Nebraska Law Review

Volume 54 | Issue 1 Article 10

1975

Terminated Tax Years: Coherent Relief for the Taxpayer: *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974)

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Note

Terminated Tax Years: Coherent Relief for the Taxpayer

Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974).

I. INTRODUCTION

Section 6851 of the Internal Revenue Code of 1954 (hereinafter "Code") allows the Internal Revenue Service (hereinafter "Service") to close a taxpayer's reporting period prematurely when the collection of the income taxes would be jeopardized by delay.[1] The

1. Section 6851(a) of the Internal Revenue Code of 1954 (hereinafter cited as CODE) provides:

> 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 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.

Scholarly articles relating to this tax procedure include: Gould, *Jeopardy Assessments: When They May Be Levied and What To Do About Them*, 18 N.Y.U. 18TH INST. ON FED. TAX 937 (1960); Hochman & Tack, *Jeopardy Assessments: A System in Jeopardy*, 45 TAXES 418 (1967) (advocating legislative modification of the procedure); Kaminsky, *Administrative Law and Judicial Review of Jeopardy Assessments Under the Internal Revenue Code*, 14 TAX L. REV. 545 (1959) (advocating a system of judicial review of section 6861 procedures under the then developed principles of administrative law generally); Meyers, *Termination of Taxable Year: Procedures in Jeopardy*, 26 TAX L. REV. 829 (1971) (questioning the power of the Service to use the procedure at all because of insufficiencies in the statutory provisions, and sug-

statute enumerates specific situations which are presumed to be prejudicial to tax collection, and permits termination of the taxable year if the Service finds that the taxpayer intends to do any other act which would jeopardize income tax collection. The Code specifies that a notice shall issue to the taxpayer informing him of the termination of his tax year and demanding payment of the amount calculated to be due.

The ramifications of section 6851 are potentially devastating to a taxpayer—far more so than the statute reflects on its face. The invocation of the procedure many times follows closely on the heels of arrests for narcotics offenses, both federal and state. The procedure is often invoked within hours of the arrest. The result is a highly confiscatory procedure which may involve the taking of not only items in the taxpayer's possession at the time of his arrest, but also items owned by him but in the possession of others or property which he believed to be in the safety of his home. The history of the procedure, especially in the recent past, raises serious questions about the amount of men, money and cooperation which has been involved in the Service's use of the procedure.[2]

Section 6851 has precipitated, especially in recent years, numerous suits for injunctive relief from the quick assessment and collection of federal income taxes. Claims for injunctive relief from section 6851 procedures have, for the most part, had a statutory basis. The statutory claim is based on the proposition that a deficiency notice must issue to the taxpayer in a section 6851 terminated tax year. Under this theory it is argued that the required deficiency letter provisions of section 6861 are incorporated into section 6851.[3] This argument maintains that section 6851 contains no

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gesting legislative changes in the procedural scheme); O'Dell, *Assessments: What Are They—Ordinary? Immediate? Jeopardy?*, 31 N.Y.U. 31ST INST. ON FED. TAX 1495 (1973); Peale, *Termination of Taxable Year*, 52 TAXES 305 (1974) (arguing in support of the present statutory scheme); Silver, *Terminating the Taxpayer's Taxable Year: How IRS Uses It Against Narcotics Suspects*, 40 J. TAXATION 110 (1974) (questioning the Service's use of the section 6851 procedure); Note, *Jeopardy Assessment: The Sovereign's Stranglehold*, 55 GEO. L.J. 701 (1967) (examining present taxpayer protections and the ABA proposals for changes); Comment, *Code Section 6851—"Termination of Taxable Year"—Application and Function Within the Internal Revenue Code of 1954*, 9 WAKE FOREST L. REV. 381 (1973); Note, *Termination of Taxable Years: The Quagmire of Internal Revenue Code Section 6851*, 15 WM. & MARY L. REV. 658 (1974) (providing a thorough explanation of the operation of the procedure, an explanation of the defensive alternatives allowed a taxpayer and suggesting appropriate legislative modifications in the statutory scheme).

2. These specific issues are, however, beyond the scope of this note.
3. Section 6861(b) of the CODE provides:

   DEFICIENCY LETTERS.—If the jeopardy assessment is made be-

independent assessment authority, and that such authority should be found in section 6861.[4] The Service, however, does not issue deficiency notices in section 6851 proceedings, maintaining that no "deficiency" exists.[5] Since the Service's failure to issue a *required* notice of deficiency is a statutory ground for injunctive relief,[6] the

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> fore any notice 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 assessment.

4. The ultimate disposition of the following cases involving the statutory theory for injunctive jurisdiction was a determination that the § 6861 notice of deficiency need not issue to the taxpayer in a short year situation. *See, e.g.*, Chapman v. IRS, 487 F.2d 1393 (2d Cir.), *aff'g*, 32 Am. Fed. Tax R.2d 73-5027 (S.D.N.Y. 1973); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973); Williamson v. United States, 31 Am. Fed. Tax R.2d 73-800 (7th Cir. 1971); Laing v. United States, 364 F. Supp. 469 (D. Vt. 1973), *aff'd*, 496 F.2d 853 (2d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3679 (U.S. May 31, 1974) (No. 73-1808).

   Some cases have held, however, that such notice was required. *See, e.g.*, Hall v. United States, 493 F.2d 1211 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3087 (U.S. Aug. 5, 1974) (No. 74-75); Aguilar v. United States, 359 F. Supp. 269 (S.D. Tex. 1973), *rev'd*, 501 F.2d 127 (5th Cir. 1974); Rambo v. United States, 353 F. Supp. 1021 (W.D. Ky. 1972), *aff'd*, 492 F.2d 1060 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3017 (U.S. July 10, 1974) (No. 73-2005); Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex. 1972), *aff'd*, 501 F.2d 108 (5th Cir. 1974).

   Additionally, appeals on this issue are pending in the third, fourth and ninth circuits. *See, e.g.*, Boyd v. United States, 33 Am. Fed. Tax R.2d 74-1246 (E.D. Pa. 1974), *appeal docketed*, No. 74-1565, 3d Cir., June 10, 1974 (held notice of deficiency not required); Shaw v. McKeever, 33 Am. Fed. Tax R.2d 74-1027 (D. Ariz. 1974), *appeal docketed*, 9th Cir. [notice of appeal filed May 17, 1974] (notice required); Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969), *reaff'd on reconsideration*, 375 F. Supp. 742 (D. Md. 1973), *appeal docketed*, No. 74-1566, 4th Cir., May 16, 1974 (notice required); Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973), *appeal docketed*, Nos. 73-2037, -2038, 9th Cir., June 8, 1973 (notice required); Woods v. McKeever, 32 Am. Fed. Tax R.2d 73-5967 (D. Ariz. 1973), *appeal docketed*, No. 74-1133, 9th Cir., Jan. 25, 1974 (notice required); Williams v. United States, 373 F. Supp. 71 (D. Nev. 1973), *appeal docketed*, No. 74-1192, 9th Cir., Feb. 4, 1974 (notice required).

5. Rather than a deficiency the Government has consistently asserted that the stated liability is: "'[A] provisional statement of the amount which must be presently paid as against the impossibility of collection.'" Clark v. Campbell, 501 F.2d at 115. *Accord*, Irving v. Gray, 479 F.2d 20, 23-24 (2d Cir. 1973); Schreck v. United States, 301 F. Supp. 1265, 1271 (D. Md. 1969).

6. Section 7421(a) of the CODE provides:

   > TAX—Except as provided in [section] . . . 6213(a) . . . 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.

taxpayer will prevail on this argument if the court views the calculated liability as a "deficiency."

Although the statutory theory has been successfully advanced in a number of cases, a recent decision of the United States Court of Appeals for the Fifth Circuit has seemingly resurrected an alternative judge-made theory which permits injunctive relief. In *Willits v. Richardson*,[7] the appellate court found that the factual foundation for the termination and the Government's subsequent seizure was one local police officer's speculations that the taxpayer was engaged in illegal drug activities.[8] In so finding, the court stated: "'[A] taxpayer under a jeopardy assessment is entitled to an injunction . . . if the . . . assessment is entirely excessive, arbitrary, capricious, and without factual foundation . . . .'"[9] In *Willits*, the court made implicit changes in prior law concerning both the burden and elements of proof in suits to enjoin the Service's use of section 6851. Additionally, the Service's underlying motive for implementing section 6851 apparently was an element in the decision-making process. The purpose of this Note is to evaluate the *Willits* decision, with attention directed primarily toward the inroads the case makes concerning the issues of the burden and ele-

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Section 6213(a), as an exception to the anti-injunction provision, provides:

> TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

7. 497 F.2d 240 (5th Cir. 1974). It should be noted that the contention upon which *Willits* was decided was raised and found to be without merit in Williams v. United States, 373 F. Supp. 71 (D. Nev. 1973), *appeal docketed*, No. 74-1192, 9th Cir., Feb. 4, 1974; Laing v. United States, 364 F. Supp. 469 (D. Vt. 1973), *aff'd*, 496 F.2d 853 (2d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3679 (U.S. May 31, 1974) (No. 73-1808); Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973), *appeal docketed*, Nos. 73-2037, -2038, 9th Cir., June 8, 1973; Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex. 1972), *aff'd*, 501 F.2d 108 (5th Cir. 1974).
8. 497 F.2d at 246.
9. *Id.* at 245.

ments of proof in taxpayer suits to enjoin section 6851 jeopardy assessments. It also raises questions regarding the appropriate standard of appellate review and the extent to which the courts ought to consider the ultimate questions of taxpayer liability for the taxes claimed to be due.

The district court's decision, which was based on the Supreme Court's decision in *Enochs v. Williams Packing & Navigation Co.*,[10] is discussed in Section II. Section III discusses the broader decision of the court of appeals and its precedent. Finally, Section IV discusses the problems raised by the decision and suggests answers to those problems.

II. THE DISTRICT COURT DECISION[11]

On the morning following the taxpayer's arrest on a narcotics charge,[12] one of the arresting officers informed an Internal Revenue agent of the arrest. The agent reviewed the police report and was advised that the taxpayer was an associate of several persons suspected of narcotics activity. It was further explained to the agent that currency found in an envelope in the taxpayer's purse, together with a slip of paper containing names and figures which was interpreted as a record of narcotics transactions had been confiscated.[13] Finally, the agent was told that the taxpayer had stated that she was unemployed. The agent then determined that the

10. 370 U.S. 1 (1962).
11. Willits v. Richardson, 362 F. Supp. 456 (S.D. Fla. 1973).
12. On May 24, 1973, Sharon Willits was detained by two plainclothes officers of the narcotics division of the Miami Police Department. Six weeks earlier, Mrs. Willits had been stopped in a vehicle by one of the same officers. On the earlier date Mrs. Willits was in the company of Rick Cravero, a suspected narcotics dealer but neither was arrested. When Mrs. Willits was detained on May 24, she was driving the same vehicle—a 1972 Cadillac—and she was alone. Mrs. Willits was arrested for speeding and taken to the police station, not to the traffic division, but instead to the narcotics section. There it was discovered that Mrs. Willits was carrying a gun without a permit. She was arrested, advised of her rights and, upon a search of her purse, barbiturate tablets were discovered. Mrs. Willits claimed she held a prescription for the tablets—a claim substantiated by subsequent testimony. In addition to these items, an envelope containing some slips of paper and $4,400 in currency, a gold coin and a small piece of jewelry were found in her purse, and she was wearing several diamond rings which she surrendered to the officers.
13. This slip of paper read as follows:

Ceon	-3000
Ron	1500
Slt	-2000
P	500
C	400
ME	5900

497 F.2d at 245.

taxpayer had filed no income tax returns for the years 1969 through 1972. Upon this information, the agent determined that the taxpayer had earned $60,000 in commissions on $240,000 worth of narcotics sales in 1973 and owed $24,549 in taxes.[14] The agent recommended that the taxpayer's tax year be truncated for the period January 1, 1973, through May 23, 1973 and caused an administrative summons to be issued to the police department for the property they had confiscated.

On May 25, the taxpayer was sent a notice advising her of the termination of her tax year[15] and informing her that any unpaid part of her tax liability would be assessed against her and necessary actions would be taken to effectuate collection. An assessment was made, and on May 30, notice of levy and seizure was served upon the police department seeking the confiscated property.

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14. In the words of the court:

> The revenue agent presumed this record showed a list of persons with dollar amounts after their names and added to this supposition the further speculation that the notation related to the division of income from a typical drug sale. He further assumed that "ME" referred to Mrs. Willits and pyramiding all these guesses, concluded that her commission on the theoretical transaction would have amounted to 44%.

Id. at 245. The court also explained that the liability was calculated on the basis of a putative sale of six kilos of cocaine, reported to the IRS agent by one of the police officers. Ironically, the Internal Revenue agent also testified that the police officer had *not* informed him that Mrs. Willits had ever dealt with the six kilos herself. The liability was determined on the basis of an assumption that Mrs. Willits had received at least a 25% commission on a sale price of $40,000 for the cocaine on the transaction in question. That amount was apparently telescoped over the short year taxable period to arrive at the final figure.

15. The standard form termination notice 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 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.
>
> /s/
> _____
> District Director

See Silver, *supra* note 1, at 112.

In the district court, the taxpayer requested injunctive relief, claiming the seizure of her property to be illegal. Although the taxpayer raised three issues,[16] only one, the contention that no taxes were owed, was dispositive of the controversy. In response, the government alleged that the suit was barred by the anti-injunction provision of the Code.[17]

The court analyzed the taxpayer's claim by applying the test set forth by the Supreme Court in *Enochs v. Williams Packing & Navigation Co.*[18] In *Enochs*, the respondent, Williams, sought to enjoin the collection of unemployment and social security taxes which the Government claimed were past due. The district court determined that the taxes were not due and issued an injunction. The Fifth Circuit affirmed, but was reversed by the Supreme Court on the basis of an interpretation of section 7421(a). The Court stated, "[s]uch a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise."[19] The Court indicated that such a showing

16. The two alternative theories raised in the district court were: (1) whether a "statutory notice of deficiency . . . had been received by the plaintiff prior to the seizure . . . ." (perhaps better stated as whether such notice was required); and (2) whether the collection should be enjoined because allegedly "based on illegally seized evidence . . . ." 362 F. Supp. at 459. The court determined that a deficiency notice need not be sent the taxpayer in a truncated tax year situation, relying on a decision of the Second Circuit Court of Appeals, Irving v. Gray, 479 F.2d 20 (2d Cir. 1973). *Id.* at 460. The district court additionally declined to rule on the issue involving the exclusionary rule stating:

> Special testimony was taken in this case on the issue of whether the search of Sharon Willits' purse by Officer Ahearn was a lawful search incident to arrest and whether the assessment of the United States for Federal taxes against the plaintiff was therefore, at least in part, based on illegally seized evidence. It is unquestioned that the exclusionary rule of the Fourth Amendment precludes the introduction of evidence in a criminal proceeding against an individual in either a state or a federal court where that evidence is obtained by the state or federal government in violation of a person's rights under the Fourth Amendment . . . . The Supreme Court has not decided whether the exclusionary rule of the Fourth Amendment applies to purely civil tax proceeding, and this area of the law appears to be unsettled. This Court would decide the issue of the legality of the search and the effect on any assessment which may have been made by the United States if that was necessary for determination of this case. However, inasmuch as a resolution of this matter can be made without ruling as to whether the exclusionary rule of the Fourth Amendment applies to a purely civil tax proceeding, this Court will make no decision as to the legality [of the search].

Id. at 459-60.

17. *Id.* at 459.
18. 370 U.S. 1 (1962).
19. *Id.* at 6.

was only one element of such an action, and becomes relevant only after the taxpayer establishes that the Government cannot prevail on its claim under even the most liberal interpretation of the law and the facts.[20]

Based on the *Enochs* decision, the district court in *Willits* found the facts did not show the Government could not ultimately prevail. The evidence tended to show that the taxpayer had associated with persons known to have dealings in narcotics; at the time of arrest she had in her possession certain narcotics, a large amount of currency and jewelry not owned at the time of her divorce in 1972.[21] Further, she was and had been unemployed and had filed

20. The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case, the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax."

We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. . . . To require more than good faith on the part of the Government would unduly interfere with . . . protection of the collector from litigation pending a suit for refund. And to permit even the maintenance of a suit in which an injunction could issue only after the taxpayer's nonliability had been conclusively established might "in every practicl sense operate to suspend collection of the . . . taxes until the litigation is ended." Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid.

Id. at 7-8 (citations and footnotes omitted). The standard expressed in *Enochs* was recently reaffirmed by the Supreme Court. Bob Jones University v. Simon, 94 S. Ct. 2038, 2046 (1974); Alexander v. "Americans United" Inc., 94 S. Ct. 2053, 2059 (1974).

21. At the hearing in the district court it was found that Mrs. Willits had been divorced in 1972, and had acquired limited property and funds as a result of the separation. By the terms of her divorce, Mrs. Willits received: (1) $67.50 per week alimony, which continued for five months at which time she accepted a lump settlement of $400; (2) child support of $67.50 per week, which still continues; and (3) the family residence, sold in 1973 for net proceeds of $2,000. Mrs. Willits admitted that during 1973 and part of 1972 she had been supported by Mr. Cravero and from her own gambling winnings. Mrs. Willits testified that she had received the jewelry and money in suit from Cravero. No evidence was introduced concerning future support by Cravero. 362 F. Supp. at 459.

no tax returns for a number of years. On these facts the court concluded it was not apparent that the Government could not ultimately prevail on its claim,[22] and thus the taxpayer failed to meet the first element of her burden of proof.[23] The result of the decision was that in a suit to enjoin the Service's use of the section

22. 362 F. Supp. at 460-61.

23. The district court also found that the plaintiff had failed to establish the two elements of equity jurisdiction. Mrs. Willits had stated that she had been supported by Mr. Cravero in the past but had made no showing that the arrangement would not continue. Further, the Government had agreed to refrain from selling any of the confiscated property until a final disposition of Mrs. Willits' tax liability could be made. The plaintiff would not, therefore, be irreparably harmed if no injunction was issued. The court also found that the taxpayer had an adequate remedy at law if she would only file a tax return:

> Taxpayer, whose taxable period has been terminated pursuant to Section 6851 of the Internal Revenue Code may reopen his taxable period by filing a return for the full calendar year (Section 6851(b) of the Internal Revenue Code). Upon filing a return for the full tax year, the taxpayer, whose year has previously been terminated under Section 6851, is, in effect, in the same position as one who has made payments of estimated income taxes throughout the year, except that by necessity the Government, rather than the taxpayer, has estimated the amount of tax.
>
> If the plaintiff reopens the taxable period by filing a 1973 income 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 refund claim, which if not allowed or not 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 a redetermination of the deficiency by the United States Tax Court.
>
> . . . .
>
> Each of these actions simply depends upon the filing by the plaintiff of her 1973 tax returns at the appropriate time, and provides her with an adequate remedy at law.

The court of appeals found there would be irreparable injury if an injunction did not issue, stating that the absence of evidence indicating that Mr. Cravero would not continue to support Mrs. Willits would in no way mitigate the financial ruin caused the plaintiff by the seizure of such a large amount of her personal property and money. Mrs. Willits' remedy at law was determined to be inadequate because of the time consuming nature of refund suits and the complete financial ruin which would result.

While these issues are beyond the scope of this note, it would seem that the appellate court's assessment of the situation was proper. *See, e.g.*, Pizzarello v. United States, 408 F.2d 579, 586 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).

6851 procedure, the issue is whether there is some factual basis for believing the taxpayer owes taxes. Two things are implicit in the decision. First, the issue is *not* whether the Service's *formula* for calculating the amount due is accurate or itself based on fact; and, second, whether "jeopardy" in fact exists is not immediately relevant.

The decision was consistent with the majority of cases considering the *Enochs* exception to the anti-injunctive provision.[24] Courts have generally hesitated to question the Government's calculations. On appeal, however, the Fifth Circuit looked at least to the factual basis for the calculation itself rather than examining the factual basis for the Government's determination that taxes were owed.

III. THE COURT OF APPEALS DECISION[25]

The Fifth Circuit totally disagreed with the district court's determinations relating to the *Enochs* issue. The court determined that the factual foundation for the seizure was "fictitious"—the product of the Service's acceptance of one local police officer's "speculations" concerning the taxpayer's drug activities.[26] The Fifth Circuit's decision is supported by the Second Circuit's decision in *Pizzarello v. United States*.[27]

In *Pizzarello*, the taxpayer had been prosecuted for maintaining gambling operations in violation of federal law. A substantial portion of the Government's evidence, including a large amount of cash, had been suppressed as illegally obtained and had been ordered returned to the taxpayer. Before the decision ordering the money returned was issued, a jeopardy assessment of $282,440.70 for unpaid taxes was sent to the taxpayer. Pizzarello sought to enjoin the collection of the tax, claiming the assessment effectively frustrated the suppression decision in the pending criminal prosecution. The court of appeals agreed, saying:

> This alleged dilemma [requiring the taxpayer to incriminate himself in a refund suit if he attempts to contest the assessment] is said to permit the Government to achieve an indirect forfeiture

24. *See*, Note, *Termination of Taxable Years: The Quagmire of Internal Revenue Code Section 6851*, *supra* note 1, at 682-90 (1974) and cases cited therein.
25. Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974).
26. *Id.* at 246.
27. 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969). The *Willits* decision was not the first case in which the Fifth Circuit had called upon *Pizzarello* for guidance. In Lucia v. United States, 474 F.2d 565 (5th Cir. 1973), the court reversed and remanded with directions to investigate the *Enochs* issues in another situation which arguably involved a speculative assessment under section 6851 in the context of excise taxes on wagering.

> under the guise of a jeopardy assessment, having failed to achieve forfeiture directly.[28]

The court approached the claim under the rule enunciated in *Enochs v. Williams Packing & Navigation Co.*[29] The court, following the *Enochs* test, evaluated whether the Government's calculation of liability was supported by facts. In *Pizzarello*, the Service had calculated a five year tax liability based on three days' records of wagers and facts which supported the belief that the taxpayer had been accepting wagers for a fifteen day period. The court of appeals found an important fact to be absent: there was no evidence tending to show that the taxpayer had operated an illegal business for the length of time claimed by the Government.[30] Thus, if there are sufficient facts to calculate tax liability for a two week period, these calculations could not, without additional evidence, provide the basis for an assessment covering a much longer period.

Following the Second Circuit's reasoning in *Pizzarello*, then, the Fifth Circuit in *Willits* scrutinized the *formula* used by the Service in calculating the tax owed. The court of appeals in *Willits*, addressing a very different question than had the district court, found the Service's claim to be "entirely excessive, arbitrary, capricious, and without factual foundation" because the evidence did not support the Service's *calculation*.[31]

Although it is thus evident that the *Willits* decision is supported by *Pizzarello*, the case raises serious questions concerning the development of the law under *Enochs*. This is even more apparent when the *Willits* decision, liberally applying the exception to the anti-injunction provision, is compared with the district court's approach, which seems more aptly to apply the spirit of both *Enochs* and section 6851.

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28. 408 F.2d at 582.
29. 370 U.S. 1 (1962).
30. 408 F.2d at 583.
31. 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 illicitly imported cocaine. [The revenue agent testified] without dispute that the sole source for connecting Mrs. Willits at all with income from the importation or sale of any cocaine was [a Miami Police Officer]. Yet, [the agent] further so testified that [the police officer] did *not* tell him that Mrs. Willits had ever dealt with the speculative six kilos or more or less cocaine or with the sale or distribution of any other narcotic. No basis in fact nor foundation for any reasonable assumption was demonstrated in the record that Mrs. Willits was connected with the smuggling or sale of this or any other amount of cocaine or narcotics.
497 F.2d at 244-45.

As a result of *Willits*, the focal point of the court's inquiry in a suit to enjoin use of section 6851 would be the Government's specific calculations. The *Willits* court advocates an examination of the formula used in determining tax liability, with the burden of establishing a factual basis for the *calculation* placed on the Government. The specific standard to be used for reviewing the calculation, however, is left unanswered. Further, the *Willits* decision emphasizes the importance of the service's underlying policy regarding the use of section 6851. The Fifth Circuit, as will be seen below,[32] apparently placed unascertainable weight on the existence and mechanics of the Service's Narcotics Project in reaching their decision. The court's approach raises two distinct problems. First, it requires a decision concerning the propriety of reviewing the Government's *particular calculations* at this stage of the litigation. Second, if such review is proper, the scope of the inquiry must be delineated.

IV. THE ISSUES

A. Propriety of the Inquiry

The *Willits* court examined the Government's use of the short year procedure in some depth. The inquiry proceeded directly to the issue of the Government's calculations of tax liability. The court's approach was matter-of-fact, as though an evaluation of the calculation itself was obviously proper. It is submitted, however, that such an approach was neither completely proper nor obvious.

There are at least four questions to be examined in connection with a review of the short year procedures: (1) whether "jeopardy" exists; (2) whether there is a factual basis for believing that the taxpayer owes taxes; (3) whether there is a factual basis supporting the Government's calculations; and (4) whether the Government's calculated liability figure can be substantiated. The short year procedure is intended, by its terms, to be invoked in response to certain unique circumstances. The Secretary or his delegate[33] is authorized to use section 6851 when he believes the collection of taxes would be jeopardized by delay. It is submitted that the accuracy of the calculated liability is irrelevant in terminated tax year situations until the threshhold question of whether "jeopardy" exists is settled. Without "jeopardy," the statutory power to terminate the tax year is not available to the Government. There is, then, a se-

32. *See* notes 45-50 and accompanying text *infra*.

33. The Secretary has delegated this authority to the district director. Treas. Reg. § 1.6851-1 (1959). As a practical matter it has been the district directors who have been directly involved in § 6851 proceedings. References in this article, however, will be to the statutorily responsible person, the Secretary.

rious question as to why the existence of the required "jeopardy" circumstances is not generally the initial inquiry in taxpayers suits such as *Willits*. One reason may be that the Secretary's "jeopardy" determination is nonreviewable agency action.[34] This answer, however, is not convincing. There is no apparent reason for placing the Service's actions beyond the pale of the rules developed under the Administrative Procedure Act.[35] Further, the Service has developed guidelines for the exercise of its discretion pursuant to section 6851.[36] If the Service arbitrarily contravenes its enumerated guidelines, an abuse of delegated authority is apparent. As such, there seems to be no reason for disallowing a taxpayer's suit to enjoin the abuse.[37] Of course, a review of the Government's calculations would be unnecessary if there was no "jeopardy."

If, however, "jeopardy" was present so that the Secretary's action in invoking section 6851 was justifiable in the first instance, evaluation of the Service's liability calculations arguably becomes relevant. Nonetheless, even in these circumstances an in depth review of the accuracy of the Government's estimated liability *formula* may not be appropriate. First, review of the formula used or

34. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (finding by administrator of Federal Food, Drug and Cosmetic Act of probable cause indicating misleading product labeling allowing seizure held non-reviewable despite likelihood of serious damage to the company); Ludecke v. Watkins, 335 U.S. 160 (1948) (removal orders under Alien Enemy Act held non-reviewable agency action); Lansden v. Hart, 180 F.2d 679 (7th Cir.), *cert. denied*, 340 U.S. 824 (1950) (President's prohibition against killing wild geese pursuant to Migratory Bird Treaty Act held non-reviewable); Sellas v. Kirk, 101 F. Supp. 237 (D. Nev. 1951), *aff'd*, 200 F.2d 217 (9th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953) (action of Secretary of the Interior in reclassifying grazing land held non-reviewable); White v. Douds, 80 F. Supp. 402 (S.D.N.Y. 1948) (decision of the NLRB determining questions concerning representation held non-reviewable); *accord*, Local 719, Int'l Prod. Serv. & Sales Employees Union v. McLeod, 183 F. Supp. 790 (E.D.N.Y. 1960). Additionally, at least in the context of § 6861, most courts have treated the "jeopardy" determination as a non-reviewable agency action. *See generally* Kaminsky, *supra* note 1.

35. 5 U.S.C. § 551 *et seq.* (1971).

36. These internal guidelines are set forth at *Termination of Taxable Period Under 6851*, IRS MANUAL (Supp. May 19, 1971). This portion of the Manual states that three conditions may warrant use of the procedure: (1) the taxpayer is or appears to be designing quickly to depart from the U.S. or to conceal himself; (2) the taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it; (3) the taxpayer's financial solvency is or appears to be imperiled. *See* Silver, *supra* note 1, at 111 n.3.

37. *Cf.* Comment, *New Limitations of the Scope of Discretion of the Commissioner of Internal Revenue*, 54 BOSTON U.L. REV. 425, 429-48 (1974) (discussing control over litigational practices of the Commissioner).

the liability of the taxpayer, at this stage of the litigation, is contrary to the spirit of the statute. The terms of section 6851 show that precision is not a prerequisite for use of the statute. The purpose of the provision is speed—speed in reacting to the *actions* of taxpayers[38] and the extraordinary summary procedure has been acknowledged as one of the rare instances where the fifth amendment does not require a prior hearing.[39] Second, the determination of the ultimate amount of liability is a question traditionally resolved by trial on extensive evidence.[40] The determination of "jeopardy" also is a factual matter. But, determinations of the propriety of assessment formulae or ultimate liability, logically involve a more substantial factual inquiry and an element of precision not required in a determination of "jeopardy."[41] Finally, if taxpayers are allowed to litigate the calculation in injunctive proceedings, the use of section 6851 could be frustrated by filing an early taxpayer suit. Such suits would force the Government to substantiate its claim before it has had time enough to gather the pertinent information to reconstruct the taxpayer's income accurately. This is not to say that the only question properly reviewable in suits such as *Willits* is whether "jeopardy" exists. There are areas of middle ground.

One approach which is both more reasonable and more easily determined in an injunctive action is to ask whether there is a factual basis for believing the taxpayer owes taxes. This is, of course, the issue which the district court addressed in *Willits*, and an approach which serves the letter and theory of the statute while recognizing the taxpayer's precarious position in a section 6851 proceeding. To ask whether a factual basis exists for believing some taxes are owed does not unduly burden the Service by requiring evidence sufficient to sustain an accurate liability figure. At the same time the taxpayer can gain relief from the termination procedure in those instances where the termination is "fictitious." In following this approach the district court in *Willits* correctly determined that there was probable cause to believe the taxpayer owed taxes. The items possessed at the time of arrest, coupled with her admitted financial state, raised a question as to whether she had unreported income upon which taxes may have been owed.

An alternative approach in injunctive suits would be to ask whether there exists a factual basis for the Service's calculation or formula. Although the Fifth Circuit in *Willits* did not clearly

38. *See generally*, Peale, *supra* note 1.
39. Phillips v. Commissioner, 283 U.S. 589, 595 (1931); *accord*, Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972).
40. *See* note 53 *infra*.
41. *See, e.g.*, Joel Newton, 39 P-H Tax Ct. Mem. ¶ 70,103 (1970) (an extremely cautious calculation of liability with numerous adjustments and allowances in the formula).

frame the issue, this appears to be the question which was asked. Again, the resolution of this issue involves a question of probable cause; however, the requisite evidence which the Service would need to produce is greater. With the issue framed in this manner, two things become apparent. First, when the taxpayer files an injunctive suit, the Service must be able to show *specific* income producing occurrences or involvements on the part of the taxpayer. This, of course, is not the equivalent of establishing a precise figure, but it is a greater burden than establishing that there is probable cause to believe that the taxpayer owed taxes.

Second, this approach creates a tension between fairness to the individual taxpayer and fairness to the Service. On one hand, a Section 6851 proceeding arguably should not be invoked without a clear factual determination. Antithetically, section 6851 involves a procedure which has the stated goal of responding to *actions* of taxpayers which may tend to jeopardize future collections. Thus, an approach requiring an election of probable cause, coupled with a quick filing of an injunctive suit by the taxpayer, appears to frustrate the original purpose of the statute.

B. Scope of the Inquiry—The Impact of *Willits*

The *Willits* decision generally accords with the precedent upon which it relies, particularly *Pizzarello v. United States*.[42] There are, however, at least three distinguishing characteristics of the Fifth Circuit's decision—especially with reference to the manageability of the test being developed—including the burden of proof, the impact or importance of the judicial attitude regarding the Internal Revenue Service's Narcotics Project and the method of evaluating the Government's claim of taxes due.

1. *Burden of Proof*

The Fifth Circuit's decision in *Willits* can be best described as hinging on "plaintiff's evidence." The Government made a claim of liability against the taxpayer, and the district court, following the letter of *Enochs*, placed the burden of proof on the taxpayer. To prevail, the court felt, the taxpayer had to show that even under the most liberal view of the law and facts, the Government could not ultimately prevail on its claim. The case was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief could be granted. The appellate court was therefore, required to take an opposite view of the law and facts, liberally construing them in favor of the taxpayer.[43] Consequently, the taxpayer prevailed in the court of ap-

42. 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).
43. This the court did in accordance with settled principles surrounding FED. R. CIV. P. 12(b)(6).

peals essentially because the Government had not substantiated its claim. The burden of proof was effectively placed squarely upon the Government. The result within the Fifth Circuit may be simply stated: when the taxpayer sues to enjoin the Government's use of section 6851, the Government must be able to support its claim if it is to defend the injunctive action successfully.[44]

Certain problems are raised by the Fifth Circuit's sub silentio treatment of the burden of proof. First, should the time lapse between seizure and the taxpayer's suit affect the burden of proof? Second, should an initial showing by the taxpayer be necessary to shift the burden to the Government, and, if so, what should such an initial requirement be? Third, should the review, perhaps, ultimately end in a determination of liability? In any event, the result of shifting the burden of proof in *Willits* is a boon to taxpayer suits to enjoin the Government's use of section 6851.

2. Judicial Attitude Toward the IRS Narcotics Project

Another important question raised by the approach of the *Willits* court relates to the Service's Narcotics Project. The "Narcotics Project" is an undertaking of the Service involved in federal tax intelligence. The tax period termination procedure of section 6851 is one of the "tools" of this project, the intent of which is to frustrate, whenever possible, the trafficking of narcotics.[45]

The appellate court collaterally expressed disfavor at the Government's use of section 6851 in this situation:

> The IRS has been given broad power to take possession of the property of citizens by summary means that ignore many basic tenets of pre-seizure due process in order to prevent the loss of tax revenues. Courts cannot allow these expedients to be turned on citizens suspected of wrongdoing—not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures. The fact that they are cloaked in the garb of a tax collection and applied only by the Narcotics Project to

44. Generally speaking this result may be proper, even though not directly supported by the *Enochs* decision. The *Willits* situation is distinguishable from *Enochs* because of altered internal policies regarding the use of § 6851. In the statement of policy, it is said that the purpose of the Narcotics Project is to "disrupt the distribution of narcotics through the enforcement of all available tax statutes." *IRS Narcotics Project—Intelligence Division Procedures,*" IRS MANUAL (Supp. November 10, 1971). Both decisions and commentators, however, have questioned whether the procedure is being properly applied. *See, e.g.,* Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Silver, *supra* note 1, at 113-14.

45. The policy of the Service's Narcotics Project is set forth at note 44, *supra.* For a more thorough discussion of the project, see Silver, *supra* note 1.

> those believed to be engaged in or associated with the narcotics trade must not bootstrap judicial approval of such use.[46]

These statements at first appear to be an "aside" in the opinion, the purest of obiter. Upon reflection, however, the statements are those of an advocate. These statements imply that the Narcotics Project is misguided, or at a minimum, internally mismanaged—an opinion not singular to the Fifth Circuit.[47]

There is little question that the Fifth Circuit's attitude affected the decision-making process in *Willits* regarding both the burden and elements of proof. If those portions of the opinion criticizing the Narcotics Project are deleted, there is a remarkably apparent disjunture between the conclusions drawn by the district court and the court of appeals from identical facts. There is a possible explanation for this dichotomy, but it seems unpersuasive. The posture of the case on appeal, it is true, was one of dismissal at a preliminary stage. This fact, however, must be considered contemporaneously with the Fifth Circuit's final comment:

> Ordinarily, the prerogative to weigh nice distinctions as to whether injunctive relief should be granted belongs to the district court . . . however, if neither party should offer additional proof in the court below, plaintiff is clearly entitled to injunctive relief upon the record made.[48]

This would indicate that it was not necessary to view the facts most favorably for the plaintiff as the court initially suggested.[49] The court flatly states that on the record, the Government could not prevail on its claim under even the most liberal interpretation of the law and facts. Therefore, notwithstanding the plausibility of this theory, it is more tenable to credit the conflicting conclusions of the two courts to the Fifth Circuit's suspicions of the Narcotics Project.[50]

This conclusion raises the serious question of whether the Service's motivation is a proper matter of inquiry, indeed, perhaps a dispositive factor, when the real issue is the Government's chance of ultimately prevailing. Assuming, as the federal courts have, that *Enochs* provides the applicable standard in injunctive suits, that case discloses that two things are critical if the Government is to prevail: Governmental good faith in using section 6851, and the facts as they appear at the time of the suit.[51] It is the element of

46. 497 F.2d at 246.
47. *See, e.g.*, Silver, *supra* note 1.
48. 497 F.2d at 247 (citations omitted).
49. *Id.* at 244.
50. After the Fifth Circuit's decision in *Willits*, the same court has repeated its remarks regarding the Narcotics Project in Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974).
51. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 6 (1962).

good faith that poses the problem here. Does the *Enochs* decision require good faith as to a belief of liability, as to the existence of "jeopardy" or extraordinary circumstances or as to the reasons for employing a given procedure? From the Supreme Court's context in *Enochs*, it appears that it is a good faith belief of liability which is relevant and intended.[52] Thus, the propriety of discussing other motives appears questionable.

Still, the *Enochs* decision may not conclusively preclude a consideration of the motive behind the implementation of section 6851. *Enochs*, after all, was decided some time before the Government began emphasizing section 6851 procedures. Thus the element of good faith may now rightfully include, indeed be indistinguishable from, the good faith of the Service's narcotics task force. Also, there is some support in lower court decisions for the Fifth Circuit's motive discussion, although in slightly different contexts.[53]

The court's consideration of motive is neither a clear example of unreasonable review by the court, nor completely unprecedented. From the perspective of public policy such review is justifiable if the procedure is used as a tool for perfecting criminal justice before trial. If the procedure is purely a harassment technique, its use must be curtailed.[54]

Further, judicial review of action taken by the Service has recently begun to parallel the scope of review exercised over federal agencies generally under the Administrative Procedure Act. Under the criteria of review developed pursuant to that law, a misuse of section 6851 could be reviewed and enjoined as arbitrary and capricious agency action.[55] In any event, the more difficult questions

52. *Id.*

53. *See, e.g.*, United States v. Bonaguro, 294 F. Supp. 750 (E.D.N.Y. 1968), *aff'd sub nom.* United States v. Dono, 428 F.2d 204 (2d Cir.) *cert. denied*, 400 U.S. 829 (1970). In *Bonaguro* the taxpayer had been arrested on suspicion of possessing counterfeit currency. At the time of arrest $1,978 was found on the taxpayer's person and was confiscated by federal officers. Shortly thereafter the Service's intelligence division was notified and consideration of a jeopardy assessment was internally recommended (§ 6861). In allowing the claim, the court stated that the Service's actions implied a "colorable use of the statutory forms at the suggestion of another agency of government in accordance with a pattern of conduct that is not strange to the courts." 294 F. Supp. at 753-54 (citations omitted).

54. As one commentator has recently observed: "The literature on judicial review of administrative action can be viewed, ultimately, as indications of the extent of public confidence in an agency's governing abilities." White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 DUKE L.J. 195, 215 (1974).

55. For a thorough discussion of the propriety of using standards developed under the Administrative Procedure Act to review Service action in a related area, see Comment, *New Limitations of the Scope of Dis-*

involve not whether such review is permissible, but how and under what conditions and guidelines will action taken by the Service pursuant to section 6851 be allowed. The clearest problem of *Willits* lies in this area. The court gives little guidance for subsequent exercise of restraint over the short year procedure. Such a standardization would not have been inappropriate nor particularly difficult. Yet, no attempt was made to formulate even the most general guidelines. The standard applied by the court was apparently one which leaves specific determinations totally to the senses, in turn allowing such elements as the judicial attitude toward the internal policies of the Service to play a random role in the decision-making process.

3. *Evaluating the Liability Formula*

The larger question raised by the *Willits* decision is the standard to be used for reviewing the Government's calculations in future injunctive proceedings. The appellate court's standard was that a taxpayer may prevail if the assessment is "entirely excessive, arbitrary, capricious, and without factual foundation . . . ."[56] The Fifth Circuit found the taxpayer had sustained her burden of proof because the assessment was "fictitious . . . [and] implemented on the basis of . . . speculations."[57] The treatment given to this question by the Fifth Circuit is troublesome because of its lack of guidance.

Whether the Government's assessment is even slightly "excessive" cannot be determined unless the taxpayer testifies to the correct amount, or *an* amount, of income for the taxable period. By her own description the taxpayer in *Willits* was unemployed and had been supported at least in part by gambling winnings. Additionally, she possessed a sizeable amount of property at the time of

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cretion of the Commissioner of Internal Revenue, supra note 37; *accord,* White, *supra* note 54, at 237.

56. 497 F.2d at 245.

57. *Id.* at 246. Not only is the standard ambiguous in context, as illustrated by the instant case, it is also ambiguous in the abstract. The criteria may be interpreted in two ways. First, the standard may be regarded as consisting of four distinct touchstones, each representing one question of fact which must be considered and answered by a suing taxpayer. Such an interpretation would require a § 6851 taxpayer to show: (1) the amount of the demand to be "entirely excessive;" *and,* (2) the demand to be "arbitrary;" *and,* (3) that it is "capricious;" *and,* (4) that it is "without factual foundation."

An alternative interpretation would view the criteria as representing only one question. Such an interpretation requires a court to make a subjective evaluation of the Government's claim. The question would be whether the claimed liability finds support under all the facts and circumstances.

her arrest. This evidence is not the equivalent of a showing she had no income for the specified period.[58]

While a basis for the exact amount of the Government's demand in *Willits* is sketchy, the sources of information and methods of computation available to the Government in section 6851 determinations are limited. It should be noted, however, that it is not the presence or absence of specific dollar amounts which normally cause implementation of section 6851 procedures, nor are such calculations part of the statutory language. Rather, the short year provisions are responses to the *actions* of taxpayers, actions tending to jeopardize or impair the collection of federal income taxes.

If the courts continue to evaluate the Government's liability formulae, a concise and workable solution to the uncertainty surrounding the terms of review can probably be developed. A likely touchstone for formalizing the standards may be found in similar areas involving income reconstruction.[59]

Under section 446 of the Code, a taxpayer has a continuing obligation to maintain records of his income for tax purposes. He must do so in a manner clearly reflecting his income. In enforcing this directive, the Service often finds it necessary to reconstruct the taxpayer's income when random audits disclose discrepancies in accounting procedures or other mistakes. In these situations the Government attempts to "reconstruct" the taxpayer's income for the reporting period. Several reconstruction methods have been developed, under the watchful eyes of both the Tax Court and the federal district courts.

Under section 446, the Service has not been limited to a specific formula. The only requirement is that the method used must be reasonable. Three of the more common methods of reconstruction are formulae based upon bank account deposits and withdrawals, changes in net worth, and percentage or unit mark-up basis.[60] Other methods have been approved under the facts of particular cases.[61] In income reconstruction cases, the Government has the

58. It might be asked in this context, however, how may the taxpayer be said to have shown the assessment was entirely excessive when she made no attempt to establish an accurate income figure, even if it were claimed to be zero? It would seem that some explanation on her part would have been appropriate.

59. Of course, in making any such transposition the Narcotics Project cannot be overlooked.

60. *See, e.g.*, Teichner v. Commissioner, 453 F.2d 944, 946 n.4 (2d Cir. 1972) (bank deposits and withdrawals); Bailey v. Commissioner, 439 F.2d 723 (6th Cir.), *cert. denied*, 404 U.S. 867 (1971) (change in net worth); Bollella v. Commissioner, 374 F.2d 96 (6th Cir. 1967) (percentage method).

61. Pinder v. United States, 330 F.2d 119, 124 (5th Cir. 1964) (allowing the Service to calculate the income of a taxpayer taking bets on a mul-

initial burden of showing the taxpayer's method of accounting does not reflect his income. This is done through the use of a reasonable formula of reconstruction.[62] Once this prima facie case has been established, the burden of showing the incorrectness of the Government's figures is shifted to the taxpayer.

An appropriate example of income reconstruction is the Tax Court's decision in *Joel Newton*.[64] In that case the operator of a barber shop had his income reconstructed on the basis of the number of towels used in the business. The taxpayer's business, by its nature, was a cash receipts enterprise, and the Service, in its audit, found the taxpayer's bookkeeping to be deficient. The Tax Court held the use of a "towel count" to be a reasonable method of reconstruction—when "used intelligently." In arriving at the figure of liability, evidence was taken and adjustments were made considering the number of and charge for adult haircuts, childrens' haircuts, and shaves; towels used for each service and those used personally by the taxpayer; the number of free haircuts given (apparently treated as an advertising or other business expense); as well as tips, which were estimated pursuant to the *Cohan* rule.[65] It is thus evident that extensive evidence was produced in resolving the taxpayer's liability.

The question of ultimate liability answered by the Tax Court in *Joel Newton* is neither desirable nor a reasonable expectancy in an injunctive suit such as *Willits*. The *Joel Newton* case does, however, illustrate several points. First, the accuracy of the formula used must ultimately be considered. The ultimate establishment of a factual basis may be difficult in many circumstances, but it is nonetheless necessary. Of the two approaches suggested above,[66]

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tiple of one day's bets extended over a 62 week period); Fiorella v. Commissioner, 361 F.2d 326 (5th Cir. 1966) (allowing the Service to use the bets of two days as representative of two and one-half years of the "business"); Agnellino v. Commissioner, 302 F.2d 797, 800 (3d Cir. 1962) (allowing a count of bed sheets represent income of a motel); Joel Newton, 39 P-H Tax Ct. Mem. ¶ 473 (1970) (allowing a count of towels to compute the income of a barber); 57 Herkimer St. Corp., 30 P-H Tax Ct. Mem. ¶ 61,223 (1961), *aff'd per curiam*, 316 F.2d 726 (5th Cir. 1963) (the towel count method used to compute the income of a bordello); Hallabrin v. Commissioner, 325 F.2d 298, 303 (6th Cir. 1963) (allowing income from a football pool to be computed from the number of pool tickets printed and amount of the average bet); Berlin v. Commissioner, 42 T.C. 355, 356 (1964) (allowing income from illegal abortions to be computed from the taxpayer's statements to police).

62. *See, e.g.*, Teichner v. Commissioner, 453 F.2d 944 (2d Cir. 1972).
63. *Id.*
64. 39 P-H Tax Ct. Mem. ¶ 70,103 (1970).
65. Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930).
66. *See* text *supra* at pp. 197-98.

the more desirable alternative would be to require a factual basis for the Service's calculation. To require only a showing that some taxes are owed ignores the realities of the Service's Narcotics Project. The advent of the Project arguably requires a closer scrutiny of the Service's use of section 6851 and also subordinates the dangers of a quick taxpayer suits.

A second point made by *Joel Newton* is that well reasoned and articulate review in reconstruction cases is possible. This suggests that when factors are within grasp they should be stated in a forthright manner, even if they include political items, such as the involvement of the Narcotics Project.

Finally, the decision stands for flexibility. In *Joel Newton* the reconstruction process did not involve one of the more commonly used income formulae. The unorthodox nature of the calculation did not and should not obviate its usefulness.

V. CONCLUSION

The use of section 6851 clearly creates problems and inconsistencies. Judicial review of the procedure is, therefore, necessary. If review is undertaken the result should not be left to the senses: the factual inquiry may be difficult, but it is necessary. The standard to be used must be clearly delineated. The issue to be resolved in taxpayers' injunctive suits should be whether a factual basis for the Service's calculation exists, and use could be made of established principles of income reconstruction. The *Willits* decision does not clearly do this. It does, however, cause many previously covert issues to surface. It is imperative that future cases seeking injunctive relief from a section 6851 proceeding be met with singular efforts to develop a coherent standard of review.

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