

1980

The Commissioner "Does Not Acquiesce"

Gary L. Rodgers

Certified Public Accountant

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Gary L. Rodgers, *The Commissioner "Does Not Acquiesce"*, 59 Neb. L. Rev. (1980)

Available at: <https://digitalcommons.unl.edu/nlr/vol59/iss4/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

By Gary L. Rodgers*

The Commissioner "Does Not Acquiesce"

"Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them."¹

I. INTRODUCTION—THE PROBLEM STATED

Bishop Hoadly's famous quote is often cited by those who view the judiciary as supreme over the legislature. But as the judge is elevated above the lawmaker, the Commissioner of Internal Revenue towers over the solon in matters of tax law. Congress may have the first word and the courts the second, but the Commissioner has the last when exercising the power to nonacquiesce in the precedential value of lower court decisions.

Notwithstanding the fact that the taxpayer is unlikely to win in the Tax Court—in 1978 the taxpayer won in only 11% of the opinions rendered²—the Commissioner refused that year to accept the precedential value of the decision in more than half of the cases it lost.³ Taxpayers may win an occasional battle, but the Commis-

* Certified Public Accountant, Alexandria, Virginia.

1. Bishop Hoadly's sermon preached before the King, March 31, 1717 as quoted in W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1 (4th ed. 1975).
2. At the appellate level, taxpayers fared slightly better with a record of 15.1% in the courts of appeals, 18.2% in the district courts and a favorable decision in two of the six Supreme Court tax cases. IRS, DEPT OF TREAS., PUB. NO. 1076, ANN. REP. 13 (1978) [hereinafter cited as 1978 IRS REPORT].
3. The following table reflects the Commissioner's decisions regarding Tax Court decisions during the past 13 years:

Year	Tax Court Decisions	Acquiescences		Nonacquiescences	
		Number	%	Number	%
1967	63	54	85.7	9	14.3
1968	61	54	88.5	7	11.5
1969	65	58	89.2	7	10.8
1970	77	64	83.1	13	16.9
1971	62	54	87.1	8	12.9
1972	71	54	76.1	17	23.9

sioner inevitably wins the war.

Yet the tax system is highly dependent upon self-assessment and voluntarism. In 1978, gross revenue collections amounted to \$399.8 billion⁴ while penalties totaling only \$1.3 billion were assessed with \$336 million abated.⁵ Based on these statistics, one may conclude that the collections are 99.8% voluntary. Self-assessment and voluntary compliance are basic to our system of taxation, and success in the administration of the system is dependent upon public confidence in the good faith of the Internal Revenue Service.⁶

In order to assess taxes due, one must be able to understand the tax system. All statutes are vague and ambiguous and most tax assessments and court decisions relate to statutory construction. Tax laws are particularly difficult to interpret when applied to complex transactions.⁷ The Internal Revenue Regulations,

Year	Tax Court Decisions	Acquiescences		Nonacquiescences	
		Number	%	Number	%
1973	81	71	87.7	10	12.3
1974	64	51	79.7	13	20.3
1975	41	25	61.0	16	39.0
1976	53	43	81.1	10	18.9
1977	40	25	62.5	15	37.5
1978	96	43	44.8	53	55.2
1979	45	39	86.7	6	13.3
Total	819	635	77.5	184	22.5

Figures obtained from the Cumulative Bulletins for years 1967-78. The 1979 statistics are from 1980-1 I.R.B. 5-6. Each case, although it may contain several taxpayer-litigants, is counted only once. Acquiescences include the nonacquiescences withdrawn and acquiescences in result only; it excludes decisions also listed as nonacquiescences in the same Bulletin. For statistics on the period 1960-66, see Comment, *The Commissioner's Nonacquiescence*, 40 S. CAL. L. REV. 550, 560 (1967).

4. The Internal Revenue Service received 136.7 million tax returns of all types, with individual taxes amounting to \$213.1 billion. SECRETARY OF THE TREAS., ANN. REP. ON THE STATE OF THE FINANCES, DOC. NO. 3276, at 186 (1978) [hereinafter cited as 1978 FINANCES REPORT].
5. Almost half of the penalties were for individual returns. *Id.* at 187.
6. Commissioner Caplin stated:

Our tax system is based on individual self-assessment and voluntary compliance. The vitality of this system hinges on the good faith of the American people and their willingness to report their income accurately. This faith is largely dependent upon the public's general confidence that our tax laws are fair, and that they are impartially and uniformly administered and enforced so that everyone is paying his just share.

Internal Revenue Service Audit Guide, at Forward (1974).

7. R. PAUL, *TAXATION IN THE UNITED STATES* 656 (1954).

designed to implement the tax laws, have been termed the world's most confusing document.⁸

To clarify these complexities, the Internal Revenue Service announces its position on tax questions in a number of ways. A private ruling may be issued to an individual taxpayer⁹ while rulings of general interest are published as Revenue Rulings. Additionally, acquiescences or nonacquiescences to Tax Court decisions are announced in the Internal Revenue Bulletins.¹⁰ In publishing a determination not to acquiesce, the Commissioner is notifying the public that a case decided in the Tax Court is not considered a binding precedent.¹¹ When decisions have been adverse to the Service, it may continue to litigate the issue and insist that contested tax returns be kept open until the issue is finally resolved—which may take from five to fifteen years.¹² The long delay while awaiting a decision on a point of law is a major contributor to the present state of uncertainty that permeates the tax laws and their interpretation.¹³

This article will discuss whether or not the Commissioner's nonacquiescence policy contributes to the interpretation of the taxing scheme: Does that policy lend certainty, uniformity, and equity to the interpretation of complex tax laws and regulations, or is it an anachronism that has outlived its usefulness? The article will begin with a survey of the history of the 56-year-old acquiescence program. It will trace this history from the time when the Tax Court was an administrative forum from which either party could appeal and the Commissioner's announcement merely served to reduce a losing taxpayer's anxiety. Continuing the discussion, it will be shown that the appeal period shrank to the point that publi-

8. Completing his own return, Albert Einstein is reputed to have remarked, "[t]his is too difficult for a mathematician, it takes a philosopher." E. GRISWOLD & M. GRAETZ, *FEDERAL INCOME TAXATION* 43 (6th ed. 1976). Former Commissioner Caplin noted that "tax regulations are aimed at experts, rather than at the man in the street." Caplin, *Supreme Court Decisions in Taxation, 1978 Term: Introduction*, 33 *TAX LAWYER* 497, 503 (1979). In the "Flesch scale," which tests how "readable" written material is, comic books score 92, *READER'S DIGEST* rates 65, *THE HARVARD LAW REVIEW* is 32, while the Internal Revenue Code weighs in at minus 6. Johnson, *Weighing in on the Flesch Scale*, *STUDENT LAWYER*, Jan., 1980, at 7.

9. Literally tens of thousands of requests for private rulings are received each year. Through freedom of information requests and at special public reading rooms in Service headquarters, these private rulings have become available to other taxpayers as well. See generally Calechman, *Recent Cases show need for caution in relying on IRS rulings and acquiescences*, 23 *J. TAX.* 122 (1965).

10. *Id.*

11. See, e.g., 1978-2 C.B. 1.

12. SENATE JUDICIARY COMM., *TAX COURT IMPROVEMENT ACT OF 1979*, S. REP. NO. 306, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as *SENATE REPORT*].

13. *Id.*

cation was anticlimatic and yet the practice was continued to provide all taxpayers with the Commissioner's current interpretations. Thus the continuation of this practice expanded the scope of nonacquiescence to include cases where appeal was not contemplated.

This article will then explore the Commissioner's use of this nonacquiescence policy to maximize the tax revenues, arguably at the expense of principles of law and equity, in the hope that a more favorable decision will ultimately be rendered. In view of the infrequent review of tax cases by the Supreme Court and the refusal of the Commissioner to be bound by the lower courts, this practice leaves the taxpayer guessing as to questions of law. Even acceptance of the Commissioner's latest position is hazardous in tax planning because it can be changed at any time with retroactive effect.

Thus, there is now no national tax law. Because the circuit courts of appeals usually have the final word in tax matters, residents of different jurisdictions in identical circumstances may have to pay different amounts of tax. This article contends that a United States Tax Court of Appeals promises the best means to achieve certainty and uniformity in tax administration. In addition, legislation introduced in the 96th Congress, could, with minor amendments, provide the safeguards needed to maintain the taxpayer confidence essential to a self-assessment tax system.

II. HISTORICAL PERSPECTIVE

A. Why the Commissioner Nonacquiesces

The Commissioner must follow court decisions of the Supreme Court, but he is not required to observe the decisions of the lower courts.¹⁴ When the Commissioner follows court decisions as precedent, it is with due regard to the doctrine of stare decisis. When a departure is made, the process is called "nonacquiescence."

Historically, the practice began in 1924 when the Tax Court was known as the Board of Tax Appeals.¹⁵ At that time there was no

14. Comment, *Treasury Department's Practice of Non-acquiescence to Court Decisions*, 28 ALB. L. REV. 274, 276 (1964).

15. The Board of Tax Appeals was established by Congress as an independent executive agency with jurisdiction to redetermine deficiencies asserted by the Service. Revenue Act of 1924, ch. 234, § 900, 43 Stat. 336 (1924). The name was changed to the Tax Court of the United States by the Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957 (1942). Note, 23 U. FLA. L. REV. 410 (1971).

Until the Revenue Act of 1926, ch. 27, § 1003, 44 Stat. 110 (1926), the Board of Tax Appeals was considered primarily an administrative rather than judicial body. This meant that the losing party could bring suit in a federal dis-

procedure for direct appeal from the Board's decision. If the Service lost, it could bring suit in federal district court within one year to collect any deficiency disallowed by the Board.¹⁶ In order that taxpayers who were successful before the Board would not have to wait a full year to find out if the service planned to appeal, the Commissioner would publish the decision to acquiesce or nonacquiesce.¹⁷ Although nonacquiescences were only disclosed with respect to Tax Court rulings, the Commissioner also established a position on district court, court of appeals, and Court of Claims decisions for the restricted use of Service personnel.¹⁸ While the nonacquiescence procedure has never been specifically authorized by statute,¹⁹ it has received the tacit consent of both Congress and the courts.²⁰

district court *de novo*, where the factual issues would be retried with the Board of Tax Appeals decision given only prima facie evidentiary value. Revenue Act of 1924, ch. 234, § 900(g), 43 Stat. 337 (1924). See also, 1B MOORE'S FEDERAL PRACTICE ¶ 0.422 (2d ed. 1974).

16. A former chief counsel provided the following chronology:

The present Service policy of issuing acquiescences in Tax Court opinions is in large degree an historical accident. The Revenue Act of 1924 provided that the Commissioner had one year to appeal from an adverse decision of the Board of Tax Appeals. A taxpayer receiving a favorable opinion from the Board of Tax Appeals was not at all sure of the finality of the opinion until the appeal period had run. To aid the petitioner, the Service began to issue acquiescences and nonacquiescences in the Board of Tax Appeals cases. Where the Service acquiesced it simply meant the Commissioner had determined not to appeal the case. When the Commissioner nonacquiesced this signaled his intention to appeal. Two years later, the statute was amended to allow for appeals [limited to questions of law] directly to the courts of appeals. Previously appeals lay in the district court and the appeal time was shortened to six months. In 1932, the present rule of three months as time for appeal was instituted.

Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 771 (1965). See also Note, *supra* note 15, at 410.

17. Uretz, *The Chief Counsel's Policy Regarding Acquiescence and Nonacquiescence in Tax Court Cases*, 14 TAX COUNSELOR'S Q. 129, 129-30 (1970).
18. Comment, *supra* note 3, at 550. Internal documents of the Service explaining the reasons behind the acquiescence or nonacquiescence to court decisions have traditionally been withheld from the public. After refusing to even decide on Freedom of Information requests for this information, the Taxation with Representation Fund, affiliated with the non-profit Tax Analysts & Advocates group, brought suit in U.S. District Court. In late January, U.S. District Court Judge Charles R. Richey ordered the documents released. *Taxation with Representation Fund v. Internal Rev. Serv.*, 485 F. Supp. 263 (D.D.C. 1980).
19. Having grown out of the Commissioner's power to appeal Tax Court decisions, publication of nonacquiescences was not expressly authorized by statute. New Developments, *The Commissioner's Nonacquiescences: Their Effect Upon Tax Planning*, 28 J. TAX. 57 (1968).
20. The procedure has been referred to in several court opinions. See the cases

When, in 1932, the time period in which the Commissioner could appeal an adverse decision shrank to only three months, announcement of a decision to acquiesce became anticlimactic since publication before the time for appeal had run was unlikely.²¹ Yet the procedure continued. Advocates cite reasons other than tradition for the practice, including providing Service positions to taxpayers in an orderly manner and giving courts an opportunity to reexamine decisions which were arguably ill-advised.²² The acquiescence program was continued because it served the purpose of informing taxpayers of the Commissioner's present, but not irreversible, view of the law.²³ When the Commissioner acquiesced, both the Service personnel and the taxpayer understood that it was the Service's current position not to litigate the same issue again.²⁴ However, a nonacquiescence "portends continued litigation of cases involving the same facts and legal theories as were presented in a given case."²⁵ Usually the Commissioner acquiesces in cases which hinge on the court's interpretation of the facts. For the most part this reflects the Commissioner's "appraisal of the chances of reversing the Tax Court in the face of the appellate standard which dictates that the Tax Court's findings of fact not be overturned unless clearly erroneous."²⁶

The Commissioner is also motivated to acquiesce in order to settle a contested point of law. The Service feels that out-of-court disposition of a contested issue is fostered by a large body of decided cases to which the Commissioner has acquiesced and which may be relied upon by Service personnel and taxpayers alike in resolving similar disputes.²⁷ The tax system would flounder and fall from its own weight if each dispute were treated as unique and capable of ultimate resolution only by a court. Often a case is found that is sufficiently similar to the taxpayer's situation to pro-

collected in Dwan, *Administrative Review of Judicial Decisions: Treasury Practice*, 46 COLUM. L. REV. 581, 599 n.74 (1946).

21. Uretz, *supra* note 17, at 130-31.

22. Dwan, *supra* note 20, at 599.

23. Rogovin, *supra* note 16, at 772. There are 16 judges of the Tax Court. Since they ordinarily sit individually, there are in reality 16 different courts and their decisions are often hard to reconcile. E. GRISWOLD & M. GRAETZ, *supra* note 8, at 61.

24. Rogovin, *supra* note 16, at 772.

25. Uretz, *supra* note 17, at 140. The former chief counsel stated that decisions as to whether to acquiesce or not reflect two major objectives: "to handle tax controversies fairly, efficiently, and expeditiously in order to avoid needless litigation; and to achieve the maximum possible uniformity and consistency of treatment among similarly situated taxpayers." *Id.* at 141.

26. To some extent, these acquiescences also reflect a desire to avoid unnecessary litigation and a willingness to accept the Tax Court determination of factual issues. *Id.* at 141-42.

27. *Id.* at 138-39.

vide a basis for settlement. Thus, the Commissioner's acquiescence fills a void created by the absence of a Revenue Ruling on point, as well as aids application of general rulings to specific fact situations.²⁸ Under this rationale, the Commissioner continues to publish acquiescence decisions.

B. How the Service Reveals its Position

The first nonacquiescence was published in the weekly *Bulletin* dated December 22, 1924, and also in the *Cumulative Bulletin* which followed.²⁹ It served to both notify the successful litigant that the Commissioner might within the year's grace period commence an appeal, and other taxpayers that the Service has exercised its option not to consider the instant case as a precedent in the disposition of other similar cases.³⁰ Since then, in every *Internal Revenue Cumulative Bulletin* and in nearly every weekly issue of the *Internal Revenue Bulletin* there is an announcement relating to adverse decisions of the Tax Court to which the Commissioner does or does not acquiesce.³¹ The lists often show, by footnotes, that the acquiescence or nonacquiescence relates only to certain issues in the case or indicates that the current position is

28. *Id.* at 139. The weekly *Internal Revenue Bulletin* announces official rulings and procedures of the Service. *Bulletin* contents of a permanent nature are consolidated semiannually into *Cumulative Bulletins*.

29. The following procedural note accompanied the announcement of the first nonacquiescence:

Under the provisions of the Revenue Act of 1924, relating to appeals to the Board of Tax Appeals, a proceeding in court may be begun for the collection of any part of a tax determined by the Commissioner to be due but disallowed by the Board, provided that such proceeding is commenced within one year after final decision by the Board. . . . In order that taxpayers and the general public may be informed as to whether or not the Commissioner has acquiesced in a decision of the Board of Tax Appeals disallowing a tax determined by the Commissioner to be due in any case where the issues involved are other than those purely of fact, announcement will be made in the weekly *Internal Revenue Bulletin* at the earliest practicable date as to whether the Commissioner has acquiesced or has decided to cause legal proceedings to be instituted. . . . No decision of the Board of Tax Appeals disallowing a tax determined by the Commissioner to be due will be cited or relied upon by any officer or employee of the Bureau of Internal Revenue as a precedent in the disposition of other cases unless and until the Commissioner definitely announces his acquiescence in such decision or, if the matter is submitted to the courts, until after final adjudication.

III-2 C.B. iv (1924).

30. The decisions as to which cases the Commissioner will accept as binding precedent also serve as a guide to the tax practitioner. Comment, *supra* note 14, at 276.

31. The Commissioner is not obligated to express either an acquiescence or non-acquiescence. Calechman, *supra* note 9, at 123.

a reversal of an earlier announcement.³² Occasionally an acquiescence is identified in a footnote as an "acquiescence in result only." This indicates that the Commissioner disagrees with at least some aspect of the Tax Court's reasoning despite the acceptance of the conclusion itself.³³

It has been the stated policy of the Service to announce its acquiescences and nonacquiescences to Tax Court decisions at the "earliest practicable date."³⁴ However, the Commissioner does not always promptly disclose the Service position. For example, the Commissioner waited ten years before publishing a position on the Tax Court decision in *National Lead Co. v. Commissioner*.³⁵ In addition, the Commissioner does not always publish a position on Tax Court decisions, and never publishes a position on district court, court of appeals, or Court of Claims cases.³⁶ Although the Commissioner does not openly nonacquiesce in a circuit court of appeals decision, the Service position in that regard can be readily inferred.³⁷ Notwithstanding an in-house joke to the contrary,³⁸

32. Dwan, *supra* note 20, at 593.

33. Uretz, *supra* note 17, at 140.

34. *Id.* at 137.

35. 23 T.C. 988 (1955). The most important issue in the case was whether the taxpayer was entitled to percentage depletion based upon gross income from ilmenite obtained from a mine although none of the titanium contained in the ilmenite concentrate was reduced to metal on a commercial basis. The Office of Chief Counsel explained the delay as follows:

The ten-year interval between the Tax Court's decision in *National Lead* in 1955 and the publication of acquiescence and nonacquiescence in 1965 . . . can be at least partially explained by the above factors [necessity to revoke previous ruling, revise regulations, or defer pending appellate proceedings]. The Government appealed one of the issues in that case to the Court of Appeals, Second Circuit, and won. The Supreme Court granted the taxpayer's petition for certiorari, and affirmed the holding of the Court of Appeals, 352 U.S. 313 (1957). Our records unfortunately do not disclose what occasioned the further delay in publication of the acquiescences and nonacquiescences in the four issues lost by the Commissioner, . . . but presumably one or more of the issues required extensive consideration prior to publication of Service position.

Letter from John H. Menzel, Director, Tax Litigation Division, Office of the Chief Counsel, to the author (Jan. 15, 1980) (copy of letter on file with Nebraska Law Review) [hereinafter cited as Menzel letter]. The Commissioner's decision was published in 1965-2 C.B. 6, 7. See also Comment, *supra* note 3, at 550 n.4.

36. New Developments, *supra* note 19, at 57.

37. If the court of appeals affirms the Tax Court decision and the Commissioner then withdraws a nonacquiescence, agreement is signaled. On the other hand, if the nonacquiescence is not withdrawn, further litigation on the issue may be anticipated. Dwan, *supra* note 20, at 593.

38. A standard joke in the Service concerns "the neophyte . . . employee who, when confronted with a decision of the Supreme Court, said 'I'm not aware of acquiescence by the Commissioner in that decision.'" *Id.* at 594 n.45.

there is, of course, no disagreement with a Supreme Court decision. There remains, however, the usual problem of defining the scope of a particular Supreme Court decision.³⁹

C. The Role of the Tax Court

The Tax Court was originally established as an independent quasi-judicial executive agency⁴⁰ to provide taxpayers with an independent hearing on tax appeals. A distinction must be made between the role of the Board of Tax Appeals under the Revenue Act of 1924 and the Tax Court's current role. Originally, the Board's decisions were to a large extent administrative; in 1928, the First Circuit noted in *Blair v. Curran*,⁴¹ that "[t]he hearing before the Board was at that time little more than a preliminary skirmish, a run for luck."⁴² The Tax Court's present status is no longer that of an independent agency in the executive branch of government.⁴³ In the Tax Reform Act of 1969, Congress established the Tax Court as an Article I court which exercises legislative power. Both Congress⁴⁴ and the courts⁴⁵ have generally recognized that it exercises judicial, rather than administrative, functions.⁴⁶ Independent of the Internal Revenue Service, it has responsibility for making impartial determinations of law and fact following a full evidentiary hearing.⁴⁷ The Tax Court has nationwide jurisdiction⁴⁸ which indicates Congress's interest in the uniform application of tax law.⁴⁹

39. Supreme Court decisions in tax cases are republished in the *Internal Revenue Bulletin*, but the lawyer's usual problem remains as to the inferences to be drawn and application of the decision to cases which may vary slightly in the factual circumstances. *Id.* at 594.

40. The Supreme Court stated that the Board of Tax Appeals is an agency, not a court, whose purpose is to provide an "independent review" of the Commissioner's decisions. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 721, 725 (1929).

41. 24 F.2d 390 (1st Cir. 1928). The decision of the Board became final if neither side took additional court action within one year, but the parties did not ordinarily regard the Board decision as a final determination. *Griswold, Res Judicata in Federal Tax Cases*, 46 YALE L. J. 1320, 1323 (1937).

42. 24 F.2d at 392.

43. See I.R.C. § 7441.

44. H. R. REP. NO. 2, 70th Cong., 1st Sess. 30-31 (1927).

45. See *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 121 (1926).

46. Comment, *Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedents*, 57 COLUM. L. REV. 717 (1957).

47. I.R.C. § 7442; see also Comment, *supra* note 14, at 275.

48. See note 47 *supra*.

49. During extensive discussion on the Revenue Act of 1926, Senators King and Norris raised the concern that when the court sat as divisions and held hearings at various locations throughout the country it might lead to different answers to identical questions. A procedural provision of the Act, § 90b, was incorporated whereby every decision of the divisions would be reported to

Although tax cases may be brought in one of the ninety-odd district courts, or in the Court of Claims, most tax cases begin in the Tax Court.⁵⁰ Appeals from the Tax Court are taken to the courts of appeals of the ten circuits and the United States Court of Appeals for the District of Columbia. Decisions of these appellate courts are reviewed by the Supreme Court only by certiorari which is generally granted only when a conflict in the intermediate courts has developed.⁵¹ Because of this low Supreme Court profile, the decisions from the multiplicity of intermediate courts of appeals have become a regrettable source of confusion with respect to internal revenue taxes.⁵²

At one time the Tax Court, in its "self-appointed" role as national tax spokesperson, refused to be bound by the decisions of the various courts of appeals which had appellate jurisdiction over it.⁵³ The Tax Court would deny binding authority to appellate precedents while applying the doctrine of stare decisis to its own rulings.⁵⁴ It maintained that it could not fulfill its responsibility to administer a uniform law of federal taxation if it were to follow the diverse precedents set by the courts of appeals. Accordingly, the Tax Court disregarded circuit court decisions that it felt were unsound even though it professed "due deference" to the circuit courts' opinions.⁵⁵ In the now famous *Dobson* case,⁵⁶ Mr. Justice Jackson recognized the authority of the circuit court of appeals to reverse the decision of the Tax Court only if there was no "clear-

the full court in Washington, D.C., for review prior to publication. 67 CONG. REC. 3749-50 (1926). See Revenue Act of 1926, ch. 27, § 90b, 44 Stat. 110 (1926).

50. In 1978, the Tax Court tried 1,742 cases, while the U.S. district courts and the Court of Claims combined only handled 447. 1978 FINANCES REPORT, *supra* note 4, at 198. Quantitatively, tax cases are not a particular burden. But qualitatively, in terms of person hours spent in deciding tax cases, they are a major burden on the existing federal judiciary. Section of Taxation, ABA Panel Discussion, *Proposals for a New National Court of Tax Appeals and the Role in Tax Litigation of the Court of Claims*, 33 TAX LAWYER 7, 8 (1979) [hereinafter cited as ABA Panel Discussion].

51. Thus it is not enough to litigate a point of law once, often it must be brought to a court of competent jurisdiction two or more times. R. PAUL, *supra* note 7, at 668. See note 118 *infra* for an extreme example where an issue was litigated in six circuits.

52. Dwan, *supra* note 20, at 584-85.

53. Note, *Collateral Estoppel: Loosening the Mutuality Rule in Tax Litigation*, 73 MICH. L. REV. 604, 615 (1975).

54. Each court of appeals has limited territorial jurisdiction and on remand the Tax Court must regard the rule of decision laid down on appeal as the law of the case. The Tax Court has, nevertheless, "consistently reserved and frequently exercised the power to adhere to its position and reject the appellate court precedent." Comment, *supra* note 46, at 718-19.

55. Note, *supra* note 15, at 411.

56. *Dobson v. Commissioner*, 320 U.S. 489 (1943), *rehearing denied*, 321 U.S. 231 (1944).

cut" question of law.⁵⁷

In a later case, *Lawrence v. Commissioner*,⁵⁸ the Tax Court maintained that its nation-wide jurisdiction compelled the application of its own decision on a particular issue without constraint by the diverse precedents of the courts of appeals.⁵⁹ The court reasoned that its duty was to apply tax law equally to all taxpayers, regardless of their residence or the Commissioner's nonacquiescence policy. Although *Lawrence* was overruled by the Ninth Circuit,⁶⁰ the Tax Court remained steadfast in its independent stance, thus incurring frequent criticism by the courts of appeals.⁶¹ Its contrariness was to no avail, for if the taxpayer was willing to pursue an appeal, the court of appeals rule would again prevail.⁶² The only result was needless litigation and the attendant judicial inefficiency.

Finally, the Tax Court gave in. In *Golsen v. Commissioner*,⁶³ the Tax Court reexamined *Lawrence* and agreed to follow the decision of the particular court of appeals to which appeal would lay when the precedent was "squarely on point."⁶⁴ The Tax Court established the rule that it would defer to the court of appeals while asserting its own reasons for disagreeing. The Commissioner could, however, continue to litigate the issue. If a conflict developed, the Commissioner would then seek certiorari to the Supreme Court and thereby attain a final determination of the issue.⁶⁵

The Tax Court has evidenced a concern over the "tentative authority of any construction of the taxing statutes which has not received Supreme Court approval."⁶⁶ Although the Tax Court accepts a large number of adverse decisions, rulings of a court of appeals are not regarded as necessarily determinative on the issue.⁶⁷ In spite of concurrences by several other circuits, court of appeals precedents have been overruled and the Tax Court's posi-

57. *Id.* at 502. In that case the Supreme Court also denominated the Tax Court as "the well-nigh infallible tax-interpreting body," motivated in part at least by the Supreme Court's desire to reduce its own involvement in tax matters. R. PAUL, *supra* note 7, at 664.

58. 27 T.C. 713 (1957).

59. *Id.* at 718.

60. *Lawrence v. Commissioner*, 258 F.2d 562 (9th Cir. 1958).

61. Note, *supra* note 15, at 412.

62. Note, *supra* note 53, at 615.

63. 54 T.C. 742 (1970), *aff'd*, *Golsen v. Commissioner*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

64. 54 T.C. at 757.

65. Note, *supra* note 15, at 414.

66. Comment, *supra* note 46, at 720.

67. When the applicable court of appeals decision is an affirmance in open court without opinion, and therefore having no precedential value, the Tax Court is

tion upheld when the Supreme Court decided to review the issue.⁶⁸ The Commissioner's recognition of this possibility lends support to the nonacquiescence policy.⁶⁹

The factors that the Tax Court considers in striving for a uniform tax policy are not necessarily the same as those of the Commissioner. The Commissioner considers ease of administration, likelihood of continued litigation, and revenue implications.⁷⁰ Meanwhile, the Tax Court pursues its perceived duty of uniformly administering the revenue laws, in recognition of its Congressionally mandated national jurisdiction and the relatively infrequent review of tax cases by the Supreme Court.⁷¹

D. How a Taxpayer "Nonacquiesces"

When the Commissioner assesses a deficiency, the contesting taxpayer may either refuse to pay and petition the Tax Court for review,⁷² or file a claim in a federal district court⁷³ or the Court of Claims.⁷⁴ In order to bypass the Tax Court, the taxpayer must first pay the contested deficiency and then file a claim for refund with the Service within two years of payment. If the claim is denied or no action is taken by the Service within six months, the taxpayer may sue for a refund in either a United States district court or the Court of Claims.⁷⁵

The present civil tax appellate system has been criticized and debated for more than forty years.⁷⁶ Tax Court decisions may be appealed by right to the circuit court in the circuit of the taxpayer's legal residence when the petition was filed.⁷⁷ Circuit court and Court of Claims decisions are appealable only to the Supreme Court itself. Thus, the Tax Court is compelled to function under the guidance of many masters, including the ten circuit courts of appeals, the Court of Appeals for the District of Columbia, and the

not bound by the *Golsen* rule of uniformity. See *Sylvan v. Commissioner*, 65 T.C. 548 (1975).

68. Comment, *supra* note 46, at 720.

69. *Id.*

70. The standards by which an adverse decision is tested by the Service include determining whether acquiescence is likely to be acceptable to most taxpayers thus ending litigation on the issue, and whether the revenue loss can be tolerated. *Id.* at 721 n.45.

71. *Id.*

72. I.R.C. §§ 7441-7487. Petition must be filed within 90 days after notice of deficiency is mailed. I.R.C. § 6213(a).

73. I.R.C. § 7422; 28 U.S.C. § 1346(a)(1) (1976).

74. I.R.C. § 7422; 28 U.S.C. § 1491 (1976).

75. I.R.C. § 6532.

76. SENATE REPORT, *supra* note 12, at 2.

77. I.R.C. § 7482(a).

Supreme Court.⁷⁸ And though finality can only come with a decision by the Supreme Court, it rarely reviews a tax decision in the absence of a conflict between circuits.⁷⁹

Since the average taxpayer cannot afford to litigate a tax matter, he must be content with knowing with as much certainty as possible what the law is. The great majority of taxpayers merely want to follow the law. By providing taxpayers the answers to questions of law, both the taxpayer and the Service can avoid the litigation that neither desires. Accordingly, one of the goals of tax administration should be certainty.⁸⁰

The nonacquiescence policy is most onerous on the small taxpayer who must litigate to take advantage of a precedent which the Commissioner opts to ignore. Where the stakes are larger, it may be worth the time and expense to litigate. But this result is anomalous since the taxpayer is forced to go to court to hear again what the court has said in an earlier case.⁸¹ The time and expense involved may cause the small taxpayer to choose not to litigate an issue which a wealthier taxpayer with a large claim may be able to challenge. This results in one set of rules, established by the Commissioner, being applicable to small taxpayers while another set, mandated by the courts, is available to large taxpayers.⁸² As such, the nonacquiescence program violates two principles of taxation—uniformity and progression.

However, the Tax Court has implemented a simplified procedure for disputes which do not exceed \$5,000 in any tax year.⁸³ Under the Small Tax Case procedure, taxpayers may present their case before a special trial judge in informal hearings. It has the advantage in that a knowledge of courtroom proceedings is not required and thus an inexpensive forum is provided for the taxpayer.⁸⁴ However, neither the taxpayer nor the government may appeal from decisions in such cases.⁸⁵ In this manner, the unequal burden of the nonacquiescence policy on smaller taxpayers is somewhat lessened.

The courts' interpretation of The Civil Rights Attorney's Fees Award Act of 1976 also adversely affects the small taxpayer.⁸⁶ The

78. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U. L.Q. 399, 416 (1940).

79. *Id.* This is discussed in further depth in the section of this article entitled, "Role of the Supreme Court," § III-D of text *infra*.

80. New Developments, *supra* note 19, at 57.

81. Comment, *supra* note 14, at 278.

82. See generally, EISENSTEIN, *IDEOLOGIES OF TAXATION* 12 (1961).

83. I.R.C. § 7463.

84. 1978 FINANCES REPORT, *supra* note 4, at 10.

85. *Id.*, 1978 IRS REPORT, *supra* note 2, at 10.

86. 42 U.S.C. § 1988 (1976).

district courts have reached divergent conclusions. A Montana district court allowed attorney's fees to a tax refund plaintiff and specifically held that the statute permitted award without regard to which party initiated the action.⁸⁷ On the other hand, other courts have held that an award of fees could not be made unless the government was the plaintiff and bad faith or harassment was established.⁸⁸ The majority of the district courts are now following the Tax Court's decision in *Key Buick Co. v. Commissioner*,⁸⁹ which denied attorney's fees to taxpayers in connection with refund litigation.⁹⁰ In 1978 the Court of Claims also followed *Key Buick* and held that attorney's fees could not be awarded because the law did not apply to actions brought against the government.⁹¹

However, there are some cases which have awarded attorney's fees when there is the appearance that the government's action materially contributed to their incurrence. The Eighth Circuit Court of Appeals held that the government's counterclaim in connection with a taxpayer-initiated refund suit was an action brought by the United States and remanded the case to determine whether the other requirements were met for payment of attorney's fees.⁹² In a recent district court case, the taxpayer won nearly \$9,000 in attorney's fees. The court held that the government had acted in bad faith when it charged a bookkeeper with failure to pay FICA and income tax withholdings. The Justice Department Tax Division attorney had refused to drop the case and, with unusual candor, stated that the government wanted to make sure the bookkeeper would testify against the company president and sole stockholder, who was their real target. This was enough to convince Judge Newcomer of the U.S. District Court for the Eastern District of Pennsylvania that the government had acted in bad faith.⁹³

87. *Levno v. United States*, 440 F. Supp. 8 (D. Mont. 1977).

88. *Engel v. United States*, 448 F. Supp. 201, 202 (W.D. Pa. 1978); *Kline v. United States*, 429 F. Supp. 1025, 1026 (D. Md. 1977).

89. 68 T.C. 178 (1977). In *Key Buick* the court observed that The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), provides that attorney's fees may be allowed as part of the costs in "any civil action or proceeding, by or on behalf of the United States," and therefore reimbursement is not available in cases appealed to the Supreme Court since those cases are never initiated by the government. The court went on to say it could not award attorney's fees because there was no statutory authority for such an award. 68 T.C. at 179.

90. *See, e.g., Jacobsen v. United States*, 78-1 U.S.T.C. ¶ 9323, 41 A.F.T.R.2d 78-1070 (W.D. Tex. 1978).

91. *Aparacor, Inc. v. United States*, 571 F.2d 552 (Ct. Cl. 1978).

92. *Patzkowski v. United States*, 576 F.2d 134 (8th Cir. 1978).

93. On counsel's advice, the bookkeeper paid \$10 of the \$86,858 assessed and then filed for a refund with the Service. The district director at Philadelphia denied the request. Upon receipt of the denial, the taxpayer filed suit for refund

It remains to be seen whether a sufficiently strong case can be made for the award of attorney's fees merely because the Commissioner's nonacquiescence was, in itself, the cause of the unnecessary suit and where the decision, because of the jurisdiction involved, was a foregone conclusion. While the Tax Court has no jurisdiction to award costs,⁹⁴ it is especially in this forum that the taxpayer should be reimbursed for legal expenses when the Tax Court merely reaffirms its earlier decision, to which the Commissioner had not acquiesced. When the Commissioner announces nonacquiescence to a Tax Court decision it forces the taxpayer to initiate an unnecessary suit. Many times the Commissioner is motivated by economic considerations: if the Service wins, the tax coffers may be greatly enriched. Justice and a sense of fair play dictate that if the court affirms its decision in favor of the taxpayer, representational fees should be reimbursed.

III. LEGAL ANALYSIS

A. Applicability of Stare Decisis

In view of the immense effort that goes into the compilation of tax services, reports, digests, indices, summaries, guides, and consolidations, both governmental and private, one would necessarily conclude that there must be a sound basis of underlying principle and case law to rely on to support one's case.⁹⁵ But, "a small amount of tunneling soon convinces the observer . . . that the bed-

in the U.S. District Court for Eastern Pennsylvania. The government answered that claim with a counterclaim for the balance of the assessment, thereby making the bookkeeper eligible for attorney's fees under The Civil Rights Attorneys' Fees Awards Act of 1976, if successful in the suit. Prior to trial, the government settled its claim with the company president for \$55,700, but continued to pursue the bookkeeper. Under oath the government attorney denied having made the statements alleged by the bookkeeper's attorney, but the jury and Judge Newcomer believed the taxpayer's story and held that the government counterclaim had been "instituted in bad faith," putting the taxpayer to the expense of defending against litigation which should not have been required. *Bryant v. United States*, 456 F. Supp. 174 (E.D. Pa. 1978).

94. Pub. L. No. 94-559 added the provision for attorney's fees to 42 U.S.C. § 1988, in a section that begins: "[t]he jurisdiction in civil and criminal matters conferred on the district courts . . ." The Tax Court therefore concluded that the provision was inapplicable to cases in that forum. *Key Buick Co. v. Commissioner*, 68 T.C. 178, 179 (1977). Furthermore, taxpayers represented in Tax Court by non-attorneys would, arguably, not incur "attorney's fees." Non-attorneys can practice before the Tax Court after qualification via examination but the number qualifying has been modest. In the 1977 annual examination three out of forty applicants passed; in 1978 there were thirty-seven applicants and again three were successful. Telephone interview with Ms. Clark, Admissions Clerk, U.S. Tax Court (Dec. 21, 1979).

95. Unlike most other fields of law, history does not repeat itself in the taxation area. While tomes of case law exist, every new case is reviewed and decided

rock is about as solid as Swiss cheese."⁹⁶

The doctrine of stare decisis holds that a court's decision as to a matter of law is binding on that court and all courts subject to its jurisdiction whenever the same question reappears⁹⁷ in a subsequent action between different parties.⁹⁸ However, in tax matters, one who relies on the doctrine of stare decisis is likely to be disappointed.⁹⁹ Under the current procedures, taxpayers whose circumstances are in all other respects identical may be required by the courts to pay different amounts of tax solely because they are residents of different jurisdictions.¹⁰⁰

Early on, the Supreme Court found the principle of finality of judgment, as expressed in the doctrine of collateral estoppel, to be applicable in federal tax cases,¹⁰¹ but limited the doctrine to those cases where all operative facts were identical.¹⁰² Collateral estoppel seeks to conserve judicial energy, promote confidence in the judicial system, avoid unnecessary litigant expenses, and minimize inconsistent results.¹⁰³ Offsetting these benefits are the danger of perpetuating error, the need for flexibility, and considerations of fairness.¹⁰⁴ The collateral estoppel doctrine has been criticized as allowing one taxpayer to escape taxation following an "erroneous" court decision, while others similarly situated are unable to take advantage of the same decision.¹⁰⁵

on its own unique merits. Marcossan, *Stare Decisis in Tax Law*, 20 TAXES 137 (1942).

96. *Id.*

97. *Id.*

98. Where a question of law is actually litigated and determined, that determination is ordinarily conclusive as to subsequent actions where the circumstances are similar but one or more parties are new. The Restatement asserts that:

Under the doctrine of stare decisis, where a court has in one case decided a question of law it will in subsequent cases in which the same question of law arises ordinarily decide it in the same way. The doctrine is not rigidly applied, and a court will sometimes overrule its prior decisions.

RESTATEMENT OF JUDGMENTS, § 70, Comment (a), at 319 (1942).

99. When it comes to tax law, precedent "has been kicked in the pants and stare decisis writhes again." Marcossan, *supra* note 95, at 137. Consultation of the various resources available to the taxpayer and the taxpayer's counselor is unlikely to provide a dependable answer to even a question closely paralleling one previously litigated. *Id.*

100. SENATE REPORT, *supra* note 12, at 2.

101. The Supreme Court ruled that the doctrine of collateral estoppel applied in federal tax cases. *Tait v. Western Md. Ry. Co.*, 289 U.S. 620 (1933).

102. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

103. Note, *supra* note 53, at 604-05.

104. *Id.* at 605.

105. deY. Manning, *The Application of the Doctrine of Estoppel Against the Government in Federal Tax Cases*, 30 N.C. L. REV. 356, 359 (1952).

The doctrine of *res judicata* in tax cases, as in law generally, rests on a rule of public policy designed to give judgments finality in the interest of achieving an end to litigation, and requires that an issue once litigated by a court of competent jurisdiction remain settled.¹⁰⁶ In 1948, the Supreme Court sharply limited the availability of defenses based on finality of judgment and held that a prior judgment is *res judicata* only in "a subsequent proceeding involving the same claim and the same tax year."¹⁰⁷ Each new tax year gives rise to a different cause of action.¹⁰⁸

All three—collateral estoppel, *res judicata*, and *stare decisis*—are based on considerations of judicial economy and a policy of favoring certainty in legal relations.¹⁰⁹ Interpreting tax statutes is a function in which the tendency to apply the doctrine of *stare decisis* is unusually strong.¹¹⁰ Once the Commissioner has had one full and fair opportunity to press a claim, and loses in a court of law, the consideration of judicial economy must be weighed heavily when other cases arise on the same issue.¹¹¹ In a 1972 district court case¹¹² it was held that requiring the relitigation of an issue results "in a significant waste of time, expenses, and manpower."¹¹³ In 1957, Mr. Justice Frankfurter, summarized the attitude toward precedent, by stating that it "underlies the whole system of our case law."¹¹⁴ When a tribunal permits a party to

106. See generally *Tait v. Western Md. Ry. Co.*, 289 U.S. 620 (1933).

107. *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948).

108. 10 J. MERTENS, *THE LAW OF FEDERAL INCOME TAXATION* § 60.25, at 90 (rev. ed. 1976). Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 4 (1942).

109. See RESTATEMENT OF JUDGMENTS, §§ 68-70 (1942). See also Note, *Collateral Estoppel in Tax Fraud Proceedings*, 51 VA. L. REV. 1360 (1965).

110. ATTORNEY GENERAL'S COMMISSION ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 466 (1941).

111. To insist that each case, no matter how similar to one previously decided, should be litigated is a redundancy our legal system can ill afford. Note, *supra* note 53, at 619.

112. *Baily v. United States*, 350 F. Supp. 1205 (E.D. Pa. 1972).

113. The case involved a partnership relationship which had been determined in "a court of competent jurisdiction" after a "full and fair opportunity to litigate the partnership issue. . . . This instant suit involves the identical issue, the identical operative facts, and the identical time period." *Id.* at 1210.

114. Mr. Justice Frankfurter, in an opinion concurring in result, stated:

Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots. . . . 'If a precedent involving a black horse is applied to a case involving a white horse, we are not excited. If it were an elephant or an animal *ferae naturae* or a chose in action, then we would venture into thought. . . .' Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation*, 36.

Reid v. Covert, 354 U.S. 1, 50-51 (1957) (Frankfurter, J., concurring).

make whatever showing it will on the merits of an issue and then adheres to its previously rendered decision on substantially the same point of law, it has invoked the doctrine of stare decisis in the interest of judicial consistency.¹¹⁵

Ordinarily, stare decisis is only a principle of policy and requires a series of precedents for its application. The Service claims that, as a rule of thumb, it will conform to a judicial interpretation if faced with two or more adverse decisions,¹¹⁶ but the Service surrendered to insurance companies in Revenue Ruling 72-84 only after losing five decisions in court.¹¹⁷ The "dealers reserve" issue was litigated in the courts of six circuits before being resolved by the Supreme Court in 1959.¹¹⁸

Prior tax decisions are regarded as controlling only when the operative facts are closely comparable.¹¹⁹ To quote the Supreme Court: "where the facts are not the same a court is free to make an independent examination of legal matters at issue. . . . [I]f consistency in decision is considered just and desirable, reliance can be placed on the ordinary rule of *stare decisis*."¹²⁰ Although the doc-

115. Branscomb, *Collateral Estoppel in Tax Cases: Static and Separable Facts*, 37 TEX. L. REV. 584, 595-96 (1959).

116. Uretz, *supra* note 17, at 144; Comment, *supra* note 14, at 278; see also ABA Panel Discussion, *supra* note 50, at 28.

117. Rev. Rul. 72-84, 1972-1 C.B. 216.

118. Commissioner v. Hansen, 360 U.S. 446 (1959). The "dealer's reserve" issue concerned accrual basis taxpayers engaged in the sales of commercial installment paper to finance companies. The financial companies paid a portion in cash and retained a percentage which they credited on their books to the taxpayers' reserve accounts for the purpose of securing performance. The question presented was whether the amounts placed in the reserve accounts were accrued income to the taxpayers in the year of the sale of the installment paper. The Commissioner contended that it was and the Tax Court sustained the Commissioner. On review, the Court of Appeals for the Ninth Circuit, Hansen v. Commissioner, 258 F.2d 585 (9th Cir. 1958), and the Eighth Circuit, Glover v. Commissioner, 253 F.2d 735 (8th Cir. 1958), reversed, while the Court of Appeals for the Seventh Circuit affirmed in Baird v. Commissioner, 256 F.2d 918 (7th Cir. 1958). On certiorari, the Supreme Court affirmed the judgment of the Court of Appeals for the Seventh Circuit and reversed the Courts of Appeals for the Ninth and Eighth Circuits, holding that the amounts on reserve constituted income to the taxpayers in the year credited to their accounts. The conflict had previously developed in three additional circuits. Compare Schaeffer v. Commissioner, 258 F.2d 861 (6th Cir. 1958) (sustained the Commissioner's position) with Johnson v. Commissioner, 233 F.2d 952 (4th Cir. 1956) (sustaining taxpayer's position), Texas Trailercoach, Inc. v. Commissioner, 251 F.2d 395 (5th Cir. 1958) (same) and West Pontiac, Inc. v. Commissioner, 257 F.2d 810 (5th Cir. 1958) (same).

119. Commissioner v. Jergens, 127 F.2d 973 (5th Cir. 1942).

120. Commissioner v. Sunnen, 333 U.S. 591, 601 (1948). A prior determination of the Tax Court with respect to one of several similar licensing agreements was held not to preclude consideration of the question with respect to royalties

trine of stare decisis was once highly respected, it has become significantly weaker in modern times. However, the doctrine is still a salutary one, and one which should be adhered to in the absence of overriding considerations.¹²¹ As a principle of policy, the "law of the case" should not prevent a court from overriding a prior holding when convinced that it is erroneous.¹²² Stare decisis, like res judicata, is a rule which forecloses and shuts out truth and can only be justified by its compensating advantages, such as relief from redundant litigation.¹²³

Mr. Justice Frankfurter recognized that stare decisis has long suffered in its application to tax law by stating in the majority opinion in *Helvering v. Hallock*:¹²⁴

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychology need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula

. . . We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process.¹²⁵

The principle of stare decisis has been of secondary importance to collateral estoppel in tax litigation, primarily because of the alleged predominancy of questions of fact in repetitious litigation of tax problems of the same or similarly situated taxpayers.¹²⁶ Stare decisis addresses only the precedential value given to decisions of law.¹²⁷ If the record in the second case is substantially different, the court will reconsider the question and, if appropriate, reach a contrary decision.¹²⁸ Furthermore, each case must be decided upon its own record and precedents may be distinguished on their facts. While overruling a 1930 decision,¹²⁹ the Supreme Court stated that it did not consider itself bound by prior decisions in the tax area.¹³⁰ However, the trial courts must follow the decisions of

under other agreements or with respect to royalties for other tax years under the same agreement. *Id.*

121. 10 J. MERTENS, *supra* note 108, § 60.21.

122. *Id.*

123. Griswold, *supra* note 41, at 1355.

124. 309 U.S. 106 (1940).

125. *Id.* at 119.

126. Branscomb, *supra* note 115, at 585.

127. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

128. Dwan, *supra* note 20, at 590.

129. *May v. Heiner*, 281 U.S. 238 (1930), *overruled by* *Commissioner v. Estate of Church*, 335 U.S. 632 (1919).

130. *Commissioner v. Estate of Church*, 335 U.S. 632 (1949). The Court, in overruling *May v. Heiner*, noted that the decision had been repudiated, at the request of the Treasury, by a joint resolution of Congress. This resolution did not purport, and was not construed by the Supreme Court, to operate retroactively. The instant case involved a 1924 irrevocable trust. *May v. Heiner* held

courts of higher authority.¹³¹ In a 1950 Tax Court memorandum decision,¹³² the Tax Court held that the doctrine of stare decisis was a compelling reason for following an earlier Tax Court decision.¹³³ However, the Commissioner, supported by a Supreme Court decision, does not consider a decision binding in which it lost and was denied certiorari¹³⁴ because too many requests are filed to expect a detailed review of each by the Court.¹³⁵

There are many factors which produce uncertainty as to questions of law in income tax matters which the doctrine of stare decisis should operate to minimize. Uncertainty will nevertheless remain, due to unforeseeable changes in federal statutes and treasury regulations and the superseding Supreme Court deci-

that the corpus of a trust transfer need not be included in a settlor's estate, even though a life interest in the income has been retained. The majority opinion, expressing the views of five of the justices, held that *May v. Heiner* could not be granted "the sanctuary of *stare decisis* due to various factors," and reversed both the Tax Court and the court of appeals decisions which had supported the taxpayer. *Id.* at 648. Mr. Justice Frankfurter dissented on the ground that *May v. Heiner* should not be overruled out of respect owed by the Court to a series of long-standing unanimous decisions and the expressed will of Congress that its resolution not be given retroactive effect. *Id.* at 667 (Frankfurter, J., dissenting).

131. *Stacy Mfg. Co. v. Commissioner*, 237 F.2d 605, 606 (6th Cir. 1956). In a strongly worded *per curiam* opinion, the Sixth Circuit noted that two other circuits had agreed with its earlier decision which reversed the Tax Court and addressed the Tax Court's failure to adhere to that precedent in a second case. The Sixth Circuit concluded that the later case was identical "for all practical purposes" and the Tax Court itself had stated that "the precise question" was again presented, but that "not being convinced that the position of the tax court [in the first case] was incorrectly taken, the tax court respectfully declines to follow the contrary view." *Id.* The Sixth Circuit opinion continued:

The situation developed in these cases requires the expression of our considered opinion that the Tax Court of the United States is not lawfully privileged to disregard . . . an opinion of the court of appeals for that circuit.

The desire of the Tax Court to establish . . . a uniform rule does not empower it to disregard the decisions of its several reviewing courts of appeals. . . . Until the Supreme Court reverses . . . , that rule must be followed. . . .

Id.

132. *J. Simpson Dean, T.C.M. (P-H) ¶ 50,075* (1950), *aff'd sub nom. Dean v. Commissioner*, 187 F.2d 1019 (3d Cir. 1951).
133. *T.C.M. (P-H) at ¶ 50,225, affirming Paulina duPont Dean*, 9 T.C. 256 (1947).
134. The Supreme Court, supporting this attitude, stated that "the refusal of an application for this extraordinary writ [of certiorari] is in no case equivalent to an affirmance of the decree that is sought to be reviewed." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).
135. Nearly 5,000 requests for certiorari are filed annually with the Court. Each year the Court decides to hear fewer than 200. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* 2 (1979).

sions.¹³⁶ The Commissioner's role in the nonacquiescence program runs counter to the legal principle of stare decisis and forces a taxpayer to litigate in court to overcome the Commissioner's nonacquiescence to a decision which supports his claim.¹³⁷ A taxpayer's right to rely on precedent and assert the law of the case should be assured once the issue has been fully and fairly litigated in a court of competent jurisdiction. Finality of judgment would not only avoid unnecessary litigation expenses in redundant cases but would free the crowded court calendars for suits of initial impression, which in tax law are myriad.

B. The Commissioner's Role

The Internal Revenue Service is charged with the responsibility for administering and enforcing the taxing power of the United States Government.¹³⁸ The top legal officer for the Service is the Chief Counsel whose office "employs over 900 attorneys, making it—next to the Department of Justice—the largest law firm in the nation."¹³⁹ The Office of Chief Counsel represents the Commissioner in all actions brought in the Tax Court.¹⁴⁰ In addition, it has jurisdiction over the acquiescence program.

The acquiescence program is an integral part of the Service's plan for uniformity and consistency in its dealings with taxpayers;¹⁴¹ Service personnel are obliged to follow outstanding nonacquiescences and acquiescences in disposing of other cases.¹⁴² While the Commissioner must follow the decision of the Supreme Court, the nonacquiescence program asserts the authority to ig-

136. Note, *Collateral Estoppel as to Questions of Law in Federal Tax Cases*, 35 IOWA L. REV. 700, 712 (1950).

137. Comment, *supra* note 14, at 277.

138. In the enforcement and administration of these acts the Commissioner is authorized to prescribe and publish "all needful rules and regulations." I.R.C. § 7805(a). Regulations issued under this authority are ordinarily given substantial weight by the courts. E. GRISWOLD & M. GRAETZ, *supra* note 8, at 46.

139. 1978 IRS REPORT, *supra* note 2, at 3.

140. The Service disposed of a total of 17,318 general litigation cases in fiscal year 1978. Of these, 11,524 went to trial and the remainder were settled out-of-court. On September 30, 1978, the end of fiscal year 1978, a total of 23,167 Tax Court cases were pending, representing approximately \$3.3 billion in contested taxes and penalties and \$0.3 billion in claimed overpayments. Figures include small tax claim procedure cases. 1978 IRS REPORT, *supra* note 2, at 3, 7, 11.

141. The Commissioner's point is that federal courts which, unlike the Tax Court, have limited geographical jurisdiction may take a different position on a similar issue of law. The Service is unwilling to create within a single region of the country a tax haven when the courts in that area have decided cases adversely to the Commissioner. *Id.* at 279.

142. Uretz, *supra* note 17, at 139.

nore the interpretations of law of other courts.¹⁴³ Except as to the party involved in the immediate litigation, the Commissioner continues to assess taxes based on Service interpretations, notwithstanding contrary interpretations of the Tax Court and courts of appeals.¹⁴⁴ In effect, this policy empowers the Commissioner to decide which cases to accept as binding precedents and which to reject.¹⁴⁵ Although the Commissioner does not announce an acquiescence or nonacquiescence to United States district court, Court of Claims, or court of appeals decisions, this does not mean that they are accepted as binding precedents.¹⁴⁶

The Office of Chief Counsel has justified the practice of the acquiescence program on the grounds of the requirement to achieve uniformity and consistency in dealing with taxpayers.¹⁴⁷ Unlike the Tax Court, the federal courts, which have limited geographical jurisdiction, may take different positions on a similar issue of law. The Service is unwilling to create a tax haven within a single region of the country when the courts in that area have decided cases adversely to the Commissioner.¹⁴⁸ Proponents further assert that since only the Supreme Court can bring finality in tax controversies, the Service should be bound by nothing less.¹⁴⁹

Certainty, to the extent attainable, is a desirable objective in tax law.¹⁵⁰ But the nonacquiescence program cannot be justified on promises of certainty because when the effect of a decision is to reduce taxes, the issue would never arise again in the courts if the Commissioner simply acquiesced.¹⁵¹

Mutuality might be legitimately advanced as a justification for the nonacquiescence program because the Service would be bound by a legal ruling while the taxpayers would not.¹⁵² An argument advanced by the Second Circuit for retention of the require-

143. Comment, *supra* note 14, at 276. With limited Supreme Court review of tax cases available, the Commissioner feels compelled to nonacquiesce when a decision has a substantial effect on revenue. Of course the nonacquiescence has only a nominal and temporary effect. Once the case gets to the court with which the Commissioner has had a difference of opinion, the burden shifts from the taxpayer to the government. Nonacquiescence, obviously, carries little weight with the court whose wisdom has been questioned. *Id.*

144. Comment, *supra* note 3, at 550.

145. Comment, *supra* note 14, at 276.

146. The publication of opinions of these courts as a "Court Decision" in the *Internal Revenue Bulletin* is tantamount to acquiescence. *Id.*

147. *Id.* at 279.

148. *Id.*

149. With limited Supreme Court review of tax cases available, the Commissioner feels compelled to nonacquiesce when a decision has a substantial effect on revenue. *Id.*

150. R. PAUL, *supra* note 7, at 664.

151. Comment, *supra* note 3, at 559.

152. *Id.* at 562.

ment of mutuality is the need to foster the Commissioner's obligation to relitigate issues which the Commissioner feels have been incorrectly decided.¹⁵³ However, the application of the mutuality rule cannot be explained by policy considerations unique to tax litigation since the factors which have led to its abolition in other areas apply to tax matters with equal force.¹⁵⁴ A mandatory acquiescence rule would eliminate the mutuality requirement, yet the result could be overcome by the Commissioner. If a mandatory acquiescence rule has the effect of significantly reducing revenues, the Commissioner could and should, after losing an appeal or being denied certiorari, ask Congress to rewrite the law.¹⁵⁵ Whether or not the law is changed, planning and certainty would be furthered and a national uniformity consistent with the newly expressed Congressional intent would result.

The Commissioner prefers not to permit taxpayers to rely upon acquiescences. Former Chief Counsel Uretz stated that one reason for this position is that otherwise acceptable decisions may contain "analytical nuances and shadings" which the Service would not have stated in the same way.¹⁵⁶ "Disagreement over the meaning of an acquiescence . . . would be expanded to an intolerable degree were acquiescences to be treated as firm bedrock for tax planning as are regulations and rulings," Uretz added.¹⁵⁷ Unlike regulations, rulings, and determination letters, a published acquiescence is not intended to be relied upon by taxpayers in tax planning.¹⁵⁸ Service personnel must apply the ruling when it

153. *Stern & Stern Textiles, Inc. v. Commissioner*, 263 F.2d 538 (2d Cir. 1959). The Second Circuit was apparently responding to the mounting sentiment for abandonment of the requirement of mutuality where the issues are identical. In *Divine v. Commissioner*, the Second Circuit noted the "formidable policy justifications for sanctioning the Commissioner's relitigation in different circuits of legally identical tax issues," which are factually different only as to the taxpayer involved. The court continued: "the Commissioner of the Internal Revenue Service has on many occasions taken the position . . . that a Court of Appeals decision with which he disagrees has no binding effect on the Service's policies in other circuits." 500 F.2d 1041, 1048-49 (2d Cir. 1974).

154. Note, *supra* note 53, at 618.

155. Commissioner Kurtz noted that recourse to Congress may not always be a satisfactory way to solve issues. However, the Commissioner noted that it does act as a safety valve and in some cases would result in a resolution six or eight years sooner than merely relying on further litigation in the courts. ABA Panel Discussion, *supra* note 50, at 14.

156. Uretz, *supra* note 17, at 136.

157. *Id.*

158. Even publication of an acquiescence or nonacquiescence is accompanied by a disclaimer on reliance:

This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would

works to a taxpayer's disadvantage. Yet, a taxpayer can not assert an acquiescence since it can be withdrawn at any time. When required, the Commissioner may use the Tax Court case as the source for a Revenue Ruling in which the Service will reflect its own analysis and interpretation of the statutes.¹⁵⁹

Another complaint is that the Commissioner seems to ignore judicial construction of statutes and nonacquiesces to maximize revenue.¹⁶⁰ The Commissioner is under Congressional and executive pressure to maintain efficient collections of taxes. In its Annual Report,¹⁶¹ the Service compares the results for the current year to the previous year's performance. In this environment, the Commissioner's concern with maximization of tax collections when interpreting an ambiguous statute is not surprising.¹⁶² The principle which states that whenever there is doubt as to the imposition of a tax, "all doubts should be resolved in favor of the taxpayer . . ."¹⁶³ has long since been discarded. The argument used to be that tax statutes should be strictly construed because the government had its chance to write the law as it wished, and any other interpretation would be likely to injure taxpayers who relied upon the literal meaning.¹⁶⁴ More recently it has been asserted that the primary duty of the Commissioner is to collect revenue.¹⁶⁵ The Attorney General ruled early on that the Commissioner should adopt the construction most favorable to the government.¹⁶⁶ Under such guidance, the Commissioner's role is more closely analogous to that of a contestant than that of an impar-

appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due.

Dixon v. United States, 381 U.S. 68, 73 (1965).

159. Uretz, *supra* note 17, at 136.

160. Comment, *supra* note 3, at 554; New Developments, *supra* note 19, at 58; see also Comment, *supra* note 14, at 280. As a tax-gathering agency, the Service has a natural tendency to resolve any controversy in favor of the government and at the expense of the taxpayer. There is also a danger that it might sometimes overstep the bounds of the administrative discretion given by Congress. The record indicates that the Service, on occasion, has been less than judicial in its treatment of taxpayers. R. PAUL, *supra* note 7, at 665-67.

161. E.g., 1978 IRS REPORT, *supra* note 2.

162. The Service is one of the few governmental bodies whose success is gauged by the ratio of revenue earned to cost incurred. When income is up and cost is down, the management is considered efficient. New Developments, *supra* note 19, at 58.

163. White v. United States, 305 U.S. 281, 292 (1938). See generally May v. Heiner, 281 U.S. 238, 245 (1930); United States v. Merriam, 263 U.S. 179, 188 (1923); Gould v. Gould, 245 U.S. 151, 153 (1917).

164. Comment, *Tax Statutes—The Role of Stare Decisis in Determining "Legislative Intent,"* 49 MICH. L. REV. 407 (1951).

165. Cole, *From Treasury Decision to Judicial Decision*, 12 TAXES 531, 532 (1934).

166. 18 Op. Att'y Gen. 246 (1885).

tial arbiter.¹⁶⁷ In 1962, the Fifth Circuit pointed out that this philosophy—that the Commissioner has to protect the revenue—leads to a “strong arm”¹⁶⁸ course of action which runs counter to the purpose which is generally reflected by Congress in the income tax laws.

Former Chief Counsel Hauser stated that in deciding whether to acquiesce, the Service considers uniformity, certainty, and the effect on the revenue.¹⁶⁹ The Service position on protecting the revenue was presented differently in an address by then-Commissioner Cohen. He stated that the citizen has a right to expect the government to administer the law on the merits, not on revenue considerations: “the revenue is protected only when we ascertain and apply the true meaning of the statute.”¹⁷⁰ Cohen’s position responds to the taxpayer complaint that the Commissioner is unfair to taxpayers when the nonacquiescence is based solely on a goal of maximizing revenue. Empirical evidence does not indicate that the policy announcement has had any meritorious effect on the program.¹⁷¹ These disclaimers by the Service are not reflected in the sharp increase in the number of published nonacquiescences. After acquiescing in four-fifths of the Tax Court decisions for many years, the ratio dropped to less than one in two in 1978.¹⁷² It is evident that each decision can have a far-reaching effect.¹⁷³

The taxpayer may be confronted with the choice either of paying the assessed taxes or requesting a court to rule again on a point of law it has already decided.¹⁷⁴

Unnecessary costs and congestion . . . are the result of a situation which, actually, places the Commissioner above any court in the land. It is hardly possible to reconcile this with our democratic and republican form of government. The Commissioner is judge and prosecutor at the same time, something which is completely alien to our Constitution.¹⁷⁵

167. The Service is authorized to interpret the law and yet is constrained by the mandate that it be done with maximization of revenue as the controlling criterion. Accordingly, the Commissioner cannot be expected to perform this task with the utmost impartiality. Cole, *supra* note 165, at 532.

168. Jones v. Commissioner, 306 F.2d 292, 303 (5th Cir. 1962). In Jones, the Commissioner sought review by the Fifth Circuit “only to protect revenue in the event the individual taxpayers . . . are held not to be taxable on the net proceeds of a judgment of the United States Court of Claims.” *Id.* at 293.

169. Comment, *supra* note 3, at 559.

170. Cohen, *The New Commissioner Reports*, 17 TAX EXECUTIVE 277, 277-78 (1965).

171. See table at note 3 *supra*.

172. *Id.*

173. Although the instant case may involve only one taxpayer, the decision may affect millions of taxpayers. Divine v. Commissioner, 500 F.2d 1041, 1048-49 (2d Cir. 1974).

174. See notes 80-81 & accompanying text *supra*.

175. Herzberg, *Blueprint of a Fair Tax Administration*, 41 TAXES 161, 163 (1963). In this article Herzberg advocated the formation of a Court of Tax Appeals to

Casting the Commissioner in an adversary role may further the exploration of issues for judicial determination. But once that determination is made, the Commissioner's nonacquiescence and continued enforcement of the Service construction may be unfair to taxpayers and deny courts the traditional respect accorded them as final impartial arbiters.¹⁷⁶ The decision to appeal requires sound and informed professional judgment. When frivolous appeals are initiated by the government, rather than an individual taxpayer, the situation is even less desirable.¹⁷⁷

C. Reconsideration and Retroactivity

Courts are frequently criticized in tax matters because they create uncertainty when they change their minds.¹⁷⁸ Like the courts, the Commissioner has also been chastised for reversing a previous position.¹⁷⁹ However, a change of mind cannot be successfully challenged unless the discretion vested in the Commissioner has been abused.¹⁸⁰ Reliance on published acquiescences is not encouraged since the Commissioner reserves the right to withdraw a published acquiescence.¹⁸¹ Similarly, taxpayers are warned to exercise caution in relying on Service rulings. Published rulings and acquiescences may be revoked and given effect retroactively, even after a taxpayer has relied upon them.¹⁸² In addition, private rulings issued to one taxpayer may not necessarily be applied to another.¹⁸³

Retroactive application of a new interpretation is often objectionable, and is particularly suspect when the change radically departs from traditional interpretations. For example, Mr. Justice Roberts, dissenting in *Helvering v. Hallock*,¹⁸⁴ pointed out that the rule overturned in that case had been uniformly followed in over

offset the "effects of procedures that hamper a fair administration of our tax laws" *Id.* at 164.

176. New Developments, *supra* note 19, at 58.

177. Dwan, *supra* note 20, at 598.

178. While courts are criticized on many fronts for "judicial legislation" which goes beyond the letter of the law, and for pursuing "too eagerly" those who would seek to avoid taxes, they too often "commit what many regard as the unforgivable sin of changing their minds." R. PAUL, *supra* note 7, at 663.

179. Uretz, *supra* note 17, at 113; Comment, *supra* note 14, at 277. See also Calechman, *supra* note 9; New Developments, *supra* note 19, at 57.

180. *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 185 (1957).

181. New Developments, *supra* note 19, at 57.

182. Calechman, *supra* note 9, at 123; Herzberg, *supra* note 175, at 162; Uretz, *supra* note 17, at 133.

183. Calechman, *supra* note 9, at 122.

184. 309 U.S. 106 (1940).

fifty cases.¹⁸⁵ The question of retroactive revocation of an acquiescence was again considered by the Supreme Court in 1965 in *Dixon v. United States*.¹⁸⁶ In that case, the taxpayers argued that they relied upon a Commissioner's acquiescence and only after the transaction was complete was the acquiescence withdrawn.¹⁸⁷ In *Dixon* the Court ruled that taxpayers were not justified in relying on an acquiescence because the Commissioner was empowered to retroactively apply the "correct law" in order to rectify an "underlying mistake."¹⁸⁸ The Court also based the Commissioner's authority to give an acquiescence retroactive effect on the fact that until 1953 the cumulative announcements of acquiescence and nonacquiescence were given Revenue Ruling numbers. The Court stated that the reasons supporting the Commissioner's power to retroactively revoke his regulations apply "with even greater force to . . . rulings and acquiescences."¹⁸⁹ The Commissioner has the authority to revoke an acquiescence retroactively under the Code, as well.¹⁹⁰

Any taxpayer who relies on any interpretation of tax law other than a Supreme Court decision or the current Commissioner's position is vulnerable. In 1940, the Supreme Court ruled that a taxpayer could not rely upon decisions of four courts of appeals and consistent Tax Court cases with respect to a specific question, because the Commissioner had not acquiesced.¹⁹¹ In a 1978 case, the

185. If there ever was an instance in which the doctrine of *stare decisis* should govern, this is it. Aside from the obvious hardship involved in treating the taxpayers in the present cases differently from many others whose cases have been decided or closed in accordance with the settled rule, there are the weightier considerations that the judgments now rendered disappoint the just expectations of those who have acted in reliance upon the uniform construction of the statute by this and all other federal tribunals

Id. at 129 (Roberts, J., dissenting).

186. 381 U.S. 68 (1965).

187. In *Dixon*, the taxpayers argued that since they had relied on an 1944 acquiescence to *Caulkins v. Commissioner*, 1 T.C. 656 (1943), *aff'd*, 144 F.2d 482 (6th Cir. 1944), they should not be liable for 1952 taxes imposed retroactively by withdrawal of the acquiescence in 1955. 381 U.S. at 73, 76.

188. The Supreme Court held that the Commissioner had the right to revoke the acquiescence retroactively and observed that a notice is published in *Internal Revenue Bulletins* that "rulings other than Treasury Decisions . . . do not commit the Department to any interpretation of the law," and concluded that "the petitioners were not justified in relying on the acquiescence as precluding correction of the underlying mistake of law and the retroactive application of the correct law to their case." 381 U.S. at 73, 76. See also *Calechman*, *supra* note 9, at 123; *New Developments*, *supra* note 19, at 57.

189. *Id.* at 75.

190. I.R.C. § 7805(b).

191. *Higgins v. Smith*, 308 U.S. 473 (1940). The case involved the taxpayer's appeal of a Second Circuit judgment, *Smith v. Higgins*, 102 F.2d 456 (2d Cir. 1939), reversing a district court decision in the taxpayer's favor. The resulting rul-

Tax Court decided that a subsequent Supreme Court decision upholding a Service regulation should be applied retroactively in spite of taxpayer reliance which was supported by a Sixth Circuit decision in effect at the time of the transaction in question.¹⁹² The Commissioner is also vested to make any modification merely prospective.¹⁹³ However, the Commissioner has rarely exercised this power. Thus, taxpayers are cautioned not to rely upon acquiescences in tax planning.¹⁹⁴

The Commissioner's right of reconsideration has had grotesque results. In 1968, the Commissioner withdrew nonacquiescence to a decision and reversed a position he had held since 1935.¹⁹⁵ In a similar situation, the Commissioner continued to fight the rule of law laid down by the Tax Court for thirty years before admitting that the Tax Court was right.¹⁹⁶ One acquiescence was withdrawn only after it had been in effect for 49 years.¹⁹⁷

The question is simply what is more important: taxpayer reliance upon a precedent so that plans can be made accordingly; or the chance that a court might eventually follow the Commissioner's point of view if pressed hard and long enough.¹⁹⁸ But-tressed by Supreme Court backing, the Commissioner's prerogative to change a position could continue to pose a dilemma for the relying taxpayer.

D. Role of the Supreme Court

The Supreme Court is the final arbitrator of tax controversies. Certorari may be granted when there is a conflict between two circuits¹⁹⁹ or when the issue is of great importance to the national

ing was that a sale without a business purpose of a wholly owned corporation cannot, as a matter of law, give rise to a deductible loss.

192. *C. Blake McDowell, Inc. v. Commissioner*, 71 T.C. 71 (1978).

193. The Code presently provides: "The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." I.R.C. § 7805(b). The Supreme Court stated that the purpose of this section was to "avoid inequities." *Helvering v. Griffiths*, 318 U.S. 371, 397 n.49 (1943). Dwan termed it the Commissioner's "equitable power." Dwan, *supra* note 20, at 597.

194. *See, e.g., Dixon v. United States*, 381 U.S. 68 (1965).

195. *Nonacquiescence to Title & Trust Co. v. Commissioner*, 33 B.T.A. 25 (1935), published in XIV-2 C.B. 43 (1935) was withdrawn and "acquiescence in result only" substituted therefor. 1968-2 C.B. 3.

196. In 1962, the Commissioner withdrew a nonacquiescence to a decision issued in 1932. Herzberg, *supra* note 175, at 163; Comment, *supra* note 14, at 277.

197. This case received acquiescence in 1929 and in 1978 the Commissioner withdrew the acquiescence and substituted a nonacquiescence. 1978-2 C.B. 5 n.36.

198. Herzberg, *supra* note 175, at 163-64.

199. *Sup. Ct. R.* 19, 388 U.S. 927, 948 (1967).

fiscal environment.²⁰⁰ However, since review by writ of certiorari is discretionary, not a matter of right, the Court hears few tax cases.²⁰¹ For example, in 1978, only six civil tax cases were decided.²⁰² In the 1976 and 1977 October terms only ten and eleven tax cases, respectively, were decided by the Court.²⁰³ The Court may also hear questions of law by certificate from the courts of appeal²⁰⁴ and direct appeal may be taken whenever an Act of Congress has been declared unconstitutional.²⁰⁵

The current appellate system lacks a practical and reliable method of authoritatively resolving tax questions within a reasonable period of time.²⁰⁶ Because of the complexity of the Internal Revenue Code, judicial conflicts are more likely to arise in the tax area.²⁰⁷ Since certiorari is often withheld until two or more circuits are in conflict, a tax issue may remain unresolved for a considerable period of time.²⁰⁸ Even then, the Court may not grant review and the inter-circuit clash may continue to create confusion.²⁰⁹ Even when certiorari is granted to resolve such a conflict, often many years pass before the Supreme Court renders its decision.²¹⁰

Because questions of federal tax law interpretation are only

200. Comment, *supra* note 14, at 275.

201. In *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950), Mr. Justice Frankfurter explained the rationale for not granting certiorari, despite an apparent conflict in decisions, as follows:

A variety of considerations underlie denials of the writ . . . A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

Id. at 917-18. See Griswold, *supra* note 41, at 1355.

202. 1978 IRS REPORT, *supra* note 2, at 13 (table entitled "Appellate Court Case Record—Refund Litigation and Tax Court Cases").

203. SENATE REPORT, *supra* note 12, at 3 n.4.

204. 28 U.S.C. § 1254(3) (1976).

205. *Id.* § 1252.

206. The Senate Judiciary Committee attributed the delay in getting a final decision to the existence of various forums and disparate appellate review. SENATE REPORT, *supra* note 12, at 2.

207. *Divine v. Commissioner*, 500 F.2d 1041, 1049 (2d Cir. 1974).

208. Comment, *Divine v. Commissioner: Collateral Estoppel and the Mutuality Requirement in Federal Tax Litigation*, 60 IOWA L. REV. 1420, 1430 (1975).

209. By refusing to grant certiorari in tax matters until there is a conflict between circuits, the Court has been criticized as tending to encourage continued litigation in the very hope of producing the required conflict. See Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1155-57 (1944).

210. If decisions have been adverse to the Service, it may continue to litigate the issue and insist that the tax returns be kept open until finally resolved,

settled with finality by the Supreme Court, the Commissioner frequently takes the position that a lower court decision has no binding effect on the Service's policies in other jurisdictions.²¹¹ The *Divine* court pointed out that the uncertainty caused by the Service's position is "exacerbated" by the fact that decisions of the courts of appeals are not frequently reviewed by the Supreme Court.²¹²

The reluctance of the Supreme Court to consider tax cases has also been attributed to the feeling that the controversy might more appropriately be resolved by Congress.²¹³ Although Congress is responsible for writing the tax laws, the Court is responsible for resolving any controversy which has resulted.²¹⁴ It is for the Court to interpret the meaning of a law or the intent of the Congress that passed it.²¹⁵

E. Certainty, Uniformity and Equity

Certainty and uniformity—as compelling to taxpayers as "rightness"—cannot be achieved if conflicts are encouraged and finality unconscionably postponed.²¹⁶ Rather than suffer through the litigation in four or five circuit courts in an effort to achieve a "right" answer, many bewildered taxpayers would be quite content to adjust to the first decision, at least until the Supreme Court or Congress acted.²¹⁷ Retroactive nonacquiescence itself undermines whatever certainty exists in tax planning. It is contrary to the uniformity principle and tends to lessen public confidence in "fair and

whether it takes 5, 10, or even 15 years. SENATE REPORT, *supra* note 12, at 2. See also *Surrey*, *supra* note 78, at 416.

211. Comment, *supra* note 208, at 1430.

212. *Divine v. Commissioner*, 500 F.2d 1041, 1049 (2d Cir. 1974).

213. Mr. Justice Douglas, in a dissent, wrote:

This Court has, to many, seemed particularly ill-equipped to resolve income tax disputes between the Commissioner and the taxpayers. The reasons are (1) that the field has become increasingly technical and complicated due to the expansions of the Code and the proliferation of decisions and, (2) that we seldom see enough of them to develop any expertise in the area. Indeed, we are called upon mostly to resolve conflicts between the circuits which more providently should go to the standing committee of the Congress for resolution.

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

214. This raises interesting questions regarding the Court's constitutionally assigned role to resolve cases and controversies. U.S. CONST. art. III, § 2, cl. 1.

215. This is the philosophy expressed by Mr. Justice Harlan. B. WOODWARD & S. ARMSTRONG, *supra* note 135, at 57.

216. *Surrey*, *supra* note 78, at 419.

217. Many tax questions are no nearer a "right" answer after several circuits have litigated the issue than when the first court announced its decision. Meanwhile bewildered taxpayers are forced to struggle along until the Supreme Court selects the best alternative or Congress works its will. *Id.*

even-handed treatment" at the hands of the Commissioner. At a minimum the Commissioner should be bound by the decision until it is withdrawn.²¹⁸

In a concurring opinion to a 1945 Supreme Court case, Mr. Justice Frankfurter asserted that the Tax Court decision should be accorded finality if the issue is one "peculiarly within the competence of the Tax Court . . . and that court has given a fair answer."²¹⁹ In a voluntary tax system the taxpayer should be able to rely on court determinations, but the Commissioner's nonacquiescences leave taxpayers in doubt as to the state of the law even after adjudicated in a court of competent jurisdiction.

Many taxpayers question the validity of the Commissioner's entire nonacquiescence program. The Commissioner has been following a practice of not appealing many of the nonacquiesced decisions.²²⁰ Thus the taxpayer is left in a quandary as to what the nonacquiescence means in a particular case, even though certainty is one of the Service's stated justifications for its acquiescence program. The theory is advanced that if the Commissioner acquiesced in a rule of law on its first decision in one of the courts, other courts might later decide related issues differently, and uncertainty would result. This argument begs the issue since the acquiescence would be binding on all Service personnel and when the decision has the effect of reducing revenue and benefiting the taxpayer, taxpayers would never press the issue in the courts again.²²¹

218. Comment, *supra* note 3, at 565.

219. *Trust of Bingham v. Commissioner*, 325 U.S. 365, 384 (1945) (Frankfurter, J., concurring). Ordinarily, tax questions as to reasonableness of business expenses are for the Tax Court as the trier of fact and even mixed questions of law and fact will be set aside by reviewing courts only when the facts fall short of meeting statutory requirements. Although a Tax Court's decision is to be given great weight by the appellate court, a question of law is reviewable on appeal. *Id.* at 370-71.

220. The Office of Chief Counsel provided the following information regarding the record fifty-three nonacquiescences in 1978:

[O]ur records indicate that 32 were appealed by the Commissioner. Appeal was recommended by the Commissioner in 12 additional cases; two of these were settled by the parties prior to the filing of an appeal; appeals of the other ten were abandoned after consultation with the Department of Justice. One of the cases on the list (*McDowell*) was appealed by the taxpayer. Certain other cases—e.g., *Keen*, *Lennard*, and *Squier*—represent instances in which a change of Service position has necessitated the announcement of a nonacquiescence to replace an earlier published acquiescence, the time for appeal, of course, having long expired.

Menzel letter, *supra* note 35.

221. When the effect of a decision is merely to reduce taxes, as opposed to shifting the burden between two taxpayers, the argument that certainty is advanced cannot explain nonacquiescence, for if the Commissioner acquiesced, that is-

The practical effect of binding the Commissioner to an interpretation is the possible impact upon the efficient collection and maximization of federal revenue.²²² While Congress created the Tax Court to lessen the financial burden of judicial review,²²³ the Commissioner's policy of nonacquiescence effectively negates that advantage. Even if certiorari were to be granted, the additional delay and expense would probably be too much for the average taxpayer.²²⁴

The Commissioner has a responsibility to treat the identically situated taxpayers consistently.²²⁵ This duty should not be ignored simply to permit the Service an additional chance to win a contested point of law.²²⁶ Inconsistency in the treatment of taxpayers adversely reflects on the "stability and rationality" of the tax system,²²⁷ while consistency has the opposite effect.²²⁸ Thus, notwithstanding the limitation of applicability of a private ruling to the taxpayer to whom issued, another taxpayer is entitled to have his request governed by the same standard of equality and fairness.²²⁹ An example of inconsistent treatment occurred in 1965 when a company sought the same favorable treatment afforded the only competing producer of the type of device affected by a Service ruling.²³⁰ The Court of Claims noted that the plaintiff had promptly asked for its own ruling, and yet the Service refused to act for well over two years.²³¹ Since the Service provided the competitor a favorable ruling after only two days of deliberation, a

sue would never be litigated again. See *New Developments*, *supra* note 19, at 58.

222. deY. Manning, *supra* note 105, at 360-61.

223. Note, *supra* note 15, at 415.

224. *Id.*

225. The Second Circuit stated:

[T]he Commissioner has a duty of consistency toward similarly situated taxpayers; [and cannot concede a point of law] . . . in one case and, without adequate explanation, dispute it in another having seemingly identical facts . . . That the Commissioner's seeming inconsistency may have arisen from the right hand's ignorance of the posture of the left is little solace to taxpayers . . . disadvantaged by the discrimination . . .

Sirbo Holdings, Inc. v. Commissioner, 476 F.2d 981, 987-88 (2d Cir. 1973).

226. Note, *supra* note 53, at 618.

227. *Id.* at 619.

228. According to Nevitt, "[o]ne of the main reasons that our system of income taxation works successfully is the general attitude of most taxpayers that they do not mind paying taxes so long as everyone else is similarly taxed." Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311, 312 (1956).

229. Calechman, *supra* note 9, at 122.

230. *International Bus. Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966).

231. *Id.* See also Calechman, *supra* note 9, at 122-23.

standard of equality and fairness required similar treatment for the plaintiff. Then-Chief Counsel Hauser stated: "it must be kept in mind that it is the responsibility of the Service to assure uniformity in treatment to taxpayers . . . [However,] it must also be remembered that it is the responsibility of the Service to protect the national revenue."²³² Yet a uniform interpretation of tax laws is more important than the Commissioner's insistence on protecting the revenue.²³³

The rationale usually used to support administrative rulings, in general, is that they are official pronouncements by the experts charged with the proper administration of the law. But "proper administration" should connote an impartial construction—not one which is always favorable to one side.²³⁴ As Mr. Justice Frankfurter wrote, "[e]ven tax administration does not as a matter of principle preclude considerations of fairness."²³⁵ The policy of nonacquiescence enables the Commissioner to press further "his unfair advantage in tax litigation."²³⁶ Although the Service claims that it will desist after two adverse decisions, experience has shown a great reluctance to give in when a large amount of revenue is at stake. This attitude has been characterized as a "soak-the-taxpayer" policy based on a devotion to dollars rather than principles of law or equity.²³⁷

The taxpayer is placed in the dilemma of having to predict the position the courts will take. The court will weigh whether equities lie with enforcing the right of the citizen to expect that his government will "always be a gentleman," or with the need for the government to protect the federal treasury. When, in a 1951 case, the taxpayer relied upon the courts' interpretation of the law, representations by the Commissioner, and apparent acceptance by Congress, the court held that "[t]axpayers expect, and are entitled to receive, ordinary fair play from tax officials."²³⁸ If taxpayers do not believe that their tax will be fairly assessed by the Service, the

232. Hauser, *Litigation Policy of the Chief Counsel in Civil Tax Cases*, 14 TAX EXECUTIVE 218, 227 (1962). In support, Marcossion writes: "No matter how strongly one may feel that construing tax legislation is part of the judicial process, the fact remains that the Supreme Court itself feels . . . a more practical approach [ie: fiscal necessity?] must be made by the courts to tax laws than to other statutes." Marcossion, *supra* note 95, at 174.

233. Herzberg, *supra* note 175, at 164; Comment, *supra* note 14, at 280; see generally Nash, *What Law of Taxation?*, 9 FORDHAM L. REV. 165 (1940).

234. Cole, *supra* note 165, at 569.

235. *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 297 (1945).

236. In the event of repeated defeats, the Commissioner continues to persist in urging upon the courts the Service's interpretations. Comment, *supra* note 14, at 278.

237. Surrey, *supra* note 78, at 399; Comment, *supra* note 14, at 278.

238. *Stockstrom v. Commissioner*, 190 F.2d 283, 289 (D.C. Cir. 1951).

voluntary compliance system will fail: the taxpayer who loses faith in the system will seek ways to avoid his fair burden of taxation.²³⁹ Thus, it is questionable whether the Commissioner's non-acquiescence policy is calculated to comport with high taxpayer confidence in the Service.²⁴⁰

Most taxpayers cannot afford the expense of contesting the Commissioner's construction in court. Furthermore, the realization that they are the victims of a policy antagonistic to their best interests will neither stimulate the attitude of voluntarism nor foster a spirit of patriotism on their part when they submit their return. Without that cooperation, the cost of collection will increase and revenues will fall.²⁴¹ Possibly the loss will exceed that which would have been experienced if a more even-handed approach to tax administration was taken.

IV. RECOMMENDATIONS

Tax critics have expressed much displeasure with the Commissioner's nonacquiescences which are coupled with a decision not to appeal. "It seems incongruous to allow the Commissioner to refuse to accept a decision, and yet not require him to appeal."²⁴² They state that if the Commissioner does not appeal, the decisions should be binding in the future.²⁴³ By not being required to appeal, the Commissioner is able to maintain a position inconsistent with court precedents, Congressional intent, and even Treasury Department rules and regulations.²⁴⁴ Thus, "[t]o this extent the Commissioner, for all practical purposes, stands above the courts and exercises his own judicial function."²⁴⁵ However the commissioner asserts that the "nonacquiescence, no appeal" policy is justified by the limited availability of Supreme Court review.²⁴⁶ According to Former Chief Counsel Uretz, it is only on "rare occasions [that] the Service will issue a nonacquiescence but not appeal a decision. It is our policy to avoid this equivocal action

239. Comment, *supra* note 14, at 280.

240. *Id.* at 274.

241. A study entitled, "Estimates of Unreported Income on Individual Tax Returns," conducted at the Commissioner's request concluded that in 1976 individuals failed to report \$75 to \$100 billion of income from legal sources and \$25 to \$35 billion from criminal activities in narcotics, illegal gambling, and prostitution. News Release, I.R.-2159 (Aug. 31, 1979).

242. Comment, *supra* note 14, at 277; accord, Comment *supra* note 3, at 558; see also Herzberg, *supra* note 175, at 164; New Developments, *supra* note 19, at 58.

243. Herzberg, *supra* note 175, at 164.

244. Comment, *supra* note 14, at 277.

245. *Id.* at 277-78.

246. Comment, *supra* note 14, at 280; see also notes 2, 57 & 135 *supra*.

whenever possible."²⁴⁷

It has been suggested that the Commissioner either "take every appeal possible from the first judicial determination of the issue or publicly acquiesce in the decision."²⁴⁸ The taxpayer's probability of encountering a changed rule more than once would then be limited to those cases where the Supreme Court overrides the Commissioner's acquiescence. The appeal-or-acquiesce policy would also answer the taxpayer's complaint on maximization of tax revenues.²⁴⁹

On the other hand, if the Commissioner is incapable of exercising rule-making powers impartially, reorganization may be called for.²⁵⁰ More objective application of the tax laws would result if regulations were not written and promulgated by the Commissioner, but rather by an administrative body which would include representatives of taxpayers, practitioners, and the Congress.²⁵¹ In view of the large number of cases handled by the Tax Court and the Supreme Court's reluctance to review tax cases, it has been recommended that greatly increased review of tax cases by the Supreme Court should be coupled with legislative denial of the Commissioner's authority to disregard unreviewed appellate court decisions. While this would lead to greater uniformity, it would make the Supreme Court the de facto arbitrator of all tax controversies, for a denial of certiorari would be equivalent to a decision on the merits.²⁵² This would also be a drastic departure from the present meaning assigned to the denial of certiorari.²⁵³

One writer raises the question of whether or not the present court setup for tax cases is antiquated.²⁵⁴ He notes that other countries have taken tax cases out of the ordinary courts and have established separate courts which "can act more speedily and with more intimate knowledge of economic facts."²⁵⁵

By far the most viable solution is the establishment of a United States Tax Court of Appeals which would have exclusive intermediate appellate jurisdiction over all civil tax matters. The existence of such a court would alleviate the need for nonacquiescence in cases where appeal was not available due to congested court cal-

247. Uretz, *supra* note 17, at 143.

248. New Developments, *supra* note 19, at 138.

249. *Id.*

250. R. PAUL, *supra* note 7, at 667.

251. Herzberg, *supra* note 175, at 162.

252. Comment, *supra* note 46, at 723 n.58; *see also* note 266 & accompanying text *infra*.

253. *See* note 201 *supra*.

254. A. HERZBERG, SAVING TAXES THROUGH CAPITAL GAINS 418-19 (1957).

255. Herzberg, *supra* note 175, at 164.

endards,²⁵⁶ or the unavailability of Supreme Court review.²⁵⁷

The establishment of a court of tax appeals has been recommended and discussed for more than forty years²⁵⁸ and has been considered during the current session of Congress.²⁵⁹ In each version of the bill, sitting judges²⁶⁰ would be appointed who would continue to serve as a judge on the circuit from which they were appointed.²⁶¹ The senate report notes that reassignment of judges already sitting was in recognition of the fact that 152 new federal judgeships just been created a year earlier in the Omnibus Judgeships Act,²⁶² and the need to avoid creation of a "specialist" court out of touch with other general areas of the law. At the same time, it would give the judges appointed to the court an opportunity to develop a special understanding and appreciation of tax matters.²⁶³ If uniformity is the primary goal, then the creation of a single court of tax appeals becomes a compelling alternative.²⁶⁴ The fear expressed that a specialized court would become unduly receptive to the Commissioner's own viewpoint would be mitigated by the concurrent service on the federal circuit courts, thus encouraging a generalist's background and limiting the tour of duty

256. Comment, *supra* note 14, at 279.

257. SENATE REPORT, *supra* note 12, at 3 n.4; *see also* note 135 *supra*.

258. SENATE REPORT, *supra* note 12, at 2. Judge Traynor in 1938 and Dean Griswold in 1944 recommended that the appeal of all tax cases heard in the Tax Court and district courts be taken to a new tribunal. *See, e.g.,* Chaplin & Brown, *A New United States Court of Tax Appeals: S. 678, 57 TAXES* 360 (1979); Griswold, *supra* note 209; Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975); Pope, *A Court of Tax Appeals; A Call for Reexamination*, 39 A.B.A. J. 275 (1953); Surrey, *supra* note 78; Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—a Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938); Comment, *supra* note 14.

259. S. 1691, 96th Cong., 1st Sess. (1979); H.R. 4044, 96th Cong., 1st Sess. (1979). S. 1691 was formerly title IV of S. 1477, a bill which would also create a new Court of Appeals for the Federal Circuit formed by combining the present Court of Claims and Court of Customs and Patent Appeals. Both S. 1477 and S. 1691 were introduced by Senator Kennedy. Walker, *Chairman's Report*, 33 TAX LAWYER 1, 3 (1979).

260. The Senate bill calls for 11 judges to be appointed, one from each of the U.S. Circuit Courts of Appeals. S. 1691, 96th Cong., 1st Sess. § 101(b). The House bill would add a twelfth from a new appellate court called the Court of Appeals for the Federal Circuit. H.R. 4044, 96th Cong., 1st Sess. § 401(a). The Section of Taxation of the American Bar Association would prefer the traditional manner in which appointments are made by the President with the consent of Congress. Walker, *supra* note 259, at 3; ABA Panel Discussion, *supra* note 50, at 7.

261. SENATE REPORT, *supra* note 12, at 6. The judges would rotate on a periodic basis. ABA Panel Discussion, *supra* note 50, at 16.

262. Omnibus Judgeships Act of 1978, 28 U.S.C.A. § 133 (Supp. 1978); SENATE REPORT, *supra* note 12, at 5.

263. SENATE REPORT, *supra* note 12, at 5.

264. Comment, *supra* note 46, at 724.

served.²⁶⁵

As contrasted with the dozen or so tax cases the Supreme Court hears, current estimates are that initially between 400 and 500 cases would be handled annually by the new appellate court.²⁶⁶ The Court of Claims jurisdiction over tax matters would be eliminated.²⁶⁷ Although the decisions of the new court would be subject to review by the Supreme Court on certiorari, such review would continue to be a rare occurrence.²⁶⁸

During the course of hearings on the Senate bill, a large number of witnesses testified²⁶⁹ and, with few exceptions, most were enthusiastic in their support of the proposed new court.²⁷⁰ Commissioner Kurtz had earlier lent his support to the proposal,²⁷¹ but when asked specifically whether or not the Service

265. The Senate version calls for a term of three years. S. 1691, 96th Cong., 1st Sess. § 101(b) (1979). The House bill specifies a term of six years. H.R. 4044, 96th Cong., 1st Sess. § 401(b) (1979).

266. This estimate of 400 to 500 cases annually is based on a review of tax cases: (1) filed in the Court of Claims, (2) appealed from district courts, and (3) appealed from the Tax Court, for the period 1975 to mid-1979. Since a court case may involve several taxpayer-litigants, the Committee adjusted the estimate upward by using a conversion factor of 87% arrived at by an actual count of a small sample of the cases. SENATE REPORT, *supra* note 12, at 4 & n.5.

267. *Id.* at 2. The Court of Claims is essentially a one-level, one-shot court. In the past five years only one case from that tribunal has been heard on appeal by the Supreme Court. ABA Panel Discussion, *supra* note 50, at 20.

268. SENATE REPORT, *supra* note 12, at 3.

269. The Treasury position was presented by John M. Samuels, Tax Legislative Counsel:

On balance, the Treasury and the Internal Revenue Service believe that the advantages of a single court of tax appeals outweigh its disadvantages. We believe a single court of tax appeals would provide for earlier resolution of tax issues, thereby mitigating the delay, uncertainty and disparate treatment that occurs under the present system.

[1979] FED. TAX COORD. 2D, WEEKLY ALERT (R.I.A.) 349.

Others testifying included: Senator Kennedy, the bill's sponsor; Maurice Rosenberg, Assistant Attorney General for Judicial Improvement; Erwin N. Griswold; Mortimer M. Caplin; Donald C. Alexander; Randolph W. Thrower; Charles M. Walker, on behalf of the American Bar Association; James B. Lewis; Meade Emory; Robert E. McQuiston, Philadelphia Bar Association; Sharon L. King, Chicago Bar Association; Donald F. Wood, Houston Bar Association; David G. Glickman, Texas Bar Association; and Vester T. Hughes, Jr. 125 CONG. REC. D1478 (daily ed. Nov. 2, 1979).

270. The structure and organization of the proposed new court caused it to receive the broad, bipartisan support not given previous proposals for a tax court of appeals. SENATE REPORT, *supra* note 12, at 4.

271. The Commissioner stated:

Sitting where I do, I am in favor of the single court because I put a heavy value on certainty. It is not healthy for the Service to continue litigating cases and requiring taxpayers to go through the courts after other courts have already decided that the taxpayers should win.

would abandon nonacquiescences if the Court of Tax Appeals were to come into being, Commissioner Kurtz hedged: "certainly there would be less of a tendency and maybe no tendency at all . . . to ignore decisions of the single court of tax appeals. Except in very rare cases that would go to the Supreme Court, those decisions will represent the final decision on that issue."²⁷² Yet the Chairman of the A.B.A. Section of Taxation Committee on Court Procedure has taken a contrary view:

[B]ut I am prompted to ask this: Will creation of this new court really remove from our vocabulary that dirty word, nonacquiesce? In short, will the Service accept and follow every decision of this new court and not preserve the issue for reconsideration, even though, in the Service's view, the decision is clearly wrong. . . .

I submit that it won't. . . . We've all had experience with the Service during our professional lifetimes and we know it is not likely that the Service will abandon a position because of a decision that they think is wrong or should be limited to its facts.²⁷³

The prospect of a single national court of tax appeals holds promise of complete elimination of any remaining rationale for the nonacquiescence program. Whether or not the Service concurs is another matter.

The demise of the nonacquiescence program should be tied, legislatively, to the creation of the new tax tribunal. An amendment to the proposed Tax Court Improvement Act²⁷⁴ which would impose appropriate restrictions on the nonacquiescence program may be necessary. The amendment should provide that: (1) the Commissioner may only issue a nonacquiescence after having decided to appeal the Tax Court decision to the United States Court of Tax Appeals, and (2) representational expenses incurred in the Tax Court be extended to successful taxpayer litigants and a suit to contest a nonacquiescence be considered vexatious *per se*.

V. CONCLUSION

The Commissioner's nonacquiescence program is an anachronism that has outlived its usefulness. It does not serve the original purpose for which it was initiated in 1924; that of informing the victorious taxpayer as to whether an appeal was or was not contemplated. Nor does it contribute to certainty in tax planning because

It is something we don't like to do. It is a burden on taxpayers and there's little to justify it, except that, given the present system and our faith that the law will move in the right direction, we have some obligation to litigate further when we feel decisions are clearly wrong.

ABA Panel Discussion, *supra* note 50, at 13.

272. *Id.* at 29.

273. *Id.* at 10.

274. S. 1691, 96th Cong., 1st Sess. (1979).

of the equivocal manner in which the program is administered. Not only may the Commissioner's position today change tomorrow, but also we may find out tomorrow that today's position was retroactively reversed.

It would appear, as one author has suggested, that the Commissioner has indeed abused his administrative discretion in applying the acquiescence procedures.²⁷⁵ It is particularly anomalous that the rate of nonacquiescence—in 1978 over half of all cases lost by the Service—should accelerate so long after the original reason for the program has faded away. Secondly, the program is the antithesis of the self-assessment theory upon which the U.S. tax system is based. A wise policy of tax administration must include the nurturing of a willing attitude among taxpayers and be calculated to impress upon them the seriousness of their obligation.²⁷⁶ As the Service points out, a voluntary system can only be successful if the public image is a favorable one.²⁷⁷

The creation of a separate court of tax appeals would eliminate appellate conflict since there would be only one court applying a nationally uniform tax law to all taxpayers.²⁷⁸ It would reduce the amount of tax litigation, provide for more certainty, and speed resolution of doubtful issues.²⁷⁹

275. The Service must take steps to assure the public that it approaches problems objectively, with a greater devotion to principles of law than to revenue. Comment, *supra* note 14, at 280.

276. There has developed a tendency to mitigate the blame attributed to the Service through the recognition that at times it is the taxpayer that may be at fault. Surrey, *supra* note 78, at 399.

277. Because it is operated as a self-assessment system, public confidence in the good faith of the government is more essential in tax administration than in any other governmental function and enforcement activities should be directed with this focus in mind. Comment, *supra* note 14, at 274.

278. Note, *supra* note 15, at 415.

279. ABA Panel Discussion, *supra* note 50, at 15.