UIC Law Review

Volume 9 | Issue 1 Article 18

Fall 1975

The Use of Jeopardy Assessments in Narcotics Enforcement, 9 J. Marshall J. Prac. & Proc. 262 (1975)

John H. Anderson

COMMENTS

THE USE OF JEOPARDY ASSESSMENTS IN NARCOTICS ENFORCEMENT

INTRODUCTION

In 1971 President Nixon launched a new program to control the drug traffic in the United States by coordinating the resources of Government agencies.[1] The Internal Revenue Service "Narcotics Project," which operates in 90 metropolitan areas, has assumed an especially important role in this new drug control program.[2] Internal Revenue Service agents have been working closely with local police departments, which notify the IRS whenever a suspected drug dealer is arrested. The IRS quickly prepares a large tax assessment against the alleged narcotics dealer to secure collection of projected income tax on earnings from the sale of drugs. In order to cover the assessment, the assets of the suspected dealer are immediately seized.[3] During the first two and a half years of the program about $27 million was seized and $101 million was assessed against 3,475 drug suspects.[4] Authority to make these summary seizures without any kind of prior notice is granted to the IRS under two sections of the Internal Revenue Code.

The IRS uses section 6861 of the Internal Revenue Code of 1954[5] when the circumstances indicate that a suspected narcotics

1. Special Message by President Nixon to the Congress on Drug Abuse, Prevention and Control, June 17, 1971, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RICHARD NIXON, 1971, at 740 (1972).

2. McClintick, *Taxing Tactic: IRS Swiftly Grabs Drug Suspects' Assets in Crackdown Effort*, Wall Street Journal, April 10, 1974, at 1.

3. Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Clark v. Campbell, 501 F.2d 108 (5th Cir. 1974); Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974); Lewis v. Sandler, 498 F.2d 395 (4th Cir. 1974); Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974); Hall v. United States, 493 F.2d 1211 (6th Cir. 1974); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974); Williams v. United States, 373 F. Supp. 71 (Nev. 1973); Lisner v. McCanless, 356 F. Supp. 398 (Ariz. 1973); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966); Williamson v. United States, 31 Am. Fed. Tax R.2d 800 (7th Cir. 1971); Graham, *The Narcotics Project*, THE NEW REPUBLIC 14 (Feb. 1, 1975); McClintick, *Taxing Tactic: IRS Swiftly Grabs Drug Suspects' Assets in Crackdown Effort*, Wall Street Journal, April 10, 1974, at 1.

4. Note 2 *supra*.

5. 26 U.S.C. § 6861(a) (1970):

If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, addidealer has not reported his entire income from the sale of drugs on previous returns. Section 6861 gives the IRS authority to seize a taxpayer's assets without prior notice[6] when it believes that the collection of a deficiency[7] would be jeopardized by delay.

---

tional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

6. When there is an ordinary deficiency assessment, the taxpayer has ten days after notice of the deficiency to pay the tax before the IRS can levy on his property. Since a jeopardy assessment has the force of a judgment, notice, demand and seizure may be made simultaneously without regard for the ten day period.

26 U.S.C. § 6331(a) (1970):

If any person liable to pay any tax neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expense of the levy) by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax . . . . If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

State law controls in determining the nature of the legal interest which a taxpayer has in property sought to be reached by a section 6331(a) lien. Federal law, however, determines the priority of competing liens against a taxpayer's interests as defined by state law once a federal tax lien has attached. Nevertheless, even if a tax lien has attached to a taxpayer's interest, a transfer of that attached interest by the taxpayer to a third party who takes in good faith without notice gives that transferee a claim superior to that of the Government if there has been no levy. Chicago Federal Savings and Loan Association v. Cacciatore, 25 Ill. 2d 535, 545, 185 N.E.2d 670, 675 (1962). However, if the Government has served notice of a lien *and* notice of a levy, the Government's claim will be superior to that of a subsequent transferee. United States v. Lewis, 272 F. Supp. 993, 995 (N.D. Ill. 1967).

26 U.S.C. § 6861(b) (1970):

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

A jeopardy assessment is invalid when a deficiency notice is not mailed within 60 days. United States v. Ball, 326 F.2d 898 (4th Cir. 1964). But the invalidity of one such assessment does not prevent the making of additional jeopardy assessments. Berry v. Westover, 70 F. Supp. 537 (S.D. Cal. 1947); Teitelbaum v. C.I.R., 40 T.C. 206 (1963). Thus a series of jeopardy assessments can be used to avoid the 60 day limitation and prevent access to the Tax Court until the IRS issues a 90 day letter. *See* petitioner's contentions in Mason v. Commissioner, 210 F.2d 388, 389 (5th Cir. 1954).

7. 26 U.S.C. § 6211(a) (1970):

For purposes of this title in the case of income, estate, gift, and excise taxes . . . the term 'deficiency' means the amount by which the tax . . . exceeds the excess of—

(1) the sum of

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

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

(2) the amount of rebates . . . .

Collection of a deficiency is considered in jeopardy when a taxpayer contemplates leaving the country or hiding his assets, or when the statute of limitations is about to run. Recently, however, the IRS has been using its jeopardy assessment power to seize the assets of narcotics dealers with little indication that the dealer is planning to place his assets beyond the reach of the IRS. When the broad powers to declare jeopardy and make summary seizures are used in this manner, section 6861 becomes a particularly effective means to curtail traffic in narcotics.

By another provision of the 1954 Code, section 6851, the IRS has authority to terminate the taxable year of a taxpayer and demand immediate payment of the tax for the taxable period so declared terminated.[8] Section 6851 is used to make a quick seizure of the assets of a suspected narcotics dealer because it eliminates the need to consult his prior returns to determine the amount of the deficiency. The termination assessment provision has traditionally been interpreted as requiring the IRS to make a finding that the taxpayer plans to depart quickly from the United States, to remove or conceal his property, or generally to do any act which could hinder collection of the tax. Nevertheless, the IRS has been using termination assessments against narcotics dealers whenever they are arrested and found with large amounts of cash.

Unlike the procedure for jeopardy assessments, when the IRS terminates the taxable year of a taxpayer under section 6851, there is no statutory requirement that a deficiency notice be mailed to a taxpayer.[9] The IRS has argued that the taxpayer therefore has no means of admission to the Tax Court and must either pay the deficiency and sue for a refund in the district court or wait until the end of his normal taxable year to contest the

8. 26 U.S.C. § 6851(a)(1) (1970):
If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

9. *Id.*

termination assessment.[10] There is a growing trend on the part of the courts, however, to reject this argument and to require that a deficiency notice be sent to a taxpayer who has been subjected to a termination assessment, thereby providing the taxpayer with a more immediate forum of relief.[11] Another consequence of this new trend is that if a deficiency notice is required, and the IRS fails to mail such a notice to the taxpayer, the termination assessment or levy can be enjoined under section 6213(a) of the Internal Revenue Code.[12] Section 6213(a) provides for an exception to the general section 7421(a)[13] bar against injunctions of tax assessments when a deficiency notice is required for a particular type of assessment but no such assessment is mailed.

Of even greater importance, however, is a growing willingness on the part of courts to question the very finding of jeopardy by the IRS. Whereas previously it was generally thought that courts did not have authority to review the exercise of discretion by the IRS in determining the existence of jeopardy,[14] there are some recent cases in which the finding of jeopardy is questioned, thereby opening a new avenue for relief to a taxpayer whose property has been seized under a jeopardy assessment. Many of these new decisions have resulted from litigation caused by jeopardy assessments under the IRS Narcotics Project. Before the effect of these new decisions can be evaluated, it is necessary to examine the more traditional judicial response to jeopardy assessments to show why these new decisions

10. Cases cited note 61 *infra*. *See also* 26 U.S.C. § 7422(a) (1970):

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate . . . .

28 U.S.C. § 1346(a) (1970):

The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws . . . .

11. Cases cited note 60 *infra*.

12. 26 U.S.C. § 6213(a) (1970):

Within 90 days . . . after the notice of deficiency authorized in section 6212 is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.

13. 26 U.S.C. § 7421(a) (1970):

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

14. Cases cited note 55 *infra*.

are so important and what possible consequences they may produce.

THE TRADITIONAL JUDICIAL RESPONSE TO JEOPARDY ASSESSMENTS

Despite the apparent objection of deprivation of property without a proper hearing, the Supreme Court in 1931 upheld the constitutionality of jeopardy assessments in *Phillips v. Commissioner.*[15] The Court reasoned that there was no denial of procedural due process[16] because the taxpayer had an adequate opportunity for a later judicial determination of the issue and extent of his tax liability. The Government's need to secure prompt collection of its revenue was held to justify the summary administrative seizure by jeopardy assessment.[17] This approach to the constitutional question has been dutifully followed whenever the issue is raised,[18] and it seems highly unlikely that there will be any sudden change in the position of the courts.

---

15. 283 U.S. 589 (1931).

16. The Supreme Court has recently examined the problems posed by procedural due process. In Fuentes v. Shevin, 407 U.S. 67 (1972), Florida and Pennsylvania replevin statutes, which permitted a secured installment seller to repossess goods without a hearing or judicial supervision, were held unconstitutional as violating the fourteenth amendment. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Court upheld the Louisiana sequestration statute which permitted a seller-creditor with a vendor's lien to secure a writ of sequestration and cause the sheriff to take possession of the property after bond had been filed. The sequestration writ, however, could only be issued by a judge upon the filing of an affidavit which clearly explained the facts which entitled the creditor to sequestration. The debtor was also allowed an immediate hearing after seizure. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Supreme Court held that Georgia garnishment statutes were unconstitutional because they authorized issuance of a writ of garnishment on an affidavit consisting of conclusory allegations without participation by a judge even though it was required that a double bond be posted. There was no provision in the Georgia statute for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. In fact, the debtor would not be able to challenge the garnishment until he filed a bond.

17. Phillips v. Comm., 283 U.S. 589, 595-97 (1931).

18. Bull v. United States, 295 U.S. 247, 259-60 (1935); Dyer v. Gallagher, 203 F.2d 477, 479 (6th Cir. 1953). *See also* Publishers New Press, Inc. v. Moysey, 141 F. Supp. 340, 344 (S.D.N.Y. 1956), wherein the court rejected the taxpayer's contention that his first amendment right to freedom of press was violated by a jeopardy assessment because it was forcing him to discontinue publication of his newspaper. The court did not enjoin the assessment. In Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957), the court similarly refused to enjoin a jeopardy assessment. The court rejected the taxpayer's contention that his constitutional rights to a fair trial were denied because he had no funds with which to retain competent counsel after the jeopardy assessment. In Ianelli v. Long, 487 F.2d 317 (3d Cir. 1973), a lower court's injunction of a jeopardy assessment was reversed. The taxpayer showed that a refund suit would expose him to criminal liability because he would have to file a return showing illegal sources of income. Plaintiff had contended that this was a violation of his fifth amendment right against self-incrimination. *See also* Yannicelli v. Nash, 354 F. Supp. 143 (D.N.J. 1972).

Although a challenge to the constitutionality of a jeopardy assessment will probably be unavailing, the taxpayer whose assets have been seized may stay the collection by filing a bond with the Commissioner under section 6863.[19] This remedy, however, is usually of little value because the assets of a taxpayer are seized when he learns of the assessment.[20] It will therefore be very difficult for the taxpayer to raise a bond which must equal the amount of the assessment.[21] Commercial bonding companies will be reluctant to furnish a bond to a taxpayer unless he has assets far in excess of the amount assessed.[22] The statutory provision for a stay of the assessment until the Tax Court decision becomes final, therefore, seems to be a remedy available only to those taxpayers who are still in possession of a substantial portion of their assets after the jeopardy assessment. There are few taxpayers in this position after such an assessment.[23]

Since in many instances the harsh consequences of a jeopardy assessment readily appear unjust, a natural remedy would be intervention by equity to enjoin collection of the jeopardy assessment. Although section 7421 expressly prohibits suits to restrain assessment or collection of any tax,[24] many taxpayers persist in their attempts to obtain an injunction. The current statutory prohibition against injunctions was originally enacted in 1867[25] and was strictly construed until 1932, when the Su-

19. 26 U.S.C. § 6863(a) (1970):
When a jeopardy assessment has been made under section 6861 or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed.

20. 26 U.S.C. § 6331(a) (1970) cited in note 6 *supra*.

21. 26 U.S.C. § 6863(a) (1970) cited in note 19 *supra*.

22. Gould, *Jeopardy Assessments: When They May Be Levied and What To Do About Them*, N.Y.U. 18TH INST. ON FED. TAX. 937, 944-45 (1960).

23. Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), *cert. denied* 396 U.S. 986 (1969) (jeopardy assessment of $282,000); Homan Mfg. Co., Inc. v. Long, 264 F.2d 158 (7th Cir. 1959), *cert. denied* 361 U.S. 839 (1959) (jeopardy assessment of $3,000,000 where IRS admitted maximum tax liability of $300,000); Melvin Building Corp. v. Long, 262 F.2d 920 (7th Cir. 1950) ($550,000 jeopardy assessment where maximum tax due was $58,000); Kimmel v. Tomlinson, 51 Am. Fed. Tax R. 762 (S.D. Fla. 1957) ("every bit" of taxpayer's property seized).

24. 26 U.S.C. § 7421(a) (1970) cited in note 13 *supra*.

25. Act of March 2, 1867, ch. 169, 14 Stat. 475: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." This statute later became REV. STAT. § 3224 (1875), and was codified in § 604 of the Revenue Act of 1928, ch. 852, 45 Stat. 873. Although the language has been changed slightly, the present section 7421 was preceded by INT. REV. CODE OF 1939, ch. 36, § 3653(a), 53 Stat. 446.

preme Court created a narrow judicial exception to the statute in the case of *Miller v. Standard Nut Margarine Co.*[26]

In *Standard Nut*, the Court reexamined the history and purpose of the prohibition against injunctions, and decided that the statutory bar embodied traditional equity principles. Because the statute did not specifically refer to cases involving exceptional circumstances, the Court decided that the general wording of the statute did not foreclose equitable relief. The holding in *Standard Nut* allows courts to prohibit the enforcement of jeopardy assessments if the complainant can show both the illegality of the assessment and circumstances justifying equitable relief.[27]

In handling suits for injunctions of jeopardy assessments, the courts that followed *Standard Nut* generally emphasized the requirement of showing sufficient grounds for the intervention of equity. The general view was that an injunction would be issued if the taxpayer could show that he would suffer irreparable harm if the assessment was not enjoined.[28] This approach is consistent with the position taken by the Supreme Court in *Standard Nut*, where it was found that the taxpayer's business would be destroyed if the jeopardy assessment was not enjoined.[29] Under the judicial interpretation of *Standard Nut*, it was relatively easy to obtain an injunction until 1962. In that year the Supreme Court restored importance to the requirement that the taxpayer must show that a jeopardy assessment is illegal before it will

26. 284 U.S. 498 (1932).

27. *Id.* at 509. In *Standard Nut* the IRS was enjoined from collecting a jeopardy asssessment. The IRS had contended that a margarine excise tax applied to the complainant which produced a product similar to margarine but which was manufactured only from vegetable oils. The Court issued the injunction after finding that the enforcement of the jeopardy assessment would destroy the taxpayer's business and that there was no adequate remedy at law. *Id.* at 510-11.

28. Smith v. Flynn, 261 F.2d 781, 784-85 (8th Cir. 1958) (forced sale of taxpayer's crops seized under a jeopardy assessment enjoined after finding that taxpayer would suffer loss if his crops were sold prior to a determination of his actual liability because of rising farm prices); Shelton v. Gill, 202 F.2d 503, 507 (4th Cir. 1953) (injunctive relief granted after finding that taxpayer would suffer irreparable harm if the assessment were not enjoined because the IRS was preparing to conduct a forced sale of taxpayer's business properties seized under the assessment); Yoke v. Mazzello, 202 F.2d 508, 509-11 (4th Cir. 1953) (injunction issued against an arbitrary refusal by the IRS to accept the taxpayer's secured bond after taxpayer showed that he would lose his home, business and life savings if the assessment were not enjoined); Kaus v. Huston, 120 F.2d 183, 185 (8th Cir. 1941) (taxpayer's contention that he would suffer financial hardship if assessment was not enjoined found not to be special and extraordinary circumstances which would require the issuance of an injunction); Macejko v. United States, 174 F. Supp. 87, 88 (N.D. Ohio, 1959) (injunction issued after finding that threat of business ruin to the taxpayer was an exceptional circumstance); Rosenthal v. Allen, 75 F. Supp. 879, 883 (M.D. Ga. 1948) (injunction issued against forced sale of rental property seized under assessment because it was taxpayer's only source of income).

29. *See* note 27 *supra*.

be enjoined. This aspect of the rule laid down in *Standard Nut* had with few exceptions been overlooked for thirty years.

In *Enochs v. Williams Packing Co.* the Supreme Court held that suits to enjoin collection of an assessment "may not be entertained merely because collection would cause an irreparable injury."[30] The *Enochs* court ruled that an injunction would be issued only if it was apparent that the Government could not establish its claim "under the most liberal view of the law and the facts."[31] The *Enochs* rule is very restrictive and in effect deprives the jeopardy-assessed taxpayer of all equitable relief unless he is able to prove the substantive invalidity of the Government's claim.[32] The Court also directed its attention to the problem of procedural invalidity with regard to a jeopardy

30. 370 U.S. 1, 6 (1962). The *Enochs* Court denied an injunction. Validity of the tax rested on the employer-employee relationship between owners of shrimp boats and their crews. Since the Government's claim had some foundation because the fishermen were corporate employees, the taxpayers failed to meet their burden of showing that the Government could not prevail under any circumstances. After *Standard Nut*, courts generally overlooked the requirement that an assessment had to be illegal before collection would be enjoined. In reasserting this aspect of the rule originally set forth in *Standard Nut*, the *Enochs* Court noted that Congress had enacted the Tax Injunction Act five years after the *Standard Nut* decision. This act prohibited federal suits to enjoin collection of state taxes where state courts provide adequate remedy. The *Enochs* Court reasoned that since similar language was not included in section 7421, Congress must not have intended to allow injunctions against collection of federal taxes in situations normally calling for the intervention of equity. It is for this reason that the "irreparable harm" test was replaced by the more rigorous prerequisite that the taxpayer had to show that collection of the tax was illegal before an injunction would issue.

31. 370 U.S. 1, 7 (1962).

32. Westgate-California Corp. v. United States, 496 F.2d 839, 843 (9th Cir. 1974) (although Westgate was able to show irreparable injury because it would be forced into bankruptcy by the assessment, the complainant failed to show that the Government could not establish its claim); Laing v. United States, 496 F.2d 853, 855 (2d Cir. 1974) (no injunction issued because taxpayer failed to meet *Enochs* test); Mersel v. United States, 420 F.2d 517 (5th Cir. 1969) (refund suit in which the court held that Government's position that taxpayers engaged in wagering was not clearly erroneous and therefore denied relief); Transport Manufacturing & Equipment Co. v. Trainor, 382 F.2d 793, 797 (8th Cir. 1967) (action for injunction dismissed because taxpayer, who contended that the IRS should be compelled to revoke its finding of jeopardy, failed to show the illegality of the assessment); White v. Cardoza, 368 F. Supp. 1397 (E.D. Mich. 1973) (court denied Government's motion to dismiss suit for injunction to allow taxpayer an opportunity to attack Government's finding of jeopardy on two grounds: first, that the discretionary finding of jeopardy was arbitrary and without foundation because the assessment was computed from inadequate records and the Government had no reason to believe that plaintiff was subject to the wagering excise tax, and second, that there was a procedural defect in that neither the Secretary nor his delegate made the required finding of jeopardy prior to the assessment); Parenti v. Whinston, 347 F. Supp. 471 (E.D. Pa. 1972) (no injunction issued because taxpayer failed to show that the Government was acting in bad faith and had no chance of establishing the validity of its claim); Liguori v. United States, 246 F. Supp. 530, 531-32 (E.D.N.Y. 1965) (motion for injunction against jeopardy assessment denied with discussion of *Enochs* rule).

assessment. The Court noted that the major purpose of section 7421 was to permit the assessment and collection of taxes without judicial intervention. Only in this manner would the United States be assured of prompt collection of its lawful revenue. In questioning the legality of an assessment, no more than good faith would be required on the part of the Government. Therefore, "the Act [section 7421] prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid."[33] Under *Enochs*, injunctions are not available to contest the director's discretionary finding of jeopardy. It is against the background of this decision that a number of recent cases exemplify a new trend in approaching suits to enjoin jeopardy assessments.

QUESTIONING THE FINDING OF JEOPARDY AND THE COMPUTATION OF THE ASSESSMENT

The distinguishing characteristic of some new decisions is that courts are willing to enjoin termination and jeopardy assessments for procedural invalidity of the Government's claim. If the finding of jeopardy has been improperly made or if the amount of the assessment has been improperly computed, some courts have enjoined the jeopardy seizure despite the statutory bar of section 7421 against injunctions of tax assessments.[34] Four circuits have taken the position that a jeopardy assessment should be enjoined when the discretionary power to make a finding of jeopardy and summarily seize a taxpayer's property is abused.[35]

This new approach to jeopardy assessments originated in the Second Circuit case of *Pizzarello v. United States*,[36] which was decided just two years before the IRS Narcotics Project began operations. In *Pizzarello*, the IRS based its jeopardy assessment upon records seized during the search of defendant's premises.[37] This search was held illegal and the court decided that the illegally seized evidence could not be used by the IRS in making its finding of jeopardy. Furthermore, the court also held that the District Director made a totally excessive computation of the assessment based on entirely inadequate information.[38] The IRS

33. Enochs v. Williams Packing Co., 370 U.S. 1, 8 (1962).
34. 26 U.S.C. § 7421(a) (1970) cited in note 13 *supra*.
35. In addition to the Second, Third, Fifth, and D.C. Circuits, the Seventh Circuit has also disclosed a tendency to break from its position that the discretionary power of the IRS in finding a jeopardy situation is not subject to judicial review. In Durovic v. C.I.R., 487 F.2d 36, 40-41 (7th Cir. 1973), the court stated that a continuing jeopardy assessment was "presently unfair and unreasonable."
36. 408 F.2d 579 (2d Cir. 1969), *cert. denied*, 396 U.S. 986 (1969).
37. *Id.* at 584.
38. *Id.* at 585-86.

agents had used the average of wagers accepted by Pizzarello over a three day period to compute the amount of wagers which he allegedly made over a five year period. The IRS, however, could not prove that Pizzarello operated as a gambler for those five years or, even if he did so operate, that his average wagers for the three day period were representative of his daily business for the other 1,575 days.[39] Because the determination of a jeopardy situation was based on illegally seized evidence and since the assessment was "excessive, arbitrary, and without factual foundation," the Second Circuit enjoined the jeopardy assessment against Pizzarello.[40] The importance of this case is that the basis for the injunction was an abuse of discretion by the Government.

In *Willits v. Richardson*,[41] which is typical of how the IRS uses a termination assessment against suspected narcotics dealers, the Fifth Circuit reversed a dismissal of the taxpayer's suit for an injunction. In *Willits*, the plaintiff had brought suit to enjoin a jeopardy seizure of virtually all of her property. The assessment was made when the IRS was notified by the Miami Police Department that the plaintiff had been arrested for speeding and that she was riding with a suspected narcotics dealer at the time of her arrest. A search of the plaintiff's purse had revealed some barbiturate tablets and $4,400 in cash. The jeopardy assessment against the plaintiff was computed from some notations on the back of a scrap of paper which had also been found in the plaintiff's purse.[42] The notations read as follows:

Ceon -	3000
Ron	1500
Slt -	2000
P	500
C	400
ME	5900.[43]

The IRS agent presumed that this list showed the distribution of income from a typical drug sale. The agent also assumed that "ME" referred to the plaintiff and that therefore her commission would amount to 44 percent of the proceeds from a sale of drugs. Furthermore, the agent assumed that the plaintiff was involved in the illicit importation of six kilos of cocaine which was sold at $40,000 per kilo.[44] The court found that there were no facts to substantiate the assumptions of the agent and held

39. *Id.* at 583-84. The IRS used the illegally seized evidence of three days wagering to estimate that Pizzarello received a total amount of $2,824,407 from wagers over five years. The IRS assessed Pizzarello for $282,440.70 which was 10% of the projected wagers allegedly made during the five year period and hence the amount of tax owed by Pizzarello.
40. *Id.* at 586.
41. 497 F.2d 240 (5th Cir. 1974).
42. *Id.* at 242-44.
43. *Id.* at 245.
44. *Id.* at 244-45.

that the arbitrarily computed jeopardy assessment was "altogether fictitious."[45] The court strongly criticized the IRS for abusing its broad discretionary power to seize a taxpayer's property without notice.[46]

The District of Columbia Circuit has also followed this growing trend of enjoining jeopardy assessments when there is a questionable finding of jeopardy or improper computation of the assessment. In *Shapiro v. Secretary of State*,[47] the dismissal of a suit to enjoin a jeopardy assessment was reversed and remanded to allow the complainant an opportunity to show that the Government's calculation of the deficiency had no rational basis. One day before the taxpayer's extradition to Israel to face charges for securities fraud, the IRS imposed a jeopardy assessment on his bank accounts. The IRS claimed that the complainant owed back taxes for income derived from activities as a dealer in narcotics.[48] The court reversed the dismissal of the taxpayer's suit for injunction because the record did not contain any facts which would support the Commissioner's discretionary finding of jeopardy. On remand the District Court was directed to dismiss the suit unless the IRS produced some evidence to substantiate the jeopardy assessment.[49]

The Third Circuit has also registered disapproval of the present misuse of jeopardy procedures. In *Sherman v. Nash*,[50] that court reversed a dismissal of the taxpayer's suit for an injunction against a jeopardy assessment. The plaintiff had alleged that the assessment had been imposed solely to assist the

---

45. *Id.* at 245.

46. *Id.* at 246. Shortly after *Willits* was decided, the Fifth Circuit reversed another dismissal of a suit to enjoin a termination assessment. In Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974), plaintiff's employees were stopped while driving a truck through Laredo, Texas. Upon examination of the truck, the arresting officers discovered $11,270 in a sack in the driver's compartment. The IRS was notified of the incident and a termination assessment for $12,774 resulted in a levy on the plaintiff's $11,270 and his truck, which was sold for $750. Since plaintiff was a Mexican citizen, who was not shown to have earned income taxable by the United States, the court felt that he should be entitled to question the validity of the termination assessment. The court was also concerned that the plaintiff's

> money and truck [were] taken peremptorily from him at the instance of drug law enforcers with no more than a vague suggestion that the Government 'suspected' that these strangers were trafficking in drugs. Adding to the mystery of the basis for the 'suspicion' is the total-the word is total-lack of any basis for computing the quick terminated tax to be $12,774.00-almost the precise total of the money and the value of the truck-a pattern followed often in the contemporary practice where tax mechanisms are employed 'not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures.'

Id. at 130-31.

47. 499 F.2d 527 (D.C. Cir. 1974).

48. *Id.* at 529-30.

49. *Id.* at 533, 535.

50. 488 F.2d 1081 (3d Cir. 1973).

Justice Department in an attempt to force him to appear before a grand jury investigating criminal activities in New Jersey.[51] The Third Circuit found that these allegations would be a sufficient basis for enjoining the jeopardy assessment. The court reasoned that the section 7421(a) bar against injunctions of tax assessments would not protect the IRS when a jeopardy assessment was used solely "as a device to harass a taxpayer or as a leverage to exert pressure on a taxpayer for nontax purposes."[52] The Third Circuit also felt that the IRS should not have "complete license to act arbitrarily and in bad faith and for other than the purpose of preserving revenue."[53]

So far four circuits have taken the position that a jeopardy assessment can be enjoined if the IRS abused its discretion in making a finding of jeopardy or computing the actual tax assessment.[54] This is a radical change from earlier treatment of the jeopardy problem under which courts did not recognize that they had authority to review the determination of jeopardy by the Commissioner.[55]

51. *Id.* at 1083.
52. *Id.* at 1084.
53. *Id.*
54. *See also* Lucia v. United States, 474 F.2d 565 (5th Cir. 1973). The tax assessment against Lucia was based on a revenue agent's calculation of wagers accepted by Lucia from March 1957 until November 1963. The agent based his calculations on one day's betting slips which were seized on a raid of Lucia's alleged gambling operation during the 1962 football season. The agent was able to estimate from the receipts that Lucia accepted $28,780 in bets on the day of the raid. Assuming that wagers were accepted six days per week and that the seized receipts represented an average day, the agent determined that Lucia accepted a total of $2,244,840 during the 13-week football season. The agent further assumed that football season wagers constituted 40% of Lucia's yearly total, and that therefore Lucia accepted annual gross wagers of $5,612,100. Lucia contended that this method of computation was without factual foundation. The Second Circuit held that the jeopardy assessment would be enjoined if Lucia could prove his allegations about the arbitrary computation of the assessment. In Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966), the Federal Narcotics Bureau seized $247,500 from the plaintiff and turned it over to the IRS which imposed a jeopardy assessment for $247,820 on the plaintiff. The plaintiff was allowed to recover in his refund action after the court found that the determination of jeopardy "can only be described as arbitrary, capricious, and unconscionable." The court reached this conclusion after hearing testimony by the IRS agent who prepared the assessment that there were no facts to support the determination of deficiency. The only basis for the jeopardy assessment was that unnamed agents of the Bureau of Narcotics believed that the seized funds represented proceeds from the sale of narcotics in the United States. In United States v. Bonaguro, 294 F. Supp. 750 (E.D.N.Y. 1968) *aff'd*, 428 F.2d 204 (2d Cir. 1970), *cert. denied*, 400 U.S. 829 (1970), the court denied a motion to dismiss a suit by the taxpayer to enjoin a jeopardy assessment. The court found that the IRS had used the jeopardy assessment for other purposes than protecting revenue. In White v. Cardoza, 368 F. Supp. 1397 (E.D. Mich. 1973), a motion to dismiss a suit to enjoin a jeopardy assessment was denied to allow plaintiff an opportunity to show that the assessment was based on inaccurate records and that the Government had no proof that plaintiff derived income from wagering, even though gambling income had been the alleged basis for the assessment.
55. Homan Mfg. Co. v. Long, 242 F.2d 645 (7th Cir. 1957); Veeder v.

The Requirement of a Deficiency Notice in Termination Assessment Cases

Closely related to the problem of enjoining jeopardy assessments by questioning the finding of jeopardy or calculation of the assessment is the problem of termination of a taxpayer's taxable year under section 6851.[56] Once his taxable year has been terminated, a taxpayer's assets may be seized and there is some dispute among the courts as to whether the IRS is required to send a deficiency notice. Without a deficiency notice, the taxpayer cannot secure a prompt review of his liability in Tax Court. He must either pay the tax and sue for a refund in district court or wait until the end of his normal taxable year and then contest the assessment in Tax Court.[57] The issue raised in a number of recent cases is whether a taxpayer who has been subjected to a section 6851 termination assessment is entitled to the same procedural safeguards that are available under a section 6861 jeopardy assessment. Essentially this problem is a question of whether the IRS is required to send a deficiency notice within 60 days after the termination assessment, as it is required to do under section 6861.[58] If a deficiency notice is required, but the IRS fails to mail such a notice to the taxpayer, the termination assessment can be enjoined under section 6213(a).[59] Since the IRS has made frequent use of the termination assessment in conjunction with narcotics enforcement activities, there are many new decisions on the issue of whether a deficiency notice is required. Although cases have gone both ways, the current trend is that such a notice must be sent to the taxpayer.[60]

Commissioner, 36 F.2d 342 (7th Cir. 1929); LaLonde v. United States, 350 F. Supp. 976 (D. Minn. 1972); Adler v. Nicholas, 70 F. Supp. 514 (D.C. Col. 1946), *rev'd on other grounds*, 166 F.2d 674 (10th Cir. 1948); Foundation Co. v. United States, 15 F. Supp. 229 (Ct. Cl. 1936).

56. 26 U.S.C. § 6851(a)(1) (1970) cited in note 8 *supra*.

57. 26 U.S.C. § 7422(a) (1970) and 28 U.S.C. § 1346(a) (1970) cited in note 10 *supra*.

58. The three other safeguards afforded to a taxpayer who has been subjected to a section 6861 jeopardy assessment are: (1) the jeopardy taxpayer can stay collection of the assessment by filing bond under section 6863(a), *see* note 19 and accompanying text *supra*, (2) property seized pursuant to a jeopardy assessment generally cannot be sold while litigation is pending in the Tax Court (26 U.S.C. § 6863(b)(3)(A)), and (3) the IRS has authority to abate a jeopardy assessment if it finds that jeopardy does not exist. 26 U.S.C. § 6861(g) (1970). Clark v. Campbell, 501 F.2d 108, 114 (5th Cir. 1974). *See also* Schreck v. United States, 301 F. Supp. 1265, 1279 (D.C. Md. 1969).

59. 26 U.S.C. § 6213(a) (1970) cited in note 12 *supra*.

60. Cases holding that a deficiency notice is not required: Lewis v. Sandler, 498 F.2d 395 (4th Cir. 1974) (follows reasoning in Irving v. Gray, 479 F.2d 20 (2d Cir. 1973)); Laing v. United States, 496 F.2d 853 (2d Cir. 1974) (no injunction for failure of IRS to send a deficiency notice after a termination assessment following same reasoning as in Irving v. Gray, 479 F.2d 20 (2d Cir. 1973)); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973) (deficiency notice not required for a termination assessment be-

Tax Court jurisdiction to redetermine liability prior to payment is predicated on the existence of a deficiency as defined in section 6211. The Government argues that the liability which arises when a person's taxable year is terminated under section 6851 does not constitute a "deficiency."[61] The Government finds support for its position in section 6211 and the applicable regulation, section 301.6211-1, which define "deficiency" in terms of the taxpayer's liability at the close of a normal taxable period.[62] The Government argues that the tax liability that arises upon a termination assessment is not a deficiency because there can be no deficiency until tax liability is ascertainable, and the tax liability cannot be determined until the end of the regular taxable period. The Government suggests that what really is being

---

cause the assessment is not a deficiency as defined in section 6211 and because the taxpayer has an adequate remedy with a refund suit in district court once the assessment is paid); Preble v. United States, 376 F. Supp. 1369 (D. Mass. 1974) (deficiency notice not required for a termination assessment because the tax liability which arises upon a section 6851 assessment is not a deficiency as specifically defined under section 6211(a)); Parrish v. Daly, 350 F. Supp. 735, 736 (S.D. Ind. 1972) (deficiency notice not required because the amount of tax determined for a terminated taxable period "is only a provisional statement of the amount that must be presently paid as a protection against the impossibility of collection at some future date"); Williamson v. United States, 31 Am. Fed. Tax R.2d 800 (7th Cir. 1971) (deficiency notice not required in the case of a termination assessment because such an assessment is not an imposed tax and merely justifies termination of the taxable year).

Cases holding that a deficiency notice is required: Clark v. Campbell, 501 F.2d 108 (5th Cir. 1974) (termination assessment, which was imposed after seizure of the taxpayer's assets by narcotics agents, enjoined because the current Tax Court position and the legislative history of section 6851 require that a deficiency notice be sent in the case of termination assessments); Hall v. United States, 493 F.2d 1211 (6th Cir. 1974) (injunction issued based on the reasoning in Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974), after the IRS imposed a termination assessment charging that taxpayer's involvement in illicit narcotics activities rendered prior collection of taxpayer's income tax ineffectual); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974) (injunction of termination assessment, which had been imposed after Rambo was arrested for reckless driving and a search of his car revealed a supply of drugs); Williams v. United States, 373 F. Supp. 71 (D.C. Nev. 1973); Lisner v. McCanless, 356 F. Supp. 398 (D.C. Ariz. 1973) (termination assessment for narcotics violations enjoined because general tax statute scheme shows Congressional intent that termination assessments are subject to the normal assessment rules under which a deficiency notice is required); Schreck v. United States, 301 F. Supp. 1265 (D.C. Md. 1969).

61. Clark v. Campbell, 501 F.2d 108, 116 (5th Cir. 1974); Irving v. Gray, 479 F.2d 20, 23-24 (2d Cir. 1973); Schreck v. United States, 301 F. Supp. 1265, 1268 (D.C.Md. 1969).

62. 26 U.S.C. § 6211(a) (1970) cited in note 7 *supra*. Regulation 301.6211-1 states that:

> If no return is made, or if the return (except a return of income tax pursuant to sec. 6014) does not show any tax, for the purpose of the definition "the amount shown as the tax by the taxpayer upon his return" shall be considered zero. Accordingly, in any such case, if no deficiencies with respect to the tax have been assessed, or collected without assessment, and no rebates with respect to the tax have been made, the deficiency is the amount of the tax imposed by subtitle A, chapter 11 . . . .

26 C.F.R. § 301.6211-1 (1975).

assessed in the section 6851 situation is the *possibility* of an eventual tax liability or deficiency.[63]

Despite the Government's contentions, the Tax Court has recently held that a section 6851 termination assessment brings the taxable period to a close and creates a liability such as would exist at the close of the normal taxable period.[64] This interpretation is strong support for the conclusion that the tax liability created by a section 6851 termination is within the Code's definition of deficiency.

Prior to the Tax Court's decision, the Maryland District Court had decided in *Schreck v. United States*[65] that the legislative history of section 6851 supported the conclusion that tax liability under that section was a deficiency. The *Schreck* court began its treatment of the legislative history with a discussion of section 250(g) of the Internal Revenue Act of 1918,[66] which was the forerunner of section 6851. Under the early tax laws, assessment authority for both normal and jeopardy taxes was given in section 1317. All taxpayers were required to settle any disputes over tax liability by paying the disputed tax and then bringing an action for refund.[67] The inherent unfairness of this "pay and sue" rule resulted in the establishment of the Board of Tax Appeals (later called the Tax Court) in 1924.[68] The Board

63. Clark v. Campbell, 501 F.2d 108, 118 (5th Cir. 1974); Schreck v. United States, 301 F. Supp. 1265, 1274 (D.C. Md. 1969).

64. Sanzogno v. C.I.R., 60 T.C. 321 (1973). In *Sanzogno*, the IRS terminated the taxable year of an Italian citizen who had received $8,000 in the United States as an orchestra conductor. Sanzogno was required to obtain a sailing permit pursuant to section 6851(d) by filing a Departing Alien Income Tax Return. Three years after Sanzogno had filed the return and returned to Italy, the IRS mailed him a deficiency notice with respect to the income he had received as a conductor in the United States. Sanzogno contended that he had filed a return and that the three year statute of limitations had expired. The IRS maintained that the departing alien return was not a "final return" for that year and that Sanzogno should have filed a regular income tax return at the close of his normal taxable year before the statute of limitations would begun to run. The Tax Court rejected the argument of the IRS and held that the departing alien return covered Sanzogno's entire taxable year, which had been terminated at the time of his departure. The tax liability which arises at the close of a terminated taxable year is the same as at the close of a normal taxable year.

65. 301 F. Supp. 1265 (D.C. Md. 1969).

66. Revenue Act of 1918, § 250(g), 40 Stat. 1057.

67. Schreck v. United States, 301 F. Supp. 1265, 1272 (D.C. Md. 1969).

68. The House Report summarizes the reasons which prompted Congress to establish the Board of Tax appeals:

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

of Tax Appeals and related deficiency notice procedure provided a forum for resolution of tax disputes without requiring the taxpayer to pre-pay a contested tax. Under the 1926 Revenue Act,[69] even the jeopardy-assessed taxpayer was allowed access to the Tax Court under a statutory requirement that a deficiency notice be sent within 60 days after the assessment. The *Schreck* court interpreted these developments as a movement away from the unjust effects of early tax law which required a taxpayer to pay any disputed taxes before there would be a hearing on the amount properly due. Even the jeopardy taxpayer was afforded certain safeguards such as a prohibition on sale of his seized property prior to a final determination of his tax liability by the Tax Court. It was inconceivable to the *Schreck* court that Congress did not intend to give similar protection to a taxpayer whose taxable year had been terminated under section 6851. For this reason, *Schreck* held that the procedural safeguards of section 6861, including the sending of a deficiency notice within 60 days after the assessment, applied to termination assessments.[70]

Although the decision of the *Schreck* court is based on a sound analysis of the legislative history of jeopardy assessments, another district court has provided a simple and unique approach to the issue of whether a deficiency notice is required in the case of a termination assessment. In *Williams v. United States*,[71] the Las Vegas Police Department notified the IRS when they arrested the plaintiff for selling heroin. The IRS imposed a termination assessment on the plaintiff after it had been estimated that the plaintiff was making daily sales of $900 worth of narcotics.[72] In its decision, the Nevada District Court was not willing to adopt the legislative history argument of *Schreck* because the language of section 6851 was sufficiently ambiguous to support the IRS view that a deficiency notice is not required for a termination assessment.[73] The *Williams* court, however, enjoined the assessment simply because requiring the IRS to send a deficiency notice in termination assessment cases would not endanger the Government's right to ensure collection of revenues.[74] The court held that the section 6861 requirement that a deficiency notice be sent within 60 days applied to termination assess-

and to determination of his liability for the tax prior to its payment. H.R. REP. No. 179, 68th Cong., 1st Sess., (1924).

69. Revenue Act of 1926, 44 Stat. 9.

70. Schreck v. United States, 301 F. Supp. 1265, 1273-74 (D.C. Md. 1969).

71. 373 F. Supp. 71 (D.C. Nev. 1973).

72. *Id.* at 72-73.

73. *Id.* at 76.

74. *Id.* at 78, 80-81.

ment cases.[75] The *Williams* decision and a number of other cases show that courts are willing to recognize that the taxpayer has a right to some kind of hearing on his tax liability soon after a termination assessment.[76]

CONCLUSION

The fact that a growing number of courts require that a deficiency notice be sent to a taxpayer whose taxable year has been terminated may encourage Congress to enact a statutory provision to the same effect. Both the legislative history of section 6851 and the current Tax Court position support such a solution to the jeopardy termination problem.

Similarly, congressional action is needed to prevent the current abuse of the discretionary power to declare jeopardy under sections 6851 and 6861. In 1953 Congress recognized that in some instances arbitrary jeopardy assessments were greatly in excess of the tax eventually found due.[77] Congress then enacted the abatement provision, section 6861(g),[78] to provide relief for the taxpayer when the assets seized greatly exceeded the projected tax liability. The abatement provision gave the IRS authority to abate a jeopardy assessment if it determined that jeopardy no longer existed. Unfortunately, the abatement provision has not been an effective safeguard against misuse of jeopardy by the IRS.

Although jeopardy assessments can be applied to tax problems which arise in connection with narcotics dealers, the use

---

75. *Id.* at 81.

76. Cases cited in note 60 *supra*.

77. S. REP. No. 730, 83rd Cong., 1st Sess. 2398-99 (1953):

H.R. 6402 specifically authorizes the Secretary of the Treasury to abate so-called jeopardy assessments when the Secretary determines that jeopardy does not exist.

Under existing law if the Bureau of Internal Revenue believes that ultimate collection of a tax is in danger, it may make a so-called jeopardy assessment. This is an arbitrary assessment designed to get control of available assets of the taxpayer pending final determination of the liability, if any. At the present time, once such an assessment has been made, the Bureau believes that it does not have authority to revoke the assessment even though it finds that a mistake has been made and that there is no danger of losing the tax. As a result, the Bureau has had in the past and now has cases before it in which arbitrary jeopardy assessments, which may be greatly in excess of any tax finally found to be due, are a cause of financial embarrassment and danger to the taxpayer involved. The Bureau believes it is unable to do anything about such cases even though it agrees that there would be no risk to the revenue in following normal procedures.

This bill simply permits the revocation of a jeopardy assessment whenever it appears that there is in fact no danger of losing any tax which may be due.

78. 26 U.S.C. § 6861(g) (1970):

The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist.

of jeopardy assessments as a means of drug enforcement has provided some of the most flagrant examples of how the broad jeopardy powers have been used for purposes other than to protect revenues. In order to prevent further abuse of the discretionary power to declare jeopardy, new statutory action is required.

One possible solution would be to apply the current search warrant procedures to jeopardy assessments. The IRS would be required to make a showing of probable cause before a neutral detached magistrate or district court judge that a jeopardy situation exists. The judge or magistrate would have sole power to determine whether a jeopardy assessment would actually be imposed. If circumstances made it impossible to secure prior judicial approval of a jeopardy assessment, the IRS would still be allowed to make such an assessment and immediate levy, subject to prompt judicial review of the reasons for the IRS findings of jeopardy. By adapting search warrant procedures to jeopardy assessments a dual purpose could be served. Not only would the Government's interest in prompt collection of taxes be protected, but also there would be some accommodation to the general due process requirement that there can be no seizure without prior notice. Unless Congress takes some action soon, the taxpayers will be forced to wait for the lengthy process of judicial legislation to develop completely what is now only a growing trend.

John H. Anderson