, the Court held that the statute, "correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in Federal District Court." And although the source of authority is in question, an assessment is undisputedly made in a section 6851 termination action.

Terminated taxpayers who sought injunctive relief by invoking the Enochs test notwithstanding the Anti-Injunction Act had previously relied on the full-payment rule to establish that no remedy existed at law. After the Second Circuit's decision in Irving and its subsequent acceptance by the Fourth Circuit in Lewis, such taxpayers now must argue that a refund suit is an inadequate remedy for a person who has suffered seizure of all of his assets. This contention was accepted by the Fifth Circuit in Willits v. Richardson. That court held that a refund suit that would not be litigated for over a year was not an adequate remedy for one whose livelihood depended upon the confiscated assets.

94. 362 U.S. at 146.
95. Id. at 177 (emphasis added).
96. 497 F.2d 240 (5th Cir. 1974).
97. The suit for a refund may not be maintained until a claim for refund has been filed § 7422 . . . . Section 6532(a)(1), as usual, precludes the suit until the claim is denied or six months have passed from the date of filing. Once suit is instituted, the Government has at least 60 days to answer the complaint. Under optimum conditions and with cooperation, the minimum period of time required to achieve the objective through the refund suit is one to two years.
A somewhat limited exception to the Irving remedy was advanced in *Pizzarello v. United States*. The Second Circuit found that a refund suit might be an inadequate legal remedy if the taxpayer therein has to testify regarding his illegal activity. Such action would force a waiver of his fifth amendment rights against self-incrimination, subjecting him to possible prosecution under state and/or federal criminal law. The issue here lies in the burden of proof assigned to the taxpayer. In an *Enochs* contest, the terminated taxpayer must challenge and prove the invalidity of the assessment. In a refund action, he must prove not only the invalidity of the assessment, but also the amount to which the Service is properly entitled, if any. The added burden in a refund action requires testimony concerning the nature and duration of illegal activity. Thus, in an effort to demonstrate no adequate legal remedy, the terminated taxpayer may seek to establish that a refund suit places him in the position of either waiving his rights against self-incrimination or forfeiting the property seized. Such a choice is impermissible under the fourth and fifth amendments.

In *Iannelli v. Long*, the Third Circuit responded to the trial court's attempt to apply the *Pizzarello* "exception" by finding an adequate legal remedy remained for the taxpayer faced with that choice: he can (1) file a refund claim adequate to toll the statute of limitations without self-incrimination and (2) defer further proceedings in the refund suit until either the conclusion of related criminal proceedings or the running of all applicable periods of limitations on prosecutions.

The court did not consider, however, that the time required to await the running of statutes of limitation cannot constitute an adequate remedy for a taxpayer whose seized assets are being liquidated by the Service. Thus, the *Pizzarello* "exception" may be a viable precedent outside the Third Circuit, it offers little hope to the terminated taxpayer who does not face criminal proceedings.

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from the time of revocation [of exempt status]. This is the delay if the organization wins and no government appeal is taken. If an appeal follows, the delay in ultimate resolution drags on.


98. 408 F.2d 579 (2d Cir. 1969).

99. *I.R.C. Section 6851*


102. *Pizzarello’s* applicability may be lessened by the fact that it involved wagering...
The entire area of injunctive relief, under prevailing interpretations of *Enochs*, has been justly characterized as a "usually vain hope." The taxpayer must first persuade the court to avoid treating the statutory presumptions regarding the Service's findings and computations as conclusive. If this is accomplished and the court has found the Service's actions reviewable, such actions must be shown to be entirely excessive, arbitrary, capricious and without factual foundation. Any showing by the Service that some recovery may be had will be sufficient to justify a denial of the relief sought. The Service's motives are not reviewable. Finally, the burden of proving irreparable harm must be met. And in at least the Second and Fourth Circuits, the terminated taxpayer will be barred from relief under *Enochs*, since those circuits have already held that a post-termination refund suit is an adequate remedy at law.

**Due Process of Law**

When confronted with an *Irving* court, the terminated taxpayer's last resort is to wage a direct attack on the constitutionality of sections 6851, 6201 and 7421 as applied, on the grounds that they deprive the terminated taxpayer of the due process of law guaranteed by the fifth amendment.

The constitutional issue arises under the Service's interpretation of assessment procedure pursuant to section 6851. The question is whether section 6851, as applied, violates due process because it does not afford an adequate opportunity for ultimate judicial determination of the liability. The issue must be resolved with respect to time, place and circumstances. Consideration of what due process may entail does not rest upon "inflexible procedures universally applicable to every imaginable situation," but rather, upon "a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." 

Section 6851 cases that have touched upon both sides of the due process issue have cited *Phillips v. Commissioner*. *Phillips* determined that the registration and occupation tax provisions which were found by the Supreme Court to create a hazard to the fifth amendment right against self-incrimination.

105. *Id.*
106. See, e.g., Preble v. United States, 74-1 U.S.T.C. ¶ 9462 (D. Mass. 1974); Par-
mined the constitutionality of section 280(a)(1) of the Revenue Act of 1926, which as applied, compelled stockholders who have received the assets of a dissolved corporation to discharge unpaid corporate taxes. Enforcement of the liability against the stockholder involved the same deficiency assessment procedure applied against delinquent taxpayers.

The Court in Phillips rejected the stockholder's argument that due process requires a judicial determination of liability prior to any possible collection action. After finding definite congressional intent for the operation of the section precisely as applied, the Court affirmed the right of the government to collect revenue by summary administrative proceedings as long as adequate opportunity was later afforded for judicial determination. While judicial relief from administrative action which threatens personal rights must be afforded promptly, "delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." After elevating the government's need to secure its revenues over the taxpayer's property rights, the Court found the requirements of due process satisfied by the two alternative methods of ultimate judicial review, in spite of the limitations and conditions imposed upon those proceedings: a refund suit or immediate redetermination of the liability by the Board of Tax Appeals (later the Tax Court).

Fuentes v. Shevin is cited by courts on both sides of the due process issue to sustain their interpretation of Phillips. Prejudgment replevin statutes of two states which authorized summary seizure of property by state agents on a third party's application were found to be violative of due process in Fuentes. The Court insisted that before a person could be deprived of his property, there must be notice and a hearing at a meaningful time and in a meaningful manner, except for extraordinary situations where a valid governmental interest justified postponing the hearing until after the seizure. Phillips was cited therein as a "truly unusual" situation.

While Fuentes affirms the Phillips proposition that an important and immediate governmental need may preempt the due process "root principle" of a pre-seizure judicial determination of liability, it does not uphold the notion that a refund suit as the sole remedy following

rish v. Daly, 350 F. Supp. 735 (S.D. Ind. 1972); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974).
108. Id. at 597.
110. Id. at 92 n.24.
seizure satisfies due process. Indeed, by emphasizing the unusual nature of the *Phillips* situation, the Court implies that no significant disparity may exist between the time of seizure and the time of hearing. Whether such a disparity constitutes a violation of due process may be decided only after a review of the governmental needs and private interests involved.

Clearly, the interest of the government in assuring collection of revenue by jeopardy assessment is of paramount importance. But once property is seized and held, the need changes in nature and the only interests remaining which would justify postponing a judicial determination of liability are of an administrative nature, such as the creation of multiple tax periods within the same year. Although the establishment of efficient administrative procedures to achieve legitimate governmental ends is a proper governmental interest worthy of cognizance in constitutional adjudication, it does not carry the same degree of significance as the prompt collection of revenue.

On the other hand, the interest of the taxpayer increases in degree following a seizure. He must now seek the return of his property rather than maintain it. Unlike the situation in *Phillips*, a section 6851 termination case involves a total or nearly total confiscation of the taxpayer's assets. In view of these consequences under section 6851, the dichotomy found in *Phillips* between personal liberties and property rights is a false one. Writing for the Court in *Lynch v. Household Finance Corporation*, Justice Stewart said:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

112. If the Service were to assess under § 6861 instead of § 6201, it would lose only the right to sell seized property immediately. Even then it could sell the property under some circumstances, such as when the property is perishable. See § 6863(b)(3)(B).
114. No seizure had taken place; the taxpayer had appealed an unfavorable determination by the Board of Tax Appeals on a $9000 assessment. The taxpayer had received $17,000 in assets from the dissolved corporation whose unpaid taxes were now being assessed.
116. *Id.* at 552.
Thus, the nature of both the private interest which is impaired and the governmental need which is served by the postponement of judicial determination of liability dictates a relatively short time period between seizure and the hearing. Certainly, if only the most extraordinary governmental need justifies preemption of the "root principle" of due process, once that need is satisfied and protected, the rationale behind the principle would operate to minimize the period of deprivation which must be tolerated before a hearing is afforded.

Under this view, it does not seem arguable that a refund suit satisfies the requirements of due process. The inevitable delays between seizure and hearing negate any notions of reasonableness. Indeed, Congress recognized the harshness when it created the Board of Tax Appeals in 1924:

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 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.

If a refund suit is thus an "incomplete remedy" in a non-jeopardy situation, it follows that it is not adequate to satisfy due process following a section 6851 action.

A holding that a refund suit does not satisfy due process in a section 6851 termination action is not necessarily inconsistent with Phillips. On the contrary, it is improper to cite Phillips for the proposition that a refund suit provides adequate opportunity for judicial determination of liability. The case specifically rested on the premise that alternate means of relief, one of which was immediate, were available to the taxpayer.

Two responses have been made to the argument that a refund suit does not satisfy due process. The first is that section 6851(e) provides that a taxpayer may post bond in an amount equal to the tax including interest, in lieu of making payment. Thus, he may be able to litigate first and pay later. This device, it is argued, satisfies the requirements of Phillips.

The second response suggests that section 6851 is limited by its dependence upon the taxpayer voluntarily engaging in one of the pro-

117. See Justice Blackmun's comment at note 97 supra.
119. 283 U.S. at 597.
scribed activities. Thus, it is argued, he cannot be heard to complain of the remedy’s harshness. This approach was endorsed in *Irving* when the court quoted the lower court’s rejection of the taxpayer’s request for equitable relief: “[I]t is bearable inequity that those whose ‘bold plans’ are frustrated may suffer potentially costly inconvenience.”

The *Schreck* court addressed itself to the first argument when it noted that the right to file a bond is an illusory remedy to one without assets far in excess of the assessment and a “mere mockery” to one whose entire assets are seized. Further, bonding companies demand security, and security is usually unavailable. In fact, the termination assessment generally exceeds the taxpayer’s net worth.

The second response, incorporating the doctrine of unclean hands, infers judicial approval of using the tax statutes to punish activity which may not constitute a criminal offense. If the courts reject immediate review following seizure, based upon an administrative finding of guilt, they will have achieved the antithesis of due process of law: conviction by administrative fiat.

**CONCLUSION**

It appears that the inevitable result of accepting the Service’s interpretation of its authority pursuant to a section 6851 termination action is a denial of due process. And while the Service may claim that its powers under section 6851 and related provisions of the Code are not followed indiscriminately, the procedure is open to grave abuses of administrative discretion.

The Service’s power to terminate taxable years and make corresponding assessments is not limited to situations involving the present drive against drug traffic. The Service can invoke this awesome power against any taxpayer who is “found” to be in the category of taxpayers to which section 6851 applies. Yet there are no external standards of universal judicial acceptance to which administrative discretion in this area must conform.

The constitutional consequences of the Service’s interpretation of section 6851 favor an acceptance of the *Schreck* court’s contention

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120. Peale at 312-13.
121. 479 F.2d at 25.
that when Congress provided taxpayers with a judicial forum for determination of liability prior to payment, it intended that access to this forum be available to both normal and jeopardy taxpayers. Considering the protection afforded the legitimate governmental interests, there is no reasonable basis for not interpreting the contemporary Code as affording the section 6851 taxpayer the same protection.

Ultimate resolution of the inter-circuit conflict must come either by acceptance of the proposition that section 6861 is the source of assessment authority following a section 6851 termination or in an expanded availability of injunctive relief under *Enochs*. It would seem the former is the more acceptable solution since it does not involve further judicial intrusion into the administration of the tax laws, and it attempts to conform to the apparent congressional intent.

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