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THE CHIEF COUNSEL'S POLICY REGARDING ACQUIESCENCE AND NONACQUIESCENCE IN TAX COURT CASES††

LESTER R. URETZ†

It has been the practice of the Internal Revenue Service to publish periodically in the Internal Revenue Bulletin its determination to acquiesce or nonacquiesce in United States Tax Court decisions which are unfavorable to the Service. The Service continues the program because it is felt to make some contribution to sound tax administration and to help the tax practitioner. The processing and approval of these recommendations of acquiescence or nonacquiescence are under the jurisdiction of the Office of the Chief Counsel and the purpose of this article is to set forth the Chief Counsel's policy regarding acquiescence and non-acquiescence.

The acquiescence program has sometimes been misunderstood—which is not entirely surprising in view of the fact that the original reason for beginning the program has long since vanished. Historically, the practice of acquiescing or nonacquiescing in Tax Court cases decided against the Government began in 1924, when the Tax Court was known as the Board of Tax Appeals. At that time there was no procedure for direct appeal by either the taxpayer or the Government from the Board to the circuit courts. If the taxpayer lost, he could pay the deficiency found by the Board and bring suit in a district court or the Court of Claims to recover the amount paid. If the Government failed to receive a favorable finding for any part of the deficiency, it could still bring suit within one year to collect the deficiency disallowed by the Board. Obviously, taxpayers who were successful before the Board were interested in knowing whether the Commissioner would acquiesce in the Board's decision without having to wait a year. Consequently, in 1924 the following announcement was published in the *Cumulative Bulletin*:

. . . 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

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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.¹

This announcement of the manner in which an acquiescence should be used in disposing of other cases was restated in positive fashion the following year in the *Cumulative Bulletin*:

Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases before the Bureau.²

The Revenue Act of 1926 provided the present procedure for direct appeal to a court of appeals. Initially the Commissioner and the taxpayer were allowed six months for appeal, but this was changed in 1932 to allow only three months. However, even after these changes, which made publication of acquiescences or nonacquiescences before the appeal time had run most unlikely, the Service continued the publication practice.

In 1954 additional language cautioning against undue reliance upon acquiescences and extending them beyond their proper scope was added to the *Cumulative Bulletin* statement, so that it now reads:

Actions of acquiescences in adverse decisions should be relied on by Revenue officers and others concerned as conclusions of the Service only as to the application of the law to the facts in the particular case. Caution should be exercised in extending the application of the decision to similar cases unless the facts and circumstances are substantially the case, and consideration should be given to the effect of new legislation, regulations, and rulings as well as subsequent court decisions and actions thereon. Acquiescence in a decision means acceptance by the Service of the conclusion reached, and does not necessarily mean acceptance and approval of any or all of the reasons assigned by the court for its conclusions.³

For further explication of the reasons for publishing acquiescences

1. III-2 CUM. BULL. iv (1924).
2. IV-1 CUM. BULL. iv (1925).
3. 1954-2 CUM. BULL. 3.

and nonacquiescences, their meaning and the process by which the Service decides which of the two actions to take, it is necessary to go beyond this history. Both the Service's overall publication program and the goals of its litigation policy must be considered.

First, acquiescences are neither designed nor intended to be definitive statements of the Service's interpretation of the law; there are other elements of the publication program far better suited to this purpose. Regulations, of course, are the most basic source. They provide administrative interpretations of the statutes and, in the case of legislative regulations, they represent detailed rules having the effect of law.

Although regulations can be changed retroactively, it is the general policy of the Service and Treasury to effectuate only prospectively amendments which are to the detriment of taxpayers. On the other hand, changes which liberalize or clarify are generally made retroactive. Accordingly, regulations may be relied upon both in planning transactions and in disposing of current disputed cases.

Voluminous and detailed as they are, regulations cannot supply all the needed—or at least desired—interpretations of our complex tax laws. The publication of Revenue Rulings and the issuance of letter rulings and determination letters fill this further need. Both types of rulings interpret the law as applied to a particular set of facts. The Service's legal conclusions are carefully stated, and Revenue Rulings, in particular, usually contain an explicit analysis and statement of authorities supporting the conclusions. Letter rulings and determination letters are issued in response to taxpayers' requests for a statement of the Service's position on the facts of their transaction. Extensive Revenue Procedures have been issued from time to time by the Service, spelling out the circumstances in which letter rulings and determination letters will be issued, and procedures to be followed in requesting such rulings.⁴

As is true of regulations, letter rulings and determination letters may be relied upon by the taxpayers to whom they are issued. Thus, Revenue Procedure 67-1 states that while a letter ruling, except to the extent incorporated in a closing agreement, may be revoked or modified at any time, nonetheless:

Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued or to a taxpayer whose tax liability was directly involved in such ruling if (1) there has been no misstatement or omis-

4. Rev. Proc. 67-1, 1967-1 CUM. BULL. 544; Rev. Proc. 67-2, 1967-1 CUM. BULL. 555; Rev. Proc. 67-3, 1967-1 CUM. BULL. 560; Rev. Proc. 67-4, 1967-1 CUM. BULL. 565.

sion of material facts, (2) the facts subsequently developed are not materially different from the facts on which the ruling was based, (3) there has been no change in the applicable law, (4) the ruling was originally issued with respect to a prospective or proposed transaction, and (5) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment.⁵

The same standards apply to determination letters.

Although letter rulings may not be relied upon by taxpayers not involved in the ruling, it is the Service's policy to publish significant precedential rulings as Revenue Rulings and these may be relied upon by all taxpayers.⁶

The rulings program of the Service is very substantial. In 1967, 468 Revenue Rulings were published, an increase of twenty-two per cent over 1966, and the publication rate in 1968 is even higher, with a total of 343 Revenue Rulings published by mid-year. Over 20,000 private letter rulings and over 40,000 determination letters were issued in fiscal 1968.

This immense publication and rulings program encompasses regulations, Revenue Rulings, letter rulings, and determination letters, all of which are intended for taxpayer reliance. In contrast, published acquiescences are not intended to be relied upon by taxpayers in tax planning. The Service can and does revoke an acquiescence and substitute non-acquiescence retroactively. For example, Revenue Ruling 67-402⁷ declares that stock issued by a corporation in payment of its salary obligations to shareholder-employees represents gross income to them where their proportionate stock interests are not altered. In accordance with this conclusion a prior acquiescence in a 1954 Tax Court decision⁸ was withdrawn and a nonacquiescence was substituted and given retroactive

5. 1967-1 CUM. BULL. 553.

6. Rev. Proc. 67-1, 1967-1 CUM. BULL. 544, 554 states:

With respect to Revenue Rulings published in the Internal Revenue Bulletin, taxpayers generally may rely upon such rulings in determining the rule applicable to their own transactions and need not request a specific ruling applying the principles of a published Revenue Ruling to the facts of their particular cases where otherwise applicable . . . Revenue Rulings published in the Internal Revenue Bulletin ordinarily are not revoked or modified retroactively.

Since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. Furthermore, they should consider the effect of subsequent legislation, regulations, court decisions, and Revenue Rulings.

7. 1967-2 CUM. BULL. 135.

8. Deloss E. Daggitt, 23 T.C. 31 (1954), *acquiesced in*, 1955-1 CUM. BULL. 4.

effect. This instance may be contrasted with that in which the acquiescence in the 1933 case of *Pittsburgh Athletic Co.*⁹ was withdrawn. That case had held that the cost of a one-year baseball player contract with a standard renewal option may be deducted in full in the year paid or accrued. Along with two 1935 court of appeals decisions¹⁰ on the same point, the case was accepted by the Service in published rulings.¹¹ In 1967 the matter was reexamined. Revenue Ruling 67-379¹² announced that the Service would no longer treat the purchase price or other acquisition cost of a baseball player's contract as an ordinary and necessary business expense. The earlier published rulings were revoked and a nonacquiescence replaced the prior acquiescence in the *Pittsburgh Athletic* case. However, because the issue had been covered in prior published rulings, the new position, including, in effect, the new non-acquiescence, was given prospective effect only.

There has been relatively little litigation on the question of retroactive revocation of an acquiescence, but the question did reach the Supreme Court in 1965 in *Dixon v. United States*.¹³ In 1943 in the case of *George Peck Caulkins*,¹⁴ the Service had litigated the issue of whether gain realized by a purchaser on retirement of an "accumulative installment certificate" was ordinary income or capital gain. The certificates were debt instruments, issued by Investors Syndicate of Minneapolis in registered form, under which the taxpayer-lender made, for example, ten annual payments of 1,500 dollars each to Investors Syndicate, the borrower, in return for a lump-sum 20,000 dollar payment in the tenth year. The Tax Court in *Caulkins* held that the taxpayer's gain was taxable as capital gain under section 117(f), relating to retirement of bonds, rather than as ordinary interest income. After the Sixth Circuit affirmed the Tax Court, an acquiescence was published in 1944, superseding a 1943 nonacquiescence. However, in 1955 the *Caulkins* acquiescence was withdrawn in Revenue Ruling 55-136¹⁵ and nonacquiescence was reinstated. The Ruling noted that "there is no logical basis in fact or in law to distinguish the discount element in the accumulative installment certificate involved in the *Caulkins* case from the original discount element

9. 27 B.T.A. 1074 (1933), *acquiesced in*, XIV-2 CUM. BULL. 17 (1935).

10. *Commissioner v. Chicago Nat'l League Ball Club*, 74 F.2d 1010 (7th Cir. 1935), and *Helvering v. Kansas City Am. Ass'n Baseball Co.*, 75 F.2d 600 (8th Cir. 1935).

11. I.T. 2932, XIV-2 CUM. BULL. 61 (1935), and I.T. 4078, 1952-1 CUM. BULL. 39. See also Rev. Rul. 54-441, 1954-2 CUM. BULL. 101.

12. 1967-2 CUM. BULL. 127.

13. 381 U.S. 68 (1965).

14. 1 T.C. 656 (1943).

15. 1955-1 CUM. BULL. 213.

involved ordinarily in the issuance of any bonds,"¹⁶ and the new non-acquiescence was given retroactive effect except as to amounts received from the particular issuer in the *Caulkins* case on certificates which were redeemed during the period in which the prior acquiescence was outstanding.

Mr. Dixon was a member of a partnership which in 1952 had purchased substantial amounts of short-term original issue discount notes which it had sold after six months, realizing gain. The partners reported capital gains, and argued before the Supreme Court that they had relied upon the acquiescence in *Caulkins*, which was outstanding when they purchased their notes, and that the retroactive substitution of nonacquiescence for acquiescence was an abuse of the Commissioner's discretion. The Supreme Court rejected these arguments, emphasized the narrow reading which must be given to an acquiescence, and affirmed the right of the Service to revoke acquiescences retroactively.¹⁷

The suggestion has been made that the Service reconsider its traditional position and treat acquiescences like Revenue Rulings; *i.e.*, adopt the general policy that acquiescences will not be changed retroactively, so that taxpayers may rely upon them in planning transactions. Our study of this suggestion leads us to the conclusion that it should not be adopted.

One reason is that many and probably most Tax Court cases are primarily factual in nature and therefore are, in general, not proper subjects for rulings.

Furthermore, Tax Court opinions are written by the Court and reflect its analysis and interpretation of the statutes, Congressional purpose, and relevant authorities. Inevitably, even those decisions with which the Service might find itself in quite close agreement contain analytical nuances and shadings which we would not have stated in the same way. Albeit the Service may agree to bind itself when it writes and publishes a ruling, for the Service to be bound by what someone else has written would be a quite different matter. If acquiescences were to be treated as rulings there would be endless, unresolvable arguments over precisely to what the Service has agreed. Disagreement over the meaning of acquiescence in a given case, perhaps present to a minor extent under the present practice, would be expanded to an intolerable degree were acquiescences to be treated as firm bedrock for tax planning as are regulations and rulings.

16. *Id.* at 214.

17. The Court stated that the petitioner had unjustifiably extended the scope of the *Caulkins* acquiescence but that, even if the extension were assumed to be warranted, section 7805(b) of the Code sanctioned retroactive withdrawal of the acquiescences. See also *United States v. Cocke*, 399 F.2d 433 (5th Cir. 1968).

Finally, in the context of the Service's entire publication and rulings program there is simply no real need to treat acquiescences as a new class of binding rulings. As we have noted, both the Service's Revenue Ruling and letter ruling programs are very substantial and are rapidly growing more so. There seems to be no credible data to manifest any significant need which would compel expanding the acquiescence program beyond its present bounds.

Of course, to so conclude is not to foreclose use of a Tax Court case and a published acquiescence as the source of a Revenue Ruling—in which the Service will present its analysis and conclusions and, its assurance of no retroactive change. Thus, litigation occasionally is concluded prior to dissemination of the Service's technical position on an issue, and in such an instance an adverse decision can spur the issuance of a Revenue Ruling. For example, in 1966 the Tax Court held¹⁸ that a stock casualty insurance company taxable under section 831 was not required to reduce its investment expenses by the amount of such expenses attributable to tax-exempt interest and dividends subject to the dividends-received deduction. Acquiescence was announced in 1967,¹⁹ and in 1968 a Revenue Ruling²⁰ was published, stating that the Service would apply the rationale of that case to life insurance companies taxable under section 802 and mutual casualty insurance companies taxable under section 821 as well as to section 831 stock casualty companies.

In preparing actions on adverse Tax Court decisions our attorneys, where appropriate, may recommend that consideration be given to publication of a Revenue Ruling. Such recommendation may also be initiated by the Technical Groups in the Commissioner's Office. Although it is the Chief Counsel who, by delegation from the Secretary of the Treasury and the General Counsel, is entrusted with the decision on acquiescence in an adverse Tax Court decision, the acquiescences and nonacquiescences are published through the regular machinery of the Assistant Commissioner (Technical). In this way an additional opportunity is afforded to spot and consider those cases where it may be necessary to further clarify the Service position by a published Ruling. In this manner, for example, the decisions of the Tax Court in *Gunderson Bros. Eng'r Corp.*²¹ and *Luhring Motor Co., Inc.*²² prompted Revenue Ruling 67-316²³ which gives Service position on whether, and in what circumstances, finance or carrying charges included in an installment con-

18. Allstate Fire Ins. Co., 47 T.C. 237 (1966).

19. *Id.*, acquiesced in, 1967-1 CUM. BULL. 1.

20. Rev. Rul. 68-103, 1968-1 CUM. BULL. 324.

21. 42 T.C. 419 (1964), acquiesced in, 1967-2 CUM. BULL. 2.

22. 42 T.C. 732 (1964), acquiesced in, 1967-2 CUM. BULL. 3.

23. 1967-2 CUM. BULL. 171.

tract of sale should be accrued ratably over the period of the contract.

One should not conclude that publication of acquiescences must be delayed while a clarifying Revenue Ruling is prepared or until a final decision is made that publishing a ruling will be unnecessary. It has always been Service policy to announce acquiescences and nonacquiescences at the earliest practicable date. While a request from the Assistant Commissioner (Technical) can and occasionally does delay publication, the normal practice is to announce the acquiescence or nonacquiescence immediately. However, there are some reasons which do normally delay announcement. Approval of an acquiescence may be deferred if the taxpayer is appealing a related issue. Decisions involving a novel issue or an issue in which the Service position is still in the process of formulation may also require a delay in approving acquiescence or nonacquiescence. For example, a proposed Revenue Ruling on a related issue or possible changes to the relevant regulations may be under consideration. Furthermore, under a current practice, even though a nonacquiescence has been approved, it will not be published while the case is actually on appeal. The mere fact of appeal by the Government is clear notice that it does not accept the Tax Court's decision.

Since acquiescences lack the force of rulings for planning purposes, one may well query what they mean, of what use they may be and why their promulgation is continued.

As with most matters in the tax field, the answers—or at least reasonably full answers—cannot be stated as briefly as the questions. The essential point is that the positive reasons for our acquiescence policy, as distinguished from explanations of why it is not something else, flow directly from our policies for handling tax controversies.

A revenue system the size of ours inevitably generates a considerable number of disputed cases. Over 105,000,000 tax returns of all types are now filed each year. In fiscal year 1968, 2,903,721 returns were examined by the Service—2,156,954 by office audit and 746,767 by field audit. Additional tax, penalties, and interest assessed amounted to more than 2.9 billion dollars. Of course, not all examinations result in deficiency adjustments—many returns are closed without change or taxpayer claims may be allowed. However, in fiscal 1967, over 1,500,000 returns were changed and tax deficiencies proposed.

Most of these disputes, particularly the smaller ones arising from office audit, are disposed of at the examination level. Nonetheless, 40,000 cases went from field and office audit to the district conference level in 1968. Almost 25,000 nondocketed income, estate, and gift tax cases went to the appellate conference level. Six thousand, three hundred cases were petitioned to the Tax Court and 1,400 refund suits were filed.

That this heavy volume of tax controversy be resolved by a fair, efficient means short of litigation is obviously essential. Our tax system would fail if each potential dispute between the Service and a taxpayer were treated as unique, capable of being resolved only by a court. Fortunately, most cases can be disposed of without litigation, and the Service feels such dispositions are fostered to a considerable extent by the existence of a large body of decided cases which may be relied upon by Service personnel and taxpayers in handling other potential cases. This body of precedent is provided by acquiesced cases.

Very few, if any, of these acquiesced cases involve purely legal issues on which there is no stated Service position expressed in the regulations or a Revenue Ruling. In general, it is not the Service's policy to attempt to use acquiescences to make public its position on legal questions; regulations and Revenue Rulings serve that function. Nonetheless, even when the basic interpretations are known, the problem of applying the law to a great variety of divergent fact situations remains. Often an acquiesced-in case or a series of acquiesced-in cases can be found the facts of which are very similar to the taxpayer's situation. The acquiescence provides a basis for settlement of a potential controversy and obviates litigation on the same facts and theory as the decided cases.

Frequently the facts of a potential case are distinguishable from those of the available acquiesced cases. Few Code sections are so broad that they automatically produce the same results regardless of the facts in a particular case. But here again, the body of acquiesced cases provides taxpayers and the Service with a starting point for evaluating the probable outcome of litigation and for considering the possibilities of a mutually agreeable, and realistic settlement. As a consequence of the existence of acquiescences some unknown but probably significant number of possible disputes are not raised on audit and settlement of a portion, at least, of the tax cases which do arise is promoted by the acquiescence program. In short, the acquiescence program, by providing an additional tool, makes a strong contribution to keeping tax controversy within manageable limits.

Another principal goal of the Service's litigation policy, and, indeed, of the Service's whole concept of tax administration is achievement of uniformity and consistency in dealing with taxpayers. The acquiescence program is an integral part of this overall effort. All Service personnel, agents, conferees, trial attorneys, and technical specialists, are required to follow outstanding acquiescences and nonacquiescences in disposing of other cases.

To summarize, an acquiescence is not a Revenue Ruling. It is not subject to the same general policy against retroactive change that a

Revenue Ruling is, and should not be relied upon as one would rely upon a Revenue Ruling or a letter ruling in planning transactions. Tax planning may be improved by use of the additional information provided, but the import of that information must be carefully kept in mind. An acquiescence simply means that the Service considers relitigation of the same issue on the same facts as found by the Tax Court, and on the same legal theory on which the case was decided to be unwarranted; it represents the Chief Counsel's judgment that under the present state of the law further litigation of the issue on the same facts and theory, would not be successful. It does not necessarily express the Chief Counsel's judgment that the Tax Court was correct, or that the decision will prove helpful in the administration of the tax laws but represents, instead, a recognition of the reality that further litigation will be wasteful and unproductive. However, a nonacquiescence portends continued litigation of cases involving the same facts and legal theories as were presented in a given case.

Moreover, occasionally an acquiescence is footnoted in the *Internal Revenue Bulletin* as an "acquiescence in result only." This designation indicates the Service's disagreement with at least some segment of the court's reasoning despite the Service's acceptance of the conclusion that not all of the deficiency has been sustained. The designation is intended as an admonition to employ added caution.

In evaluating the significance of an acquiescence in any particular case, cognizance must be taken of the essentially factual nature of many decisions. An acquiescence is not an averment that the Service will not litigate the same point in another case with a different set of facts. One area where difficulty has occasionally sprung from failure to perceive this point is that of substance-versus-form cases, such as those centering on dividend equivalence, sale-leaseback, or debt-versus-equity questions. In general, acquiescence in substance-versus-form cases connotes a determination by the Service that a case turns on questions of fact and does not resolve issues of law.

That acquiescences relate solely to issues and theories raised and decided in a given case and do not extend to matters which might have been raised must also be noted.

Another necessary caution is that due regard be given to subsequent developments. The significance of an acquiescence might be nullified or greatly diminished by subsequent legislation, regulations, or rulings. Later decisions on related points may breathe new life into old positions. The Service does its best to review old acquiescences and nonacquiescences which have become misleading and substitute the contrary designation, but, in any event, proper weight should be given to newer developments.

In general, the older the case and the longer an acquiescence or non-acquiescence has been outstanding, the more likely it is that new legislation, regulations, rulings, or court decisions have rendered the acquiescence or nonacquiescence obsolete.

The policies which guide decisions as to whether to acquiesce reflect the Service's 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.

Since the majority of all contested cases are essentially factual in nature the Service's strenuous efforts to settle without a Tax Court trial are not always productive. Each side may view the case differently and differ widely on estimates of the relative strengths of their positions. Also, in a number of instances settlement is impeded because the Government's position becomes akin to that of a stakeholder. For example, divorced parents may claim a dependency deduction for a child, each claiming to have supplied more than one-half the support or a buyer and seller may assert inconsistent allocations of the purchase proceeds. In such cases avoidance of a "whipsaw" effect necessitates a refusal to settle with one of the taxpayers unless a consistent settlement can be reached with the other.

These difficulties explain why a high percentage of the cases actually tried before the Tax Court are "fact" cases. Furthermore, even in cases which were originally thought to contain legal questions, decisions may hinge on the court's interpretation of the facts. Usually, although there are exceptions, the Service acquiesces in such decisions. For the most part such action reflects nothing more than a realistic 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. To some extent these acquiescences also reflect a general policy against excessive litigation. The Service is normally content to accept the Tax Court's resolution of factual questions.

The number of decisions which present questions of law is quite small. But they do occur and their importance cannot be measured by their number. Certainty as to what the law is is of prime importance to our tax system, for uncertainty can seriously thwart attainment of the goal of uniform and consistent treatment of similarly situated taxpayers.

Acquiescence-nonacquiescence policies are designed to contribute to an early resolution of disputed legal questions—so that the Government's position will either be approved and then, hopefully, followed by all taxpayers, or rejected and changed. We consciously attempt to spot the cases which present significant legal issues, insure that the position

taken in them reflects the general Service position, and bring them to prompt trial. In the event an issue is decided unfavorably in the Tax Court, the Service's position is reconsidered, and if further litigation appears warranted, the adverse decisions are nonacquiesced-in and appeals are taken. In the ideal situation,²⁴ the same issue would be presented simultaneously to several different courts of appeals, and ultimately a petition for certiorari to the Supreme Court would be filed if there were a conflict among circuits or if the question were a matter of overriding administrative importance.

Of course, not every case which arguably contains a legal issue will be tried, or appealed if the Government loses. A case with facts which cloud or distort the legal question may, if appealed or even if tried, introduce confusion instead of clarity and certainty into the law and as a result such litigation would be of little or harmful precedent value. Thus, cases which might be said to present a legal issue may, nonetheless, be settled by the Service without trial.

On rare occasions the Service will issue a nonacquiescence but not appeal a decision. It is our policy to avoid this equivocal action whenever possible. However, it may be that the record made in the Tax Court is inadequate to clearly and fairly present the issue or the court to which appeal lies may have already decided the question.

Unusual circumstances may also dictate a nonacquiescence but not an appeal. For example, *Edward P. Clay*²⁵ involved premium payments on term life insurance made by an automobile dealership where the insurance was available only to dealer-owners who owned at least a twenty per cent interest in a dealership and were actively engaged in its operation. The case was tried and briefed under then outstanding regulations, section 1.61-2(d)(2), which provided that premiums paid by an employer on policies of group term life insurance covering the lives of employees are not gross income. The question, therefore, was whether the insurance was available to Mr. Clay in his capacity as an employee or only in his capacity as a shareholder. The Tax Court's opinion in favor of the petitioner was filed on July 21, 1966. Its analysis took into consideration section 1.61-2(d)(2) of the regulations. However, on July 5, 1966, that section had been amended retroactively by Treasury

24. A recent textbook example of this procedure occurred in two cases involving the question of whether a section 355 spin-off can be accomplished with successive distributions of stock, in different tax years. The two cases were consolidated in the Tax Court which decided against the Commissioner, were then appealed to the Second and Ninth Circuits—which split—and finally were taken to the Supreme Court on certiorari. *Commissioner v. Gordon*, 391 U.S. 83 (1968), *rev'g* *Commissioner v. Gordon*, 382 F.2d 499 (2d Cir. 1967) and *aff'g* *Commissioner v. Baan*, 382 F.2d 485 (9th Cir. 1967).

25. 46 T.C. 505 (1966).

Decision 6888.²⁶ This amendment, believed by the Service to be merely interpretative of the old regulations, made it clear that premiums paid under a term insurance plan of the kind by which Mr. Clay was covered were taxable income to the insured shareholder. Under these circumstances the Service decided to nonacquiesce in the decision, but not to appeal since the court had not had an opportunity to consider the new regulations.

The Supreme Court usually does not hear appeals from the eleven courts of appeals or from the Court of Claims unless a conflict exists among the courts, but if the matter is of great administrative importance direct appeals in the absence of a conflict, even after only one court of appeals or Court of Claims decision, are possible. In recent years certiorari was granted without a conflict in *Commissioner v. Estate of Noel*,²⁷ *Commissioner v. Clay B. Brown*,²⁸ and *United States v. Cannelton Sewer Pipe Co.*²⁹ However, even given the most receptive attitude on the part of the Supreme Court on the importance of quickly achieving national uniformity in tax matters, the tremendous demands on the Court's time necessitate that many issues be resolved by the courts of appeals with certiorari granted only if a clear conflict develops.

This realization prompts the question of how long the Government will continue to nonacquiesce and appeal after it has first lost an issue in the Tax Court. Conceivably, the Service could eliminate any period of uncertainty and foster uniformity by accepting the conclusion of the first court of appeals presented with the issue. History, however, shows that the earliest decision is not necessarily the right one.

Additional litigation and appeal to one or more other courts of appeals after an initial loss will show either sufficient judicial unanimity to justify changing the Service's position or will produce a conflict requiring Supreme Court review. The "dealers reserve" issue was not resolved by the Supreme Court in *Commissioner v. Hansen*³⁰ until having been heard before the courts of six circuits. Usually, this number of circuits will not be involved before an issue is resolved. It may be stated as a general rule of thumb, to which exceptions must of necessity be made, that the Service will accept a result reached by two courts of appeals where there are no contrary appellate decisions. However, if the Service has been successful in litigating simultaneously several cases which present the same issue, decisions may result in quick succession

26. 1966-2 CUM BULL. 23.

27. 380 U.S. 678 (1965).

28. 380 U.S. 563 (1965).

29. 364 U.S. 76 (1960).

30. 360 U.S. 446 (1959).

from more than two circuits. Such was the situation in the "dealers reserve" cases.

The usual method of informing the public of the Service's decision to accept adverse appellate court decisions is to issue a Technical Information Release (T.I.R.), stating the issue and the holding of the courts of appeals and announcing that the Service will follow these decisions.³¹ If the issue was previously the subject of a Revenue Ruling, the T.I.R. will state that the Revenue Ruling is being revoked or modified.³² Limitations on the acceptance of the adverse decisions may be stated. Thus, after losing a source of income—a title passage issue—in both the Second³³ and Seventh Circuits³⁴ a T.I.R. was issued³⁵ accepting the result in "other Western Hemisphere trade corporation cases," the precise type of case involved in that litigation. After losing the *Clay Brown* bootstrap sale case in the Supreme Court a T.I.R. was issued³⁶ pointing out that the Service did not construe the decision as extending to bootstrap transactions involving excessive price.

Under present practice our acquiescence program extends only to regular Tax Court decisions; acquiescences are not published in district court, Court of Claims, or court of appeals cases or in Tax Court memo decisions. The idea of announcing acquiescences and nonacquiescences in the decisions of courts other than the Tax Court has been carefully considered and thus far rejected. Unlike the Tax Court, none of these courts is established as a nation-wide court specializing solely in tax litigation. Many of the district court decisions are written in a form that is not well suited either to an acquiescence or nonacquiescence announcement, nor for use as authority in disposing of other cases as they do not contain a discussion and analysis of the law. The lack of historical precedent for extending the program to these courts might well cause them to greet any such move with lack of sympathy and even with resentment. Finally, in recent years we have followed a policy of giving more explicit and careful consideration to whether a T.I.R. should be published after an adverse decision on a significant legal point by the Court of Claims or by a court of appeals, either in a refund or Tax Court

31. See, e.g., T.I.R. 904, dated May 17, 1967, followed by Rev. Rul. 68-212, 1968-1 CUM. BULL. 91.

32. See T.I.R. 764, dated Sept. 28, 1965, followed by Rev. Rul. 67-412, 1967-2 CUM. BULL. 317; T.I.R. 947, dated Dec. 5, 1967 and T.I.R. 970, dated Feb. 27, 1968, followed by Rev. Rul. 68-136, 1968-1 CUM. BULL. 453.

33. *Commissioner v. Pfaudler Inter-American Corp.*, 330 F.2d 471 (2d Cir. 1964).

34. *Commissioner v. Hammond Organ W. Export Corp.*, 327 F.2d 964 (7th Cir. 1964).

35. T.I.R. 603, dated June 12, 1964. See also Rev. Rul. 64-198, 1964-2 CUM. BULL. 189.

36. T.I.R. 768, dated Oct. 5, 1965. See also Rev. Rul. 66-153, 1966-1 CUM. BULL. 187.

case. The T.I.R. announcement seems the best suited vehicle for responding to the decisions of these courts.

Extension of the acquiescence program to Tax Court Memo decisions poses a closer question. The essential rationale for not doing so is that historically the Tax Court itself has regarded its memorandum opinions as pertaining to non-precedential fact cases or as involving matters well covered in regular decisions. On the other hand, it can be argued that memorandum decisions represent some precedent, even if limited, and are useful in disposing of other cases. Taxpayers and the Service cite memo decisions in their briefs. They are occasionally cited by the Tax Court in its opinions—more frequently in recent years—and have even been referred to by the Supreme Court,³⁷ although only in a footnote.

In conclusion, it may be stated that the Service remains somewhat hesitant to expand the publication of acquiescences and nonacquiescences to Tax Court memorandum decisions and opposes the expansion of publication to other courts. While the program performs a useful role within its present scope there is a nagging thought that extension would produce few meaningful results and would merely augment the ever-increasing flood of paper which threatens to submerge us all.

37. *Fidelity-Philadelphia Trust Co., Ex'r v. Smith*, 356 U.S. 274, 281 n.9 (1958).

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