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Richard DeY. Manning

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THE APPLICATION OF THE DOCTRINE OF ESTOPPEL AGAINST THE GOVERNMENT IN FEDERAL TAX CASES

RICHARD DEY. MANNING*

More than thirty years ago, Mr. Justice Holmes made the oft-quoted statement that "Men must turn square corners when they deal with the Government."¹ Some ten years later, Circuit Judge McDermott coupled with this the statement that "The Government ought to turn square corners when dealing with its citizens."² At first blush, one would be inclined to agree as wholeheartedly with the latter statement as with the former. However, in cases where a taxpayer has been misled to his disadvantage by representations of, or actions by, agents of the government, the vast majority of decisions have refused to hold the government to the "square corners" envisioned by Judge McDermott.

The recent case of *Stockstrom v. Commissioner*,³ decided by the Court of Appeals of the District of Columbia, is of great importance in this field. For in this case, the court went "against the tide" of the majority and applied a doctrine which has been loosely termed "quasi estoppel," to bind the government to an erroneous interpretation of a statute which had been made to a taxpayer by agents of the government. The taxpayer had made gifts to certain trusts in 1938 and in the two previous years. Relying upon opinions of two courts of appeal, the Treasury Regulations, past treatment of the same type transaction, and representations of a high Bureau official, he did not file a gift tax return for 1938. Ten years later, the Supreme Court passed upon this question, and the effect of the opinion was to make such gifts subject to the gift tax. The Commissioner then reversed his former position and assessed the taxpayer for the tax on the 1938 gifts. Taxpayer defended on the ground that his failure to file a return was based upon the action of the government agents; that had he filed a return in 1938,

* Associate Editor, THE NORTH CAROLINA LAW REVIEW.

¹ *Rock Island, A. & L. R.R. v. United States*, 254 U. S. 141, 143 (1920).

² *Howbert v. Penrose*, 38 F. 2d 577, 581 (10th Cir. 1930). This thought has been rephrased: "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1299 (1935).

³ 190 F. 2d 283 (D. C. Cir. 1951), briefly commented upon in 14 GA. B. J. 106, and 37 VA. L. REV. 1015. Certiorari is not contemplated. CCH 1952 FED. EST. & GIFT TAX REP. 9500.

the present action would be barred by the statute of limitations; therefore, he argued, the Commissioner should not now be heard to assert this claim. The court so held, reversing a judgment for the Commissioner.⁴

The decision of the court in this case raises again the question of whether the doctrine of estoppel is properly applicable to the government in a tax case, and if it is, under what circumstances it should be applied. The term "estoppel" as used in most tax cases does not mean, in the strict sense, estoppel *in pais*.⁵ Rather, it is a modified concept sometimes referred to as "equitable estoppel" or "quasi estoppel."⁶ As the field of federal taxation is a most fertile one for misstatements and misapplications of the law, made by agents of the government and relied upon by citizens, it is not surprising that there are a large number of cases dealing with the problem.⁷

⁴ Prettyman, J. (dissenting): "... I wish the law were as the opinion of the court in this case holds it to be, but I am convinced that it is not." 190 F. 2d 289.

⁵ 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.02 (Rev. vol. 1948), citing POMEROY'S EQUITY JURISPRUDENCE §805 (4th ed. 1918): "(1) There must be conduct—acts, language or silence amounting to a representation or concealment of material facts. (2) These facts must be known to the party estopped at the time of such conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time of such conduct, and at the time it was acted upon by him. (4) The conduct must be accompanied by the intention, or at least the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it; and (6) he must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it."

⁶ Sterns Co. v. United States, 291 U. S. 54 (1934); Robbins v. United States, 21 F. Supp. 403 (Ct. Cl. 1937); Naumkeag Steam Cotton Co. v. United States, 2 F. Supp. 126 (Ct. Cl.), *cert. denied*, 289 U. S. 749 (1933). See Atlas, *The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71 (1948).

In 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.02 (Rev. vol. 1948), it is stated that the application of "quasi estoppel" seems limited to suits for refund, and that the "other doctrine" of estoppel has not been superseded. The latter statement is undoubtedly true (see page 367, *infra*), but the accuracy of the first statement is doubted. See Stockstrom v. Commissioner, 190 F. 2d 283 (D. C. Cir. 1951); Eichelberger & Co. v. Commissioner, 88 F. 2d 874 (5th Cir. 1937).

⁷ The most surprising thing is the persistence of counsel in advancing the argument of estoppel when it has met with such singular lack of success in the past. "Yet it is a blunt fact in these tax litigations that, while the Commissioner has again and again achieved estoppel of a taxpayer, the taxpayer's attempts to estop the Commissioner have, practically without exception, failed utterly." Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1299-1300 (1935); Note, *Reliance on Advice of Government Officials*, 33 CORNELL L. Q. 607, 609 (1948) ("... the Government has been markedly more successful in setting up estoppels against the taxpayer than has the taxpayer in his battles against the Government."); Atlas, *The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71, 79 (1948); 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.13 (Rev. vol. 1948).

For a discussion of principles involved where the government seeks to estop the taxpayer, see Sterns Co. v. United States, 291 U. S. 54 (1933); 10A MERTENS, *op. cit.*, *supra*, §§60.04-60.12; Maguire and Zimet, *op. cit.*, *supra*; Atlas, *op.*

I. RELIANCE UPON COURT DECISIONS

Collateral Estoppel

Seemingly, the strongest case that could be presented for the exercise of an estoppel against an asserted tax would be where the same issue was litigated in a former tax year, and found in favor of the taxpayer. Such a situation is governed by a doctrine classified as "collateral estoppel."⁸ If the same parties are involved,⁹ and the same question of liability is in issue,¹⁰ with the only difference being the tax year involved, the question is the extent to which the former adjudication controls the present suit. The Supreme Court, in *Tait v. Western Maryland Ry.*,¹¹ held that the doctrine of collateral estoppel was applicable to federal tax cases. The application of the doctrine is restricted to those cases where all of the operative facts involved in a decision on a particular point of law are precisely the same.¹² An intervening

cit., supra. The author will not refer to such situations except as they directly affect the topic under discussion.

⁸"That aspect of the generic concept of res judicata which prevents relitigation, in a second case, of issues of fact or law which were necessarily litigated and decided in an earlier case between the same parties involving a different cause of action." Note, *Collateral Estoppel as to Questions of Law in Federal Tax Cases*, 35 IOWA L. REV. 700 (1950). This doctrine is often erroneously spoken of as res judicata, but the doctrine of res judicata is not applicable where a different cause of action is involved. RESTATEMENT, JUDGMENTS §45, comment c (1948). "It is uniformly held that each tax year gives rise to a different cause of action." 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.23, p. 221 (Rev. vol. 1948); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942). There seems to be no valid distinction between adjudications of fact and adjudications of law, as far as the applicability of the doctrine of "collateral estoppel" is concerned. Griswold, *Res Judicata in Federal Tax Cases*, 46 YALE L. J. 1320 (1937).

Any prior adjudication by a court of competent jurisdiction is sufficient to support this doctrine, all other factors being present. *Commissioner v. Sunnen*, 333 U. S. 591, 597 (1947). An adjudication by the Tax Court (or Board of Tax Appeals) is such an adjudication for purposes of the application of the doctrine. *Pelham Hall Co. v. Hassett*, 147 F. 2d 63, 66 (1st Cir. 1945). This is true even if the "determination" was made under a rule 50 proceeding. *Commissioner v. Texas-Empire Pipe Line Co.*, 176 F. 2d 523 (10th Cir. 1949).

⁹The taxpayer must be the same, or in privity with the taxpayer appearing in the first suit. *Commissioner v. Sunnen*, 333 U. S. 591, 597 (1948); *Capital Warehouse Co. v. Commissioner*, 171 F. 2d 395 (8th Cir. 1948). The representative of the government is not required to be the same. This might occur where the Commissioner was a party to the first suit and the second is against the United States or the Collector (*Tait v. Western Maryland Ry.*, 289 U. S. 620 (1933)); where the United States is the party to the first action and the subsequent suit is against the Collector (*Second Nat. Bank v. Woodworth*, 66 F. 2d 170 (6th Cir. 1933)) or the Commissioner (*Garcia v. Commissioner*, 22 B. T. A. 1027); and where the first suit is by the Collector and the subsequent suit is against the United States or the Commissioner (INT. REV. CODE §3772 (d)). For a history of the development of the last stated rule, see Griswold, *Res Judicata in Federal Tax Cases*, 46 YALE L. J. 1320, 1340 (1937) and 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.21 (Rev. vol. 1948).

¹⁰*Cromwell v. County of Sac*, 94 U. S. 351, 353 (1876); *Pelham Hall Co. v. Hassett*, 147 F. 2d 63 (1945).

¹¹289 U. S. 620 (1933).

¹²*Commissioner v. Sunnen*, 333 U. S. 591, 600 (1948), 48 COL. L. REV. 963;

change in the applicable statute or administrative regulation will prevent its application.¹³ Similarly, where an intervening decision of a state court changes the applicable state law,¹⁴ or where a federal case changes the relevant federal law,¹⁵ the doctrine is inapplicable. This doctrine has been criticized as allowing one taxpayer to escape taxation because of an erroneous court opinion, while others similarly situated are not so affected.¹⁶ In the light of the restrictive view the courts have taken toward the application of collateral estoppel in tax cases,

24 N. Y. U. L. Q. Rev. 239 (1949); *Gillespie v. Commissioner*, 151 F. 2d 903 (10th Cir. 1946); *Stoddard v. Commissioner*, 141 F. 2d 76 (2d Cir. 1944); *Campana Corp. v. Harrison*, 135 F. 2d 334 (7th Cir. 1943). The facts must actually have been passed upon, as the doctrine of collateral estoppel does not apply to those issues which might have been decided but were not. *Wurtsbaugh v. Commissioner*, 187 F. 2d 975 (5th Cir. 1951); *Stanback v. Robertson*, 183 F. 2d 889 (4th Cir. 1950); *Trapp v. United States*, 177 F. 2d 1 (10th Cir. 1948); *Hartford-Empire Co. v. Commissioner*, 137 F. 2d 540 (2d Cir.), *cert. denied*, 320 U. S. 787 (1943). Where a former decision approved of the reasonableness of compensation paid, but not the *method* of arriving at that amount, the former action was held to constitute no basis for the application of collateral estoppel as to the reasonableness of compensation paid in subsequent years. The court stated that a change in "economic conditions" changed the concept of "reasonableness." *Burford-Toothaker Tractor Co. v. Commissioner*, 192 F. 2d 633 (5th Cir. 1951).

¹³ *Commissioner v. Sunnen*, 333 U. S. 591, 601 (1948); *Commissioner v. Security-First Nat. Bank*, 148 F. 2d 937 (9th Cir. 1945); *Boeing v. United States*, 98 F. Supp. 581 (Ct. Cl. 1951). *But cf.* *Home Oil Mill v. Willingham*, 86 F. Supp. 568 (N. D. Ala. 1950) (while the decision was based upon the merits of the case, the court did not permit an intervening General Counsel's Memorandum to defeat collateral estoppel).

¹⁴ *Blair v. Commissioner*, 300 U. S. 5 (1937); *Masterson v. Commissioner*, 141 F. 2d 391 (5th Cir. 1944). This has been held to apply, even though the state proceedings were "non adversary." *Thomas Flexible Coupling Co.*, 14 T. C. 802 (1950). *Cf.* *Kelly's Trust v. Commissioner*, 168 F. 2d 198, 199 (2d Cir. 1948). The Commissioner charged that the state proceedings were non adversary. The court answered this by stating: "Whatever may have been the nature of the state-court suit in its inception, the appeal made it adversary . . . especially as, on appeal from the state-court judgment, one judge dissented. The fact that the appeal was considered shows that the judgment was not by consent, for a consent-judgment by its nature precludes an appeal."

¹⁵ After some divergence by the courts of appeal, the Supreme Court, in *Commissioner v. Sunnen*, 333 U. S. 591 (1948), 48 Col. L. Rev. 963; 24 N. Y. U. L. Q. Rev. 239 (1949), settled this question. *Sellin, The Sunnen Case—A Logical Terminus to the "Issue" of Res Judicata in Tax Cases*, 4 TAX L. REV. 363 (1949); Note, *Collateral Estoppel as to Questions of Law in Federal Tax Cases*, 35 IOWA L. REV. 700 (1950).

The question of what constitutes a *change* in the federal law has given rise to new problems. The *Sunnen* case indicated that a decision of the Supreme Court was necessary ("... a modification or growth in legal principles as enunciated in intervening decisions of *this Court* may also effect a significant change in the situation." 333 U. S. at 600 (emphasis added)). *Cf.* *Bush v. Commissioner*, 175 F. 2d 391 (2d Cir. 1949), 11 U. OF PIT. L. REV. 68 (1950), where an intervening decision of the same court, one judge different, was held sufficient to defeat collateral estoppel.

¹⁶ Conversely, where the previous suit is unfavorable to the taxpayer, he bears a burden not necessarily borne by others. *See* 61 A. B. A. REP. 821, 831 (1936); *Sellin, The Sunnen Case—A Logical Terminus to the "Issue" of Res Judicata in Tax Cases*, 4 TAX L. REV. 363, 365 (1949); *Bird, Res Judicata*, 23 TAXES 684 (1945); *Griswold, Res Judicata in Federal Tax Cases*, 46 YALE L. J. 1320, 1357-58 (1937); Note, 33 COL. L. REV. 1404 (1933); Note, *Collateral Estoppel as to Questions of Law in Federal Tax Cases*, 35 IOWA L. REV. 700, 704-05 (1950).

and the criticism leveled at it, there is a possibility that it may be completely discarded.¹⁷

Stare Decisis

An entirely different situation is presented when the taxpayer was not a party to the case upon which he relied to determine his tax liability. This raises the question of whether or not reliance upon a court decision is of any value if the decision is subsequently reversed or overruled. In *Helvering v. Griffiths*,¹⁸ the Supreme Court stated, as one of the grounds for refusing to overrule a former decision interpreting a revenue statute, that the change would operate retroactively. This, reasoned the Court, would cause transactions to be taxed which were not taxable under the former interpretation.¹⁹ It has been pointed out that this was the effect of *Helvering v. Gerhardt*,²⁰ under which decision 1,500 employees of the Port of New York Authority unexpectedly found themselves liable for back income taxes for at least eleven years.²¹ From the taxpayer's point of view, the same result will obtain whether the change in the statutory interpretation is made by the highest court overruling a former decision²² or where a higher court renders a decision contrary to lower court interpretations.²³ There is undoubtedly some logic in allowing a person to rely upon the judicial interpretation of a statute,²⁴ but the

¹⁷ *Commissioner v. Sunnen*, 333 U. S. 591 (1948); notes 12-16, *supra*. But see *United States v. Munsingwear, Inc.*, 340 U. S. 36, 38 (1950).

¹⁸ 318 U. S. 371 (1943).

¹⁹ The dissenting justices thought such effect "none of our business," 318 U. S. at 408. The case under discussion was *Eisener v. Macomber*, 252 U. S. 189 (1920).

²⁰ 304 U. S. 405 (1938), 24 CORNELL L. Q. 611 (1939), 48 YALE L. J. 137 (1938). Similar cases in the estate tax field are *Commissioner v. Church's Estate*, 335 U. S. 632 (1949) and *Helvering v. Hallock*, 309 U. S. 106 (1940). Justice Roberts, dissenting in *Hallock*, pointed out that the rule overturned by the majority had been uniformly followed in not less than fifty cases. He then stated: "If there ever was an instance in which the doctrine of stare decisis should govern, this is it. Aside from the obvious hardship involved in treating the taxpayers in the present cases differently from many others whose cases have been decided or closed in accordance with the settled rule, there are the weightier considerations that the judgments now rendered disappoint the just expectations of those who have acted in reliance upon the uniform construction of the statute by this and all other federal tribunals. . . ." 309 U. S. at 129. For the administrative and Congressional reaction to this and similar decisions, see note 27 *infra*.

²¹ See Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940); Notes, 24 CORNELL L. Q. 611 (1939), 48 YALE L. J. (1938). These employees and other state employees were never called upon to pay this tax, as Congress intervened. See note 27 *infra*.

²² *Helvering v. Hallock*, 309 U. S. 106 (1940).

²³ *Higgins v. Smith*, 308 U. S. 473 (1940); *United States v. Raynor*, 302 U. S. 540 (1938). When relying upon a lower court opinion the taxpayer should be aware that they are subject to "the fallibility which is inherent in all courts except those of last resort." *Broome v. Davis*, 87 Ga. 584, 586, 13 S. E. 749 (1891).

²⁴ One of the underlying difficulties of this problem is the question of whether a court decision is the law or merely evidence of the law. The author will not attempt to discuss this question. See Spruill, *The Effect of an Overruling Decision*, 18 N. C. L. REV. 199 (1940); Freeman, *Retroactive Operation of Decisions*, 18 COL. L. REV. 230 (1918); Carpenter, *Court Decisions and the Common Law*, 17

practical effect of binding the government to such interpretation even if erroneous would be highly unfavorable upon the efficient collection of revenue.²⁵ While arguments have been advanced that court decisions should only operate prospectively,²⁶ the fact remains that they operate retrospectively; therefore no valid basis for the assertion of an estoppel would seem to exist because of reliance upon court decisions.²⁷

COL. L. REV. 593 (1917); Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924); Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1941); Holdsworth, *Case Law*, 50 L. Q. REV. 180 (1934).

²⁵ The Supreme Court has stated that where a problem of statutory construction is involved, the policy is to "observe the time honored admonition of restricting the scope of our decisions to the circumstances before us." *Helvering v. Stuart*, 317 U. S. 154, 170 (1942). If such a doctrine be applied in connection with the "prospective operation" theory, certain practical difficulties arise. This can be shown hypothetically: In the case of *Helvering v. Gerhardt*, 304 U. S. 405 (1938), the decision made 1,500 employees of the Port of New York Authority liable for eleven years back income taxes. If the "prospective operation" theory were applied, these persons would only be liable for future taxes, and there would be no liability for past years. The litigating party could hardly receive this advantage, however, for it is difficult to see how the court could render a decision that the taxpayer's salary was taxable, and at the same time deny the collector the right to collect the tax. Compare with this the situation of an employee of some other state agency, not of the Port Authority type. If the decision be restricted to "the circumstances before the court," these latter employees would not seem to be affected by the decision. Upon what basis would their salaries be handled? If the Commissioner sought to tax them under the Court decision, he could only look to future salaries. If he attempted to tax them under the general authority of the statute, one of their number could litigate the matter and, under the "prospective operation" theory preclude the Commissioner from collecting for past years.

The absurd results reached clearly indicate that the operation of such a theory is all but impossible in the field of taxation. As pointed out, the Court has recognized that its decisions operate retroactively. *Helvering v. Griffiths*, 318 U. S. 371 (1943). Also, the Court has recognized that any other doctrine would not be feasible. See *Helvering v. Hallock*, 309 U. S. 106, 119 (1939): "We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process."

²⁶ See authorities cited in note 24 *supra*.

²⁷ See *Helvering v. Hallock*, 309 U. S. 106, 119 (1939). In *Higgins v. Smith*, 308 U. S. 473 (1940) the Court held that the taxpayer was not justified in relying upon the decisions of four courts of appeal and consistent Board of Tax Appeals cases, as the Commissioner had not acquiesced. If the taxpayer had relied upon the Commissioner's interpretation, and the Supreme Court had subsequently held the prior court opinions to be correct, no estoppel would lie. See page 366.

While some types of court decisions are made to operate only prospectively (see Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1941)), the *Gerhardt* and similar cases seem to establish the fact that tax decisions operate retrospectively. It has been suggested that Congress limit the retrospective effect of court decisions which cause inequitable results. See Note, 48 YALE L. J. 137, 139 (1938). In several cases, Congress has done this. Following the *Gerhardt* case, the 1,500 employees of the Port of New York Authority, and all other state employees affected by that decision, were relieved of liability for the past year's taxes by the Public Salary Tax Act of 1939, 53 STAT. 574 (1939). This Act included a provision for refund of all taxes paid on such salaries. The Act did, of course, tax all such salaries earned after the date of its passage. See INT. REV. CODE §22(a).

Commissioner v. Church's Estate, 335 U. S. 623 (1949), which overruled *May v. Heiner*, 281 U. S. 238 (1930), was limited by the Technical Changes Act of 1949, 63 STAT. 891 (1949). See INT. REV. CODE §811(c)(2). For the reasons

II. RELIANCE UPON TREASURY REGULATIONS

The above situations occur occasionally, but more frequently the taxpayer acts in reliance upon a regulation or other ruling of the Bureau, or upon a representation made by the Commissioner or some lesser government functionary. In this situation, the strongest case for the raising of an estoppel would seem to be where reliance was placed upon a formal regulation promulgated by the Treasury Department. If such is the case, two factors must be considered: Was it a legislative or an interpretative regulation; and, what cognizance has it received, if any, from Congress or the courts?

Interpretative Regulations

Interpretative regulations are issued under the general authority of section 3791 of the Internal Revenue Code, which provides that the Commissioner "shall prescribe and publish all needful rules and regulations for the enforcement of [the Code]." The courts have generally held that regulations issued under the authority of this section are to be regarded as merely stating the Treasury's construction of the statute.²⁸ If a taxpayer acts in reliance on one of these interpretative regulations, and the Commissioner later changes the regulation, or, in case of litigation, presses a different construction of the statute upon the court, no estoppel will operate to prevent such action.²⁹ The courts

behind this Act, see SEN. REP. No. 831, 81st Cong., 1st Sess., 1949, reprinted in 1949-2 CUM. BULL. 289. Another limitation upon the retroactive effect of a judicial decision was made by the Technical Changes Act of 1949. By amendment to section 1000(g) of the INT. REV. CODE, the Act relieved the retroactive effect of *Lehman v. Commissioner*, 109 F. 2d 99 (2d Cir. 1940), which held reciprocal trusts taxable as part of the estate of the settlor-beneficiary. See SEN. REP. No. 831, 81st Cong., 1st Sess. (1949).

The Bureau may also limit the retroactive effect of court decisions. *Helvering v. Hallock*, 309 U. S. 106 (1939) was thus limited by T. D. 5512, U. S. TRES. REG. 105 §81.17(3). See also, I. T. 3609, 1943 CUM. BULL. 505, which limits the retroactive applicability of *Helvering v. Stuart*, 317 U. S. 154 (1942).

See Dwan, *Administrative Review of Court Decisions*, 46 COL. L. REV. 581, 596 (1946); Pavenstedt, *Congress Deactivates Another Bombshell: The Mitigation of Church and Spiegel*, 5 TAX L. REV. 309 (1950).

²⁸ *Hesslein v. Hoey*, 91 F. 2d 954 (2d Cir.), cert. denied, 302 U. S. 756 (1937); *Walker v. United States*, 83 F. 2d 103 (8th Cir. 1936); 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.14 (Rev. vol. 1948). The consideration to be given a regulation where an estoppel is sought is not to be confused with the weight given to such a regulation as an aid to statutory construction. Where the courts are concerned with the regulations for this latter purpose, such regulations are said to have weight varying all the way from "the force and effect of law" (*Maryland Casualty Co. v. United States*, 251 U. S. 342, 349 (1919)), to "no higher dignity than an expression of opinion" (*Douglas v. Edwards*, 298 Fed. 229, 245 (2d Cir. 1924)). For a general discussion of this problem see Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252, 260 (1940); Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 557 (1940); Cole, *From Treasury Decision to Judicial Decision*, 12 TAX MAG. 531, 532 (1934); Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 YALE L. J. 660, 662 n. 13 (1940).

²⁹ *Fletcher Trust Co. v. Commissioner*, 141 F. 2d 36 (7th Cir. 1944); Blum-

take the view that "the Commissioner can not make or change the law by regulations and a regulation at variance with the import of the statute is of no effect."³⁰ Thus, reliance upon the regulation would seem to form no more basis for an estoppel than reliance upon the advice of any competent person or upon the tax services or legal periodicals.³¹

This situation can be complicated by the fact that under certain circumstances, the regulation may be said to have been adopted by Congress. This result might occur when there is reenactment of a statute following the issuance of interpretative regulations as to its construction. Recent cases have left the problem in a rather indefinite state,³² but some rules as to the application of "adoption by reenactment" are well settled. If the court finds that Congress has adopted the regulation, then the Commissioner, the taxpayer, and the court must follow it.³³ Thus, while the defense of estoppel would be of no avail, the taxpayer might hold the Commissioner to his original ruling under the legislative adoption theory.³⁴ This doctrine is inapplicable where the statute is clear,³⁵ where the regulation is contrary to the language

berg v. Smith, 138 F. 2d 956 (7th Cir. 1943); *Tonningsen v. Commissioner*, 61 F. 2d 199 (9th Cir. 1932); *Langstaff v. Lucas*, 9 F. 2d 691 (W. D. Ky. 1925), *aff'd*, 13 F. 2d 1022 (6th Cir. 1926), *cert. denied*, 273 U. S. 721 (1926); *Ben Stocker*, 12 B. T. A. 1348 (1928). See *Atlas, The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71, 79 (1947). Cf. *Sanford v. Commissioner*, 308 U. S. 39, 49-54 (1939).

³⁰ T. T. Rudolph, 6 B. T. A. 265, 269 (1927). See *M. E. Blatt Co. v. United States*, 305 U. S. 267, 279 (1938) ("Treasury regulations can add nothing to income as defined by Congress."); *Southern Maryland Agricultural Fair Ass'n*, 40 B. T. A. 549, 552 (1939) ("The Commissioner by his regulations cannot change the law.").

³¹ See *Surrey, The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 558 (1940).

³² *Helvering v. Hallock*, 309 U. S. 106 (1940); *Helvering v. Wilshire Oil Co.*, 308 U. S. 90 (1939); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939).

³³ *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *Helvering v. Winnill*, 305 U. S. 79 (1938); *Lang v. Commissioner*, 304 U. S. 264 (1938); *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289 (1934); *Squibb & Sons v. Helvering*, 98 F. 2d 69 (2d Cir. 1938); *Mayes v. Paul Jones & Co.*, 270 Fed. 121 (6th Cir. 1921); *Alvord, Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252, 265 (1940); *Brown, Regulations, Re-enactment, and the Revenue Acts*, 54 HARV. L. REV. 377, 382 (1941).

³⁴ *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *Commissioner v. Monarch Life Ins. Co.*, 114 F. 2d 314, 323 (1st Cir. 1940) ("The Commissioner should not now be permitted to apply retroactively . . . any new regulations made after the tax years in question, particularly after Congressional re-enactment under the previous regulations."). Since the enactment of the Code, the "adoption by re-enactment" rule has become of much less importance. The entire revenue act is no longer re-enacted each year, but amendments are now made to the Code.

³⁵ *Biddle v. Commissioner*, 302 U. S. 573, 582 (1938); *Koshland v. Helvering*, 298 U. S. 441 (1936); *Louisville & Nashville R.R. v. United States*, 282 U. S. 740 (1931); *Slough v. Commissioner*, 147 F. 2d 836 (6th Cir. 1945); *Paul, Use and Abuse of Tax Regulations in Statutory Construction*, 49 YALE L. J. 660 (1940).

of the statute,³⁶ or where the regulation is ambiguous.³⁷ It has been suggested that the mere reenactment of a statute has no weight whatsoever; that it must at least be shown that Congress was cognizant of the regulation.³⁸ Further, if the regulation was issued contemporaneously with the passage of the act,³⁹ and if it has been long recognized,⁴⁰ there is more likelihood that the adoption rule will be applied.

If the taxpayer relies upon a regulation which has not been adopted under the reenactment rule, is it of any assistance to him that a court adopted the interpretation of the regulation? The answer seems to be that it is not.⁴¹

Legislative Regulations

As pointed out, certain regulations might properly be classified as legislative, as distinguished from interpretative.⁴² Such regulations are

The statutory language must be ambiguous (*Brewster v. Gage*, 280 U. S. 327 (1930)); general (*Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939)); silent (*United States v. Dakota-Montana Oil Co.*, 288 U. S. 459 (1933)); doubtful (*McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931)); or susceptible of two constructions (*R. J. Reynolds Tobacco Co. v. Commissioner*, 97 F. 2d 302 (4th Cir. 1938)) before the regulation will be considered as representing the correct interpretation of the statute. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. P. A. L. REV. 556, 559-60 (1940).

³⁶ See note 30, *supra*. *Clifford, Jr. v. United States*, 105 F. 2d 586 (8th Cir. 1939); *Commissioner v. Shattuck*, 97 F. 2d 790 (7th Cir. 1938); *F. W. Woolworth v. United States*, 91 F. 2d 973 (2d Cir. 1937), *cert. denied*, 302 U. S. 768 (1938); *Boca Ratone Co. v. Commissioner*, 86 F. 2d 9 (3rd Cir. 1936); *Langstaff v. Lucas*, 9 F. 2d 691 (W. D. Ky. 1925), *aff'd*, 13 F. 2d 1022 (6th Cir. 1926); Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 YALE L. J. 660, 668-69 (1940).

³⁷ *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939); *Burnet v. Chicago Portrait Co.*, 285 U. S. 1 (1932); *Iselin v. United States*, 270 U. S. 245 (1926).

³⁸ "... the mere re-enactment of a statute following administrative construction should be given no weight whatsoever in determining the proper construction of the statute." Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 400 (1941). Cf. Feller, *Addendum to the Regulations Problem*, 54 HARV. L. REV. 1311 (1941), followed by Griswold, *Postscriptum*, 54 HARV. L. REV. 1323 (1941).

³⁹ *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315 (1933); "The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." See Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 405 (1941); Note, 52 HARV. L. REV. 1163, 1164 (1939). Cf. *Helvering v. Hallock*, 309 U. S. 106 (1940).

⁴⁰ *McDermott v. Commissioner*, 150 F. 2d 585 (D. C. Cir. 1942); *Evansville Courier v. Commissioner*, 62 F. 2d 232 (7th Cir. 1933).

⁴¹ *Helvering v. Gerhardt*, 304 U. S. 405 (1938). But the court might consider this factor when passing on the validity of the regulation. See *Commissioner v. H. W. Porter & Co.*, 187 F. 2d 939 (3rd Cir. 1951); *O'Malley v. Yost*, 186 F. 2d 603 (8th Cir. 1951).

If recognition and approval of a regulation by a court would make the regulation "more authoritative," a regulation made pursuant to a court opinion would seem to have at least the same "authoritative" weight. Courts have not given these latter regulations such effect. *Helvering v. Hallock*, 309 U. S. 106 (1940). Cf. *Averill v. Commissioner*, 101 F. 2d 644 (1st Cir. 1938).

⁴² Unfortunately, the courts do not always differentiate between interpretative

not issued under a general grant of authority as are the interpretative regulations, but rather, are issued under specific authority contained in particular sections of the Code.⁴³ If the Code section granting authority for the regulations sets out sufficiently definite standards for the guidance of the Commissioner, and the regulations issued under this authority are within the standards set, they are said to have the force and effect of law.⁴⁴ Until amended, these regulations must be followed.⁴⁵ An amendment, to have retroactive effect, probably needs specific statutory authority,⁴⁶ and any retroactive amendment is subject to the same limitation as a retroactive law.⁴⁷ Thus, the taxpayer may feel relatively

and legislative regulations. In *Helvering v. Wilshire Oil Co.*, 308 U. S. 90 (1939) the Court allowed the Commissioner to amend a regulation, even though the basic statute had been re-enacted several times by Congress. The regulation was legislative, but the Court failed to make any distinction. Thus, while the case was correctly decided, as pertains to a legislative regulation, there is doubt as to its application to an interpretive regulation. Also, the Commissioner did not seek to give the amendment retroactive effect, although it was applied to a transaction which was handled by the taxpayer under a binding election made under the original regulation. The Supreme Court has not wholly disregarded the distinction, but it has been given little effect. See *Burnet v. S. & L. Building Corp.*, 288 U. S. 406, 415 (1933); *Fawcus Machine Co. v. United States*, 282 U. S. 378 (1931); *Brown, Regulations, Re-enactment, and the Revenue Acts*, 54 HARV. L. REV. 377, 385 (1941). But cf. *Schafer v. Helvering*, 83 F. 2d 317 (D. C. Cir.), *aff'd*, 299 U. S. 171 (1936).

⁴³ E.g., INT. REV. CODE §§22(c), 112(2), 118(b), 170, 189. These sections do not always contain uniform language. For a discussion of the effect of the different wording in the Code sections, see Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 577-78 (1940).

⁴⁴ *Avent v. United States*, 266 U. S. 127 (1924); *Schafer v. Helvering*, 83 F. 2d 317, *aff'd*, 299 U. S. 171 (1936); *Titsworth v. Commissioner*, 73 F. 2d 385 (3rd Cir. 1934).

⁴⁵ *Helvering v. Wilshire Oil Co.*, 308 U. S. 90 (1939), discussed in note 42 *supra*. The courts have indicated that these regulations will not be interfered with unless in excess of the Commissioner's authority (*Commissioner v. General Machinery Corp.*, 95 F. 2d 759, 761 (6th Cir. 1938)), violative of provisions of the statute (*Corner Broadway-Maiden Lane, Inc. v. Commissioner*, 76 F. 2d 759, 761 (6th Cir. 1938)), or arbitrary and unreasonable in their application (*Finance & Guaranty Co. v. Commissioner*, 50 F. 2d 1062 (4th Cir. 1931)). See HENDERSON, *INTRODUCTION TO INCOME TAXATION* 78 (2nd ed. 1949); Note, 52 HARV. L. REV. 1163, 1165 (1939).

⁴⁶ See Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252, 264 (1940). But cf. INT. REV. CODE §3791(b): "The Secretary or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulations, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." The necessary implication is that unless so prescribed, these regulations, etc., may have retroactive effect. While the subsection refers to "any ruling, regulations, or Treasury Decision," the Congressional intent seems to be to limit its application to the interpretative regulations, the authority for which appears in subsection (a) of the same section.

⁴⁷ The courts will not construe a revenue provision retroactively unless its language clearly so requires. *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141, 164 (1944); *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422, 424 (1944). Cf. *Commissioner v. Commodore, Inc.*, 135 F. 2d 89 (6th Cir. 1943) (court refused to permit retroactive application of statute by way of Treasury Regulation, where statutory language did not require such application). If, however, the statute is so worded as to require retroactive operation, that fact

safe in relying upon this type of regulation if it appears to meet the requirements for valid legislative regulations.⁴⁸

In addition to the formal regulations, the Commissioner issues various informal bulletins, memoranda, and rulings upon tax matters.⁴⁹ Where such an informal ruling is made, and a taxpayer other than the one to whom the ruling was made relies upon it, no estoppel can be raised by such reliance.⁵⁰ Also, such rulings are not subject to the reenactment rule,⁵¹ nor can they be classified as legislative regulations.⁵²

alone will not render it invalid. *Milliken v. United States*, 283 U. S. 15 (1931). However, a statute may be so "arbitrary and capricious" as to offend the Fifth Amendment. On this ground retroactive application has been denied in a number of cases. *E.g.*, *Nichols v. Coolidge*, 274 U. S. 531 (1927) (Revenue Act of 1918 §402(c), COMP. STAT. §6336 3/4c, taxed transfers of property intended to take effect in possession and enjoyment at or after decedent-donor's death, held unconstitutional as applied to good faith transfers before its passage, which were not, in fact, in contemplation of death); *Helvering v. Helmholz*, 296 U. S. 93 (1935) (same type of statute; Court followed *Nichols v. Coolidge*). An excellent discussion of the problem by Judge Learned Hand appears in *Cohan v. Commissioner*, 39 F. 2d 540, 545 (1930) ("... in extreme cases transactions, untaxed when they took place, cannot be reached by a later statute, certainly when not in contemplation at the time."). See generally, Ballard, *Retroactive Federal Taxation*, 48 HARV. L. REV. 592 (1935); Smith, *Retroactive Income Taxation*, 33 YALE L. J. 35 (1923).

In *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129 (1936) the Commissioner issued a legislative regulation upon which the taxpayer relied. Later, the regulation was amended in such a manner as to make the taxpayer liable for a greater tax if the regulation were retroactively applied. The Court held that the former regulation was invalid, as being out of harmony with the statute and as being unreasonable, and then stated: "The contention that the new regulation is retroactive is without merit. Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation presented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute." 207 U. S. at 135. This decision brings to mind the famous quotation: "That which we call a rose by any other name would smell as sweet." Shakespeare, *Romeo and Juliet*. Act II, Sc. 2, Line 33.

⁴⁸ See note 44 *supra*.

⁴⁹ Commissioner's rulings, General Counsel's memoranda, Treasury Decisions (which do not become regulations until approved by the Secretary, *Wood v. Commissioner*, 75 F. 2d 364 (1st Cir. 1935)), and others.

⁵⁰ *Helvering v. New York Trust Co.*, 292 U. S. 455 (1934); *Aluminum Co. of America v. United States*, 123 F. 2d 615 (3rd Cir. 1941); *Janney v. Commissioner*, 108 F. 2d 564 (3rd Cir.), *aff'd*, 311 U. S. 189 (1940); *Santa Monica Mountain Park Co. v. United States*, 99 F. 2d 450 (9th Cir. 1938); *Baltimore & O. Ry. v. United States*, 38 F. Supp. 83 (D. Md. 1941); *Bedford Mills v. United States*, 2 F. Supp. 769 (Ct. Cl. 1933). The Bureau emphasizes this by printing across the cover page of every issue of the Internal Revenue Bulletin that "special attention is directed to the cautionary notice on page II that published rulings of the Bureau do not have the force and effect of Treasury Decisions and that they are applicable only to the facts presented in the published case." See *Guy T. Gibson, Inc.*, 46 B. T. A. 1015 (1942); *Oberwinder v. Commissioner*, 147 F. 2d 255 (8th Cir. 1945); HENDERSON, INTRODUCTION TO FEDERAL TAXATION §28 (2nd ed. 1949).

Also, other administrative agencies may not estop the collection of taxes. See *United States v. Stewart*, 311 U. S. 60 (1940) where the Court held that the Farm Loan Board was without authority to make representations that certain transactions would be tax exempt. *Accord*, *Hazel W. Carmichael*, P-H 1948 TC Mem. Dec. ¶48,080.

⁵¹ *Biddle v. Commissioner*, 302 U. S. 573, 582 (1938); *Aluminum Co. of*

III. RELIANCE UPON TAXPAYER'S RULINGS AND SIMILAR DEPARTMENTAL DECISIONS

In each of the above situations, it is to be noted that there were no representations, as such, made to the taxpayer whose tax is now in controversy. In each situation discussed, the particular interpretation of the statute was what might be classed as impersonal, so far as the taxpayer was concerned. But, as pointed out, these situations would seem to form the strongest foundation for reliance by a taxpayer as they are all relatively authoritative pronouncements of the law. However, the doctrine of estoppel *in pais* is not applicable for several reasons,⁵³ and the doctrine of "equitable" or "quasi estoppel" has not been applied to any of these situations.⁵⁴ The question then arises as to whether some other and possibly less reliable interpretation of the statute can form a stronger basis for an estoppel.

In many cases, informal rulings are made or other action is taken in a particular taxpayer's case. The Commissioner or some lesser agent may make a ruling, offer advice, or in some other way directly influence the action of a particular taxpayer. It is here that the doctrine of "equitable" or "quasi estoppel" is most frequently mentioned.⁵⁵ This doctrine, first voiced in cases involving estoppel against a taxpayer, was thus stated by Justice Cardozo:

"... Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. . . . A suit may not be built on an omission induced by him who sues."⁵⁶

In many of the cases involving dealings between an individual taxpayer and a government agent, the courts refuse to recognize any such "equitable" or "quasi estoppel" and fall back to the requirements of estoppel *in pais*. Thus, application of the doctrine of estoppel has been denied on the ground that the government agents had made mere state-

America v. United States, 123 F. 2d 615, 621 (3rd Cir. 1941); *Brown, Regulations, Re-enactment, and the Revenue Acts*, 54 HARV. L. REV. 377, 390 (1941).

⁵³ *Biddle v. Commissioner*, 302 U. S. 573, 582 (1938); *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 321 (1924).

⁵⁴ See note 5 *supra*. In the great majority of cases, the only elements of estoppel *in pais* present are (5) and (6).

⁵⁵ Even the doctrine of "quasi estoppel" requires the party against whom the estoppel is asserted to have caused the other to act or refrain from acting. See note 63 *infra*. Cf. *Stockstrom v. Commissioner*, 190 F. 2d 283 (D. C. Cir. 1951).

⁵⁶ See note 97 *infra*. *Stockstrom v. Commissioner*, 190 F. 2d 283 (D. C. Cir. 1951).

⁵⁷ *Sterns Co. v. United States*, 291 U. S. 54, 62 (1938).

ments of opinion⁵⁷ or statements of law,⁵⁸ rather than the required misrepresentation of fact.⁵⁹ The question of what can be said to be opinion, fact, or law is often a difficult one, and this point is avoided by most courts.⁶⁰ Other courts, seeking to avoid passing on the question of the applicability of the doctrine, find that the person making the representation had no authority to do so,⁶¹ or that the reliance upon the statement was unreasonable.⁶² ("Equitable" or "quasi estoppel" makes no such technical distinctions, but rather, is applied in a very non-technical manner.⁶³) Some of the cases refuse to apply an estoppel because of the statutory provision for binding closing agreements and compromises, reasoning that the statutory method is exclusive.⁶⁴

Prospective Rulings and the Couzens Case

One of the most appealing cases for the application of the "equitable" or "quasi estoppel" doctrine is where there has been a ruling made upon a proposed transaction, reliance by the taxpayer upon this ruling, and subsequent repudiation by the government. Such a situation resulted from the sale of the minority interest in the Ford Motor Company by Senator James Couzens.⁶⁵ The sale was contingent upon the taxable gain that would result and this, in turn, was contingent upon the fair market value of the stock on March 1, 1913. The Commissioner, in response to a request, made an elaborate investigation and placed a value on the stock. In reliance upon this valuation, the stock was

⁵⁷ *Commissioner v. Duckwitz*, 68 F. 2d 629 (7th Cir. 1934), *affirming*, 22 B. T. A. 358 (1931).

⁵⁸ *United States Trust Co. of New York*, 13 B. T. A. 1074 (1928), cited and followed in *Elizabeth W. Boykin*, 16 B. T. A. 477, 478 (1929). Cf. *Sugar Creek Coal & Mining Co.*, 31 B. T. A. 344, 348 (1934) "A mutual mistake of law is no foundation for estoppel. . . . If it were there would be just as much ground for the taxpayer to claim that the Government is estopped to change its position."

⁵⁹ See note 5 *supra*, element (1).

⁶⁰ And legal writers. The author joins in the statement of Maguire and Zimet, "We humbly decline the task of saying what is fact and what is law." *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1329, n. 176 (1935).

⁶¹ *Helvering v. New York Trust Co.*, 292 U. S. 445 (1933); *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (8th Cir. 1944); *Barnett Investment Co. v. Nee*, 72 F. Supp. 81 (W. D. Mo. 1947); *New York Life Ins. Co. v. Anderson*, 257 Fed. 576 (S. D. N. Y. 1919), *cert. denied*, 256 U. S. 696 (1921); *Searles Real Estate Trust*, 25 B. T. A. 1115 (1932); *James Couzens*, 11 B. T. A. 1040, 1149, 1174 (1928).

⁶² *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (8th Cir. 1944); *Langstaff v. Lucas*, 9 F. 2d 691 (W. D. Ky.), *aff'd*, 13 F. 2d 1022 (6th Cir. 1926).

⁶³ "Quasi estoppel" is applied "to prevent a wrong being done wherever, in good conscience and honesty a party ought not to be permitted to repudiate his previous statements and declarations." *Mahoning Investment Co. v. United States*, 3 F. Supp. 622 (Ct. Cl. 1933), *cert. denied*, 291 U. S. 675 (1934). *Stockstrom v. Commissioner*, 190 F. 2d 283 (D. C. Cir. 1951).

⁶⁴ INT. REV. CODE §§3760 (closing agreements), 3761 (compromises). See *Botany Worsted Mills v. United States*, 278 U. S. 282 (1929); *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (8th Cir. 1944).

⁶⁵ *James Couzens*, 11 B. T. A. 1040 (1928).

sold. Some years later, the Acting Commissioner assessed a large deficiency, claiming an overvaluation by the former Commissioner. In answer to an asserted estoppel by the taxpayer, the Board of Tax Appeals stated:

"Such an argument must be treated with the utmost caution, since its sanction in any case would result in having an individual tax liability depend, not upon the factors and measures prescribed by Congress as applicable to all, but upon the statements and conduct of a particular government officer in respect of each individual.

"... however it may be in cases involving contract or other situations where the government deals on an equality with its citizens, there is a necessity inherent in its sovereign power of taxation which the doctrine of estoppel can resist in only the most extraordinary case. Whether there may be such a case is not now within our power to know."⁶⁶

This quotation sums up two important considerations in cases involving estoppel against the government. The latter, dealing with the capacity in which the government acts in the transaction, involves the determination of whether the capacity is governmental or proprietary.⁶⁷ Such a distinction is sometimes made in cases where an estoppel is asserted against the government,⁶⁸ but as the collection of revenue is so obviously a governmental function the point is of little importance in taxation cases. However, the concluding thought in the statement is important to the law of taxation because of its recognition of the fact that in an "extraordinary" case the doctrine of estoppel *might* be successfully asserted.

The other point brought out in the quoted portion of the opinion, that of having individual tax liability depend upon the statements and conduct of a particular government agent, raises a more serious problem. In the first place, there can be no question but that this very situation results every time the Commissioner decides not to upset an erroneous ruling of a revenue agent.⁶⁹ It is true that this decision is

⁶⁶ *Id.* at 1148, 1151. The Board then allowed the valuation to be reopened. This revaluation resulted in an ultimate victory for the taxpayer, however, as the redetermined March 1, 1913, value was higher than the original value assigned by the Commissioner. From this revaluation, Senator Couzens realized less taxable gain than originally assessed.

⁶⁷ "Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there." *Cooke v. United States*, 91 U. S. 389, 398 (1875); *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757 (Ct. Cl. 1951); *Stein-Block Co.*, 23 B. T. A. 1162, 1167 (1931). See 19 AM. JUR., Estoppel §169 (1939).

⁶⁸ See note 67 *supra*.

⁶⁹ Concerning the quoted portion of the text, it has been said that "If the first part of this quotation should be read as a declaration of simple faith that whenever an executive department acts in normal routine the human factor vanishes and perfectly precise results are mechanically achieved, it would be fit only for con-

technically not binding upon the Commissioner but from a practical standpoint, when the "file is closed" that brings the matter to an end. Also, this decision is binding upon the government if it is coupled with the running of the statute of limitations. Another practical point to be considered is that, according to a former Chief Counsel of the Bureau, the vast majority of the Bureau's rulings are honored by the Bureau, even though they may be erroneous.⁷⁰ In addition, the higher Treasury officials have been given statutory authority to bind the government by making closing agreements and compromises with taxpayers, even if such agreement or compromise is based upon an erroneous interpretation of the statute.⁷¹ So, if the possibility of an individual binding the government be adopted as the objection to the application of estoppel against the government, the aforementioned practices weaken the validity of such objection. However, when this objection is viewed in another light, a practical reason appears for its support. As one author has stated:

"The picture suggested is in part that of a revenue official not entirely free from political insecurity, not very high up the departmental ladder, not very well paid, not too sure he wishes to stay permanently in government service. Persuasively opposed to the official is a lawyer or accountant—sometimes a group of such men, visible or invisible—highly trained, acutely interested in the particular case, keen from knowledge that fees depend upon success. Entirely without any suggestion of impropriety or crookedness, the observer will suspect that private interest is likely to be better served than public interest."⁷²

Where the picture is as suggested, there is some reason for the Commissioner to have the right to review any representations that might be made in such a case. The Commissioner has for several years refused to make such prospective rulings except under very strictly defined conditions.⁷³ Therefore, the occasions on which a taxpayer may attempt to rely upon a prospective ruling will be much less numerous.

temptuous dismissal." Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1301 (1935). In many instances, the Commissioner is given the duty of making certain findings, thus by legislative mandate doing that which the court refuses to allow. However, these findings do not appear to be binding upon the government, when made. See Magill, *Finality of Determinations of the Commissioner of Internal Revenue*, 28 COL. L. REV. 563, 565 (1928).

⁷⁰ Wenchel, *Taxpayer's Rulings*, 5 TAX L. REV. 105, 113-14 (1950).

⁷¹ INT. REV. CODE §3760. See Atlas, *The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71, 81 (1947). This authority has been delegated, in part, to the Commissioner. See note 118 *infra*.

⁷² Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1301 (1935). Cf. ". . . corruption might be encouraged if a taxpayer could obtain a ruling from a collector or Commissioner, which would not be vulnerable to attack or reconsideration." Note, *Reliance on Advice of Government Officials*, 33 CORNELL L. Q. 607, 613 (1948).

⁷³ Memo. 4963, 1939 2 CUM. BULL. 459:

Commissioner's Power to Reopen Prior Administrative Determinations

The Commissioner must necessarily make rulings on past transactions, and as stated, he will make rulings on *some* prospective transactions, leaving open this field for the possible application of the doctrine of estoppel. For instance, where the Commissioner makes a finding of fact, or a ruling, in a particular case involving past or future transactions, and the taxpayer accepts this finding or ruling and pays his tax thereon, the Commissioner or his successor may seek to reopen and reassess the taxpayer upon a finding or ruling different from that originally made. This is what occurred in the *Cousens* case as to a future transaction and the Board of Tax Appeals allowed the Commissioner so to act. This right is not always granted, however. Several early cases refused, and at the present time the Court of Appeals for the Sixth Circuit refuses, the Commissioner the right to upset the finding of his predecessor.⁷⁴ These cases rely upon the theory that an administrative determination, once made within the authority of the particular agency, cannot be upset except upon a showing of fraud or misrepresentation.⁷⁵

"(2) Rulings will be made on prospective transactions only where the law or regulations provide for a determination by the Commissioner of the effect of a proposed transaction for tax purposes. . . ."

See *Wenchel, Taxpayer's Rulings*, 5 TAX L. REV. 105, 108 (1950).

Closing agreements may be entered into in situations such as presented in the *Cousens* case. See T. D. 4855, 1938-2 CUM. BULL. 252. See notes 116-118 *infra*.

⁷⁴ *Woodworth v. Kales*, 26 F. 2d 178 (6th Cir. 1928); *United States v. Detroit Steel Products Co.*, 20 F. 2d 675 (E. D. Mich. 1927); *Penrose v. Skinner*, 278 Fed. 284, 286 (D. Colo. 1921), *aff'd on rehearing*, 298 Fed. 335 (D. Colo. 1932). Cf. *H. S. D. Co. v. Kavanagh*, 191 F. 2d 831 (6th Cir. 1951). These cases are discussed in note 75 *infra*.

⁷⁵ The case of *Penrose v. Skinner*, 278 Fed. 284, 286 (D. Colo. 1921), *aff'd on rehearing*, 298 Fed. 335 (D. Colo. 1932) seems to be the first decision to have clearly spelled out such a theory; this was, however, a dictum. The court cited several Supreme Court and lower court cases in support, and while a few of the lower court cases appear to support the theory, none of the Supreme Court cases seem to do so. The next case promulgating the theory was *United States v. Detroit Steel Products Co.*, 20 F. 2d 675 (E. D. Mich. 1927), 37 YALE L. J. 255, which followed *Penrose v. Skinner*. At approximately the same period, and on the same set of facts, several other cases reached a contrary result. *United States v. Standard Spring Mfg. Co.*, 23 F. 2d 495 (D. Minn. 1927); followed in *Champ Spring Co. v. United States*, 47 F. 2d 1 (8th Cir. 1929), *cert. denied*, 283 U. S. 852 (1931); *United States v. Tuthill Spring Co.*, 55 F. 2d 415 (N. D. Ill. 1931); *United States v. Bartron*, 35 F. 2d 765 (D. S. D. 1929). It is worthy of note that the *Detroit Steel Products* case seems to have been cited in only two federal cases. It was distinguished in *United States v. Heilbroner*, 22 F. Supp. 368, 370 (S. D. N. Y. 1938), *aff'd*, 100 F. 2d 379 (2d Cir. 1938), and approved in *In re Bowen*, 48 F. Supp. 67 (E. D. Pa. 1942), *rev'd*, 138 F. 2d 22 (3rd Cir. 1943), *cert. denied*, 320 U. S. 799 (1944).

The next case advancing such a theory was the controversial decision of *Woodworth v. Kales*, 26 F. 2d 178 (6th Cir. 1928), noted with approval in 27 MICH. L. REV. 677 (1929). The facts of the case were almost identical with those of the *Cousens* case (see page 368), but the court refused to allow the Commissioner to reopen the question of the March 1, 1913 value of the Ford stock. The court stated that ". . . where the ascertaining of an essential fact is left to their [officers of the government] discretionary judgment, where they exercise that dis-

The Supreme Court has not passed on this question, but the other courts of appeal which have passed on the question allow the Commissioner the right to reopen his predecessor's findings.⁷⁶ The Supreme Court *has* passed upon the question of a Commissioner's right to reopen and reassess upon his *own* findings, and has expressly held that he could

creation in good faith and where thereupon the tax is computed and paid, it seemingly must be the theory of normal operation that the matter is closed. . . . 'No one will contend that a succeeding Commissioner could overrule or ignore the decisions of his predecessor, unless such decisions were in law erroneous or tainted with fraud [or mistake].' The court was quoting from *Penrose v. Skinner*. If taken at its face value, this decision would be of little aid to a taxpayer, for, if the previous findings were not erroneous, there is little likelihood that the Commissioner would seek to change it. However, this case has been relied upon by taxpayers seeking to estop the Commissioner from reopening *any* previous determination, made by *himself or his predecessor*. It has been distinguished in several cases on the ground that it concerned an attempted reopening of a ruling by a former Commissioner, while those cases concerned reopening by the same Commissioner. These cases did deny the validity of the *Kales* case, however. Page v. Lafayette Worsted Co., 66 F. 2d 339, 343 (1st Cir.), *cert. denied*, 290 U. S. 692 (1933); Holmquist v. Blair, 35 F. 2d 10, 13 (8th Cir. 1929); L. Loewy & Son v. Commissioner, 31 F. 2d 652 (2d Cir. 1929); Francis P. McIlhenny, 13 B. T. A. 290 (1928), *aff'd*, 39 F. 2d 356 (3rd Cir. 1930); J. I. R. Henry, 13 B. T. A. 295 (1928). Even the Sixth Circuit subsequently limited its effect, but did not deny its validity. Austin Co. v. Commissioner, 35 F. 2d 910, 911 (6th Cir. 1929), *cert. denied*, 281 U. S. 735 (1930). On substantially the same facts, other courts have expressly reached a contrary view. Berry v. Westover, 70 F. Supp. 537, 544 (S. D. Calif. 1947); Kelly v. United States, 27 F. Supp. 570, 581 (D. Mass. 1939); Stein-Block Co., 23 B. T. A. 1165 (1931) ("On practically the same set of facts we, in *James Couzens* . . . reached a different conclusion from that reached in the *Kales* case, and such has been our consistent holding since the former decision."). See also, cases cited in note 76 *infra*. The Supreme Court has indicated a view contrary to the *Kales* case. See note 77 *infra*.

However, the Sixth Circuit has never repudiated the *Kales* case, and it has been followed in that circuit. Routzan v. Brown, 95 F. 2d 766 (6th Cir. 1938); Boyne City Lumber Co. v. Doyle, 47 F. 2d 772 (W. D. Mich. 1930); and see Page v. Lafayette Worsted Co., *supra*, at 343 (dissenting opinion); Austin v. Commissioner, *supra*, at 914 (dissenting opinion). Several writers have seemingly approved the *Kales* case. See Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1292, n. 40 (1935) ("Woodworth v. Kales . . . , perhaps the best-known case, is somewhat favorable to the taxpayer. But it must be handled cautiously."); Note, *Res Judicata in Administrative Law*, 49 YALE L. J. 1250, 1264-65 (1940); Note, 27 MICH. L. REV. 677 (1929).

In 1951, the Sixth Circuit was again presented with the question of the Commissioner's right to reopen a finding made by a predecessor. In H. S. D. Co. v. Kavanagh, 191 F. 2d 831 (6th Cir. 1951) the court denied the right of the Commissioner to reopen such a finding, and cited in support, the *Kales* case. Thus, after a lapse of thirteen years, this doctrine gets a "new lease on life." The effect of this decision, as supporting such a theory, is weakened somewhat by the reference of the court to the "unusual powers" given the Commissioner to approve employee pension plans and trusts, which were in issue in that case. Also, the court cited Vestal v. Commissioner, 152 F. 2d 132 (D. C. Cir. 1945) in support of its refusal to allow a redetermination of the former finding. That case involved a "duty of consistency" (see page 378, *infra*) rather than a question of the finality of an administrative determination.

Cf. INT. REV. CODE §3790, "In the absence of fraud or mistake or mathematical calculations, the findings of fact in and the decisions of the Commissioner upon . . . the merits of any claim . . . under . . . the internal revenue laws shall not . . . [except by the Tax Court], be subject to review by any other administrative or accounting officer, employee, or agent of the United States. . . ." [Italics added.]

do so.⁷⁷ It is difficult to see why the Court of Appeals of the Sixth Circuit does not feel bound by this rule in cases where the redetermination is made by a Commissioner other than the one making the original determination.⁷⁸

Some of the courts which give the Commissioner the right to reopen his own, or his predecessor's, findings and rulings give as one reason for so doing that the taxpayer is not bound by such a ruling or determination, and therefore the government should not be bound.⁷⁹ However, in view of the many situations in which the Commissioner may estop the taxpayer, with no corresponding right in the taxpayer against the government, such reasoning seems questionable.⁸⁰ As to past transactions, a better reason seems to be that it would be difficult for the taxpayer to show any damage from his reliance upon the finding, for in any event, his liability will be no greater than it would have been had the agent ruled correctly in the first instance.⁸¹ Even the very liberal doctrine of "quasi estoppel" requires that some damage result to the person asserting the estoppel.⁸² The cases allowing the Commissioner to reopen rulings made on future transactions do not have

⁷⁶ *Keystone Auto Club v. Commissioner*, 181 F. 2d 402 (3rd Cir. 1950); *John M. Parker Co. v. Commissioner*, 49 F. 2d 254 (5th Cir. 1931); *Sweets Co. of America v. Commissioner*, 40 F. 2d 436 (2d Cir. 1930); *Overby v. United States*, 44 F. 2d 268 (Ct. Cl. 1930); *Oak Worsted Mills v. United States*, 36 F. 2d 529 (Ct. Cl. 1929), *new trial denied*, 38 F. 2d 699 (Ct. Cl. 1930), *aff'd on other grounds*, 282 U. S. 409 (1931); *Handy & Hartman*, 17 B. T. A. 980 (1929), *aff'd*, 284 U. S. 136 (1931); 10A MERTENS, *LAW OF FEDERAL INCOME TAXATION* §60.15 (Rev. vol. 1948); Magill, *Finality of Determinations of the Commissioner of Internal Revenue*, 28 COL. L. REV. 563, 566 (1928).

⁷⁷ *Burnet v. Porter*, 283 U. S. 230 (1931), approving *McIlhenny v. Commissioner*, 39 F. 2d 356 (3rd Cir. 1930). *Accord*, *Blackhawk-Perry Corp. v. Commissioner*, 182 F. 2d 319 (8th Cir. 1950); *Okonite Co. v. Commissioner*, 155 F. 2d 319 (3rd Cir. 1946); *Chiquita Mining Co. v. Commissioner*, 148 F. 2d 306 (9th Cir. 1945); *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (8th Cir. 1944); *New Jersey Woolen Mills v. Gnichel*, 116 F. 2d 338 (3rd Cir.), *cert. denied*, 312 U. S. 709 (1940); *Tonningsen v. Commissioner*, 61 F. 2d 199 (9th Cir. 1932); *Bonwit Teller & Co. v. Commissioner*, 53 F. 2d 281 (2d Cir.), *cert. denied*, 284 U. S. 690 (1932); *Bumgartner v. Commissioner*, 51 F. 2d 472 (9th Cir.), *cert. denied*, 284 U. S. 674 (1931); *Levy v. Commissioner*, 48 F. 2d 725 (9th Cir. 1931); *Harriton v. Lucas*, 41 F. 2d 429 (D. C. Cir. 1930); *Taft Woolen Mill v. United States*, 38 F. 2d 704 (Ct. Cl.), *cert. denied on this point*, 281 U. S. 717, *aff'd on other grounds*, 282 U. S. 409 (1930); *cf. Stowe v. Commissioner*, 190 F. 2d 723 (2d Cir. 1951); *Commissioner v. Neal*, 65 F. 2d 761 (8th Cir. 1933).

⁷⁸ Other courts of appeal seem to regard the two situations as being the same, and cite cases involving either of the two situations as authority for allowing the Commissioner to reopen his own or his predecessor's findings. See, e.g., *McIlhenny v. Commissioner*, 39 F. 2d 356 (3rd Cir. 1930).

⁷⁹ Magill, *Finality of Determinations by the Commissioner of Internal Revenue*, 28 COL. L. REV. 563, 569 (1928).

⁸⁰ See generally, Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281 (1935); Atlas, *The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71 (1948).

⁸¹ *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (8th Cir. 1944). The payment of interest, and possibility of a penalty, might constitute sufficient "damage" to the taxpayer. This point does not appear to have been raised in any case.

⁸² The doctrine has been defined as being applicable "to prevent a wrong being

this point to rely upon, and they either use the reasons stated in the *Couzens* case, or rely upon the strict requirements of estoppel *in pais*.⁸³

Commissioner's Power to Change Existing Administrative Rulings and Practices

In the cases just discussed, it is to be noted that the Commissioner, or his predecessor, who made a ruling on a particular transaction, did so to determine the tax liability *for that year*. If the ruling is changed, it will have the effect of changing the tax liability for the year *in which the ruling was made*. Suppose, however, that the transaction on which the original ruling was made is of a recurring nature. If there has been no subsequent change in the situation of the taxpayer, nor any change in the applicable statute or regulation, can the Commissioner, after several years, now assert a different rule for the current year? Here, the asserted change is not intended to affect prior years, but only the current and future years. This involves the question of the applicability of the doctrine of "collateral estoppel" to Commissioner's rulings.

In *Schafer v. Helvering*,⁸⁴ the taxpayer had filed his returns as a dealer in securities. With full knowledge of the facts, the Commissioner had approved of the taxpayer's action which was in accord with the required practice of the Bureau. After allowing this for four years, the Commissioner refused to allow the taxpayer to file as a dealer for the year 1929. The taxpayer charged that the change in position was taken by the Commissioner because the original determination and practice resulting therefrom was no longer the most favorable to the government. This was answered by the court as follows:

"... granting . . . that the Bureau's willingness to leave undisturbed the practice [originally required] was induced by the larger tax accruing to the government, such action, or lack of action cannot estop the government now from insisting upon compliance with the laws."⁸⁵

The full effect of such a holding was brought out in the opinion, in answer to another asserted defense of the taxpayer:

"It is also said, and doubtless it is true, that during some of those years—perhaps all of them—the method of computing income now insisted on by the Commissioner, if then applied, would have resulted in a smaller tax. . . .

done 'wherever, in good conscience and honest dealing' a party ought not to be permitted to repudiate his previous statements. . . ." *Robbins v. United States*, 21 F. Supp. 403 (Ct. Cl. 1937). Since the taxpayer is merely having to pay what he lawfully owes (*Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (8th Cir. 1944)), there is no "wrong being done." Cf. *Stockstrom v. Commissioner*, 190 F. 2d 283 (D. C. Cir. 1951).

⁸³ See page 367 and notes 57-62 *supra*.

⁸⁴ 83 F. 2d 317 (D. C. Cir.) *aff'd*, 299 U. S. 171 (1936).

⁸⁵ *Id.* at 320.

[Also] “. . . petitioners might have altogether avoided the tax now assessed . . . and it is likely that they would have done so but for their reliance upon the repeated approval of the other method by the Bureau; but even this can not help them if the old interpretation of the regulation by the Bureau was wrong. . . .”⁸⁶

The recognition by the court that the method now asserted would result in a lower tax to the taxpayer, if applied retroactively, was of little assistance to the taxpayer. By the time the opinion was rendered, the statutory time for filing a claim for refund had expired. This would be true in the vast majority of cases of this nature. Also, the fact that he *could have* so acted as to avoid liability for the tax is of little assistance, for the transactions are now completed and he cannot “re-do” them. In spite of the inequities often resulting in cases of this sort, the *Schafer* case represents the unanimous view of the courts today.⁸⁷

Inconsistent Determinations by the Commissioner

Sometimes, the determination of a particular fact or a ruling on a particular transaction will be projected into another year, where the *same fact or transaction* must govern tax liability. For example, a taxpayer realizes a gain on an exchange of property. In reviewing the return, the Commissioner increases the valuation of the property received and the taxpayer pays the tax on the additional gain resulting from this redetermination. In some future year, if the taxpayer sells the property, he will have to look to the value as determined upon acquisition in order to arrive at his basis for gain or loss on the sale. A serious difficulty might arise if the Commissioner refuses to recognize the prior valuation, and asserts a lower value as having been the correct value at acquisition.⁸⁸ This, of course, would increase the taxable gain or

⁸⁶ *Id.*

⁸⁷ *Niles Bennet Pond Co. v. United States*, 281 U. S. 357 (1929); *Keystone Auto Club v. Commissioner*, 181 F. 2d 402 (3rd Cir. 1950); *Hotel Kingkade v. Commissioner*, 180 F. 2d 310 (10th Cir. 1950); *Commissioner v. Rowan Drilling Co.*, 130 F. 2d 62 (5th Cir. 1942); *Detroit & Winsor Ferry Co. v. Woodworth*, 115 F. 2d 795 (6th Cir. 1940); *Sharpe v. Commissioner*, 107 F. 2d 13 (3rd Cir. 1939), *cert. denied*, 309 U. S. 665 (1940); *William Hardy, Inc. v. Commissioner*, 82 F. 2d 249 (2d Cir. 1936); *Seeley v. Helvering*, 77 F. 2d 323 (2d Cir. 1935); *Mt. Vernon Trust Co. v. Commissioner*, 75 F. 2d 938 (2d Cir. 1935); *Nichols Land Co. v. Commissioner*, 65 F. 2d 437 (8th Cir. 1933); *Elrod Slug Casting Machine Co. v. O'Malley*, 57 F. Supp. 915 (D. Neb. 1944); *South Chester Tube Co.*, 14 T. C. 1229, 1235 (1950); *Southern Maryland Agricultural Fair Ass'n*, 40 B. T. A. 549 (1939); 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.14 (Rev. vol. 1948).

⁸⁸ This is essentially the fact situation presented in *J. O. Cole, Ex'r*, 13 B. T. A. 1310 (1928), where the Commissioner, for the purpose of determining gain upon acquisition of certain bonds acquired by the taxpayer, used the *par value* of the bonds. Later, when the bonds were sold at a loss, the Commissioner successfully asserted that the basis for determination of the loss was the *market value* at the date of acquisition, which value was *less* than the *par value*. See *Alamo Nat. Bank v. Commissioner*, 95 F. 2d 622 (5th Cir. 1938) (the court discusses this possibility). For cases involving similar situations, see note 97 *infra*. See also,

reduce the loss which was realized on the sale. If the statute of limitations has not intervened to bar a reassessment of, or an amendment to, the prior return there is no question but what the Commissioner might redetermine the value upon acquisition.⁸⁹ And the gain on the original transaction will be reduced as the gain on the subsequent transaction is increased, so that no serious inequities are likely to result. If the statute *has* intervened between the year of acquisition and the year of sale, the inequity that might result from a redetermination of the value at acquisition is obvious. The gain on the sale would be determined from a low evaluation of the property sold, and the gain on acquisition would have already been taxed on the gain determined by a high evaluation of the same property.

A situation of this nature might come about in two different ways. In several sections of the Code, the Commissioner is given a choice of methods which he may require a taxpayer to follow in respect of a particular transaction.⁹⁰ Thus, either method that might be required is legal. On the other hand, the case might be one in which there is only one *correct* way to handle the particular transaction. Any other way would then be "illegal." Therefore, when the Commissioner makes such a determination, it must be ascertained whether he has statutory authority to require one of several methods, or, whether he is merely making the determination under his own interpretation of the statute. Mr. Justice Frankfurter, speaking as Circuit Justice for the First Circuit, pointed out the distinction between the doctrines applicable in these two situations, which are correctly labeled "election" and "estoppel":

"[Election] is applicable where a taxpayer has had a choice of two methods of computing his tax, both legal. . . . Estoppel, on the other hand, applies where there was only one lawful course open, which was not followed . . . by the taxpayer. . . ."⁹¹

While the above statement was made in a case involving an asserted estoppel against a taxpayer, it would seem to apply to the Commissioner as well. Unfortunately, however, the cases do not always make a distinction between the doctrine of election and that of estoppel.⁹² Such

Maguire, Surrey, and Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L. J. 509, 511 (1939); Note, 52 HARV. L. REV. 300 (1938).

⁸⁹ See notes 74-78 *supra*. United States v. La Societe Francaise D. B. M., 152 F. 2d 243 (9th Cir. 1945). This statement is qualified by the Sixth Circuit holdings, discussed at note 75 *supra*.

⁹⁰ See *e.g.*, INT. REV. CODE §§22(c), 22(d) (5) (A) and (B) (dealing with inventories); 45 (dealing with related businesses). Cf. §22(d) (6) (D). See generally, Magill, *The Finality of Determinations of the Commissioner of Internal Revenue*, 28 COL. L. REV. 536, 564-65 (1928).

⁹¹ *Ross v. Commissioner*, 169 F. 2d 483, 493 (1st Cir. 1948).

⁹² See, *e.g.*, *Commissioner v. Mellon*, 184 F. 2d 157 (3rd Cir. 1950); *Vestal v. Commissioner*, 152 F. 2d 132 (D. C. Cir. 1945); *Alamo Nat. Bank v. Commissioner*, 95 F. 2d 622 (5th Cir. 1938).

a distinction is important, for some courts attach different legal consequences to the two situations.⁹³ In order for the doctrine of election to be applicable, there must be a specific Code provision or regulation for the alternative method or methods.⁹⁴ Where such provision is made, giving to the Commissioner the right to require one of several methods, he would seem to be bound by the election made thereunder.⁹⁵ However, where the original method of computation required by the Commissioner is illegal, the problem is simply one of the application of an estoppel. In such cases, the taxpayer is frequently estopped if he chose the original method of handling the transaction,⁹⁶ but only a few cases estop the government where the Commissioner required the original method.⁹⁷ These few cases are most important, however, for they

⁹³ See notes 95 and 97 *infra*.

⁹⁴ *Ross v. Commissioner*, 169 F. 2d 483 (1st Cir. 1948); *Commissioner v. Arnold*, 147 F. 2d 23 (1st Cir. 1945); 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.17 (Rev. vol. 1948 and Cum. Supp. 1951).

⁹⁵ See 10A MERTENS, LAW OF FEDERAL INCOME TAXATION §60.17 (Rev. vol. 1948). Cf. *Ross v. Commissioner*, 129 F. 2d 310 (5th Cir. 1942).

⁹⁶ See Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1285-93 (1935).

⁹⁷ *Vestal v. Commissioner*, 152 F. 2d 132 (D. C. Cir. 1945); *Commissioner v. McLean*, 127 F. 2d 942 (5th Cir. 1942); *Dixie Margerine Co. v. Commissioner*, 115 F. 2d 445 (6th Cir. 1940); *Eichelberger & Co. v. Commissioner*, 88 F. 2d 874 (5th Cir. 1937); *Ford Motor Co. v. United States*, 9 F. Supp. 590 (Ct. Cl. 1935); and see *Howell v. Commissioner*, 162 F. 2d 316 (5th Cir. 1945) *semble*. Cf. *Wurtsbaugh v. Commissioner*, 187 F. 2d 975 (5th Cir. 1951); *H. S. D. Co. v. Commissioner*, 191 F. 2d 831 (6th Cir. 1951), discussed in note 75 *supra*. See also *Ernest Strong*, 7 T. C. 953 (1946), where the court refused to allow the Commissioner to assert that certain gifts were valid and complete for purposes of the gift tax when he had, in a former action, won an income tax assessment case on the ground that the same trusts were not valid gifts. *Accord*, *United States v. Brown*, 86 F. 2d 798 (6th Cir. 1936). See Karol, *The Doctrine of Estoppel*, 23 TAXES 1132 (1945). The *Strong* case did not involve a situation caused by inconsistent provisions of the income and gift taxes. There are some situations where facts similar to those presented in *Ernest Strong* could be caused by different requirements of the income and gift tax provisions. *Helvering v. Clifford*, 309 U. S. 331 (1940) was such a case. There, a trust was set up in such a manner as to constitute a taxable gift to the donor. However, under the provisions of the income tax, the income of the trust, even though not payable to him, was taxable to the donor. This problem, with a suggested solution, is discussed in Griswold, *A Plan for the Coordination of the Income, Estate, and Gift Tax Provisions with Respect to Trusts and Other Transfers*, 56 HARV. L. REV. 337 (1942); Platt, *Integration and Correlation—The Treasury Proposal*, 3 TAX L. REV. 59 (1947); Wales, *Consistency in Taxes—The Rationale of Integration and Correlation*, 3 TAX L. REV. 173 (1947); Griswold, *Coordinating Federal Income, Estate, and Gift Taxes*, 22 TAXES 6 (1944).

The following cases have refused to estop the Commissioner from taking an inconsistent position, even though inequities might result. *Gaylord v. Commissioner*, 153 F. 2d 408 (9th Cir. 1946); *Lembcke v. Commissioner*, 126 F. 2d 940 (2d Cir. 1942); *Triplex Safety Glass Co. v. Latchum*, 44 F. Supp. 436 (D. Del.), *aff'd per curiam*, 131 F. 2d 1023 (1942); *United States Trust Co. of New York*, 13 B. T. A. 1074 (1928); *Ross v. Commissioner*, 129 F. 2d 310 (5th Cir. 1942) where the court distinguished between the Commissioner himself taking an inconsistent position, and the Commissioner taking a position inconsistent with that of a revenue agent. Compare with this the situation where different representatives of the government are involved in suits against the same taxpayer over the same issue decided in a former year. Note 9 *supra*. In some cases, the Com-

firmly establish the principle that the government can be estopped in a tax case. Relying upon a "duty of consistency" which is said to be "akin to estoppel" these cases have refused to allow the Commissioner to correct a former erroneous ruling where the result would be inequitable. This "duty of consistency" has been criticized because "it does not do equity unless supplemented by what in the end comes to a reassessment of the first tax in violation of the statute of limitations."⁹⁸ This may be true in certain cases,⁹⁹ but in the vast majority of cases where the Commissioner is permitted to take an inconsistent position the resulting inequity far outweighs this factor. For example, in *United States Trust Co. v. Commissioner*,¹⁰⁰ the Commissioner disallowed a deduction in 1920 and required that it be taken the following year. After the statute of limitations for 1920 had expired, the Commissioner disallowed the deduction for 1921 and ruled that 1920 had been the correct year for the deduction. Thus, the taxpayer was unable to take the deduction in either year. Another striking example of the inequities which might result from the Commissioner taking an inconsistent position is *Gaylord v. Commissioner*.¹⁰¹ There the taxpayer made a gift and paid the gift tax thereon; later, after the statute of limitations had run on the year of the gift, the Commissioner ruled that the income derived from the gift was still taxable to the donor. The taxpayer could do nothing about the gift tax paid, and also was required to pay the income tax. Fortunately, all of the courts do not follow such harsh rules, and each of the two cases mentioned above have their counterparts in other cases where the courts have refused to allow the Commissioner to act as he did in those cases.¹⁰²

missioner has been allowed to tax the same income to two persons. *Emery v. Commissioner*, 78 F. 2d 437 (1st Cir. 1935) ("Doubtless the Commissioner will make a fair adjustment. . . ." *Doubtless?*); *Elizabeth W. Boykin*, 16 B. T. A. 477 (1929); *Okonite Co. v. Commissioner*, 155 F. 2d 248 (3rd Cir. 1946) (acceptance of tax from stockholders on a corporate dividend; denial to the corporation that it was a taxable dividend).

Cf. *Rothensies v. Electric Storage Battery Co.*, 329 U. S. 296 (1946), and *Bull v. United States*, 295 U. S. 247 (1935), both noted in 94 U. PA. L. REV. 343 (1946), involving the doctrine of equitable recoupment. This is another method used by the courts to alleviate hardships caused by the statute of limitations. See generally, *Atlas, The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71 (1947); *McConnell, The Doctrine of Recoupment in Federal Taxation*, 28 VA. L. REV. 577 (1942).

⁹⁸ *Ross v. Commissioner*, 169 F. 2d 483, 494 (1948). This, of course, presupposes that there is some basic "wrong" in violating the statute of limitations to prevent an inequity. Congress has seen fit to do this very thing. See INT. REV. CODE §3801, discussed at page 379.

⁹⁹ This will follow only if the whole transaction is recomputed (see page 379 for the operation of a recomputation under section 3801 of the Code). No such consequences followed in the cases cited in the first paragraph of note 97 *supra*.

¹⁰⁰ 13 B. T. A. 1074 (1928).

¹⁰¹ 153 F. 2d 408 (9th Cir. 1946). This case was not based upon conflicting gift and income tax provisions. See the discussion of *Ernest Strong*, 7 T. C. 953 (1946) at note 97 *supra*.

¹⁰² *Joseph Eichelberger & Co. v. Commissioner*, 88 F. 2d 874, 875 (5th Cir.

Congress has recognized the inequities that may result from a change in position after the statute of limitations has run and has provided for adjustments in certain types of cases.¹⁰³ This provision is remedial in nature, and its purpose has been explained as follows:

"That section is a relief provision and was enacted to relieve both taxpayers and the Government from the unjust effects, in certain cases, resulting from the correction of errors where the operation of other provisions of the revenue laws ordinarily precludes correction of tax results . . . flowing from an erroneously inconsistent position previously maintained (that is, for other years) by either or both parties."¹⁰⁴

In the cases where applicable, the adjustment is made as follows:

" . . . the tax for the year with respect to which the error was made is determined, the error is then corrected, and the difference between the corrected tax result and the first figure constitutes the amount of the adjustment. . . ."

" . . . if the amount is an increase over the tax previously determined, it is recovered in the same manner as a deficiency determined by the Commissioner; if a decrease in that tax, in the same manner as an overpayment claimed by the taxpayer."¹⁰⁵

However, the adjustment provision does not carry out fully the recommendation of the subcommittee that the "statute of limitations . . . be so adjusted as to insure the taxation of income, and the allowance of deductions, in the year to which properly applicable."¹⁰⁶ For no clearly apparent reason the statute does not provide for adjustment in cases where deductions are not taken in the proper year, which was the

1937). On quite similar facts the court held *contra* to *United States Trust Co.*, stating that "The United States got the benefit of his [the Commissioner] decision then and ought to abide by it now." And, in *Ernest Strong*, 7 T. C. 953 (1946) the court reached a result contrary to that in the *Gaylord* case. However, the *Strong* case was decided upon the principle of *res judicata*, as there had been a former decision on the question of whether the gift to the trust was a valid one. In the former case, the court had held the gift valid, and a gift tax had been paid. This case was held to preclude the Commissioner from now assessing an income tax to the grantor of the trust. While the court discussed the principles of *res judicata*, the question was actually one of collateral estoppel. See page 358 and note 8 *supra*. It is doubtful if the doctrine of collateral estoppel was applicable in that case. See page 359 for the limitations upon the operation of the doctrine. See also, *Commissioner v. McLean*, 127 F. 2d 942 (5th Cir. 1942).

¹⁰³ INT. REV. CODE §3801. See Maguire, Surrey and Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L. J. 509 and 719 (1939); Note, 52 HARV. L. REV. 300 (1938); Legis., 39 COL. L. REV. 460 (1939).

¹⁰⁴ *Gooch Milling and Elevator Co. v. United States*, 78 F. Supp. 94, 97 (Ct. Cl. 1948). See Maguire, Surrey and Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L. J. 509 and 719 (1939); Atlas, *The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71, 83 (1947).

¹⁰⁵ Maguire, Surrey and Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L. J. 509 and 719, 740 (first quoted paragraph) and 746 (second paragraph). This is approximately the same language as contained in T. D. 4856, 34 TREAS. DEC. INT. REV. 414 (1938).

¹⁰⁶ *Report of a Subcommittee of the Committee on Ways and Means on a Pro-*

situation presented in the *United States Trust Co.* case.¹⁰⁷ Also, the statute pertains only to income taxes, and therefore, does not include such situations as occurred in *Gaylord v. Commissioner*. In spite of the fact that it does not cover all cases where inequity results from a change of position after the statute of limitations has expired, the statute does prevent many inequities.¹⁰⁸ However, it must be remembered that the adjustment statute *does not* prevent the Commissioner from taking an inconsistent position, it merely mitigates some of the consequences which would otherwise result from this inconsistency.¹⁰⁹

Of all of the types of representations that might be made to a taxpayer, the one not yet mentioned is the one most frequently occurring in the day to day administration of the revenue laws—the “horseback” opinion of a minor revenue agent. These are the men with whom the average citizen comes in contact; these are the men upon whose advice the average citizen relies. But needless to say, in the light of the foregoing discussion, the representations of these lesser Bureau agents are so much “chaff in the wind” as a basis for an estoppel.¹¹⁰

IV. EXISTING AND SUGGESTED REMEDIES FOR THE PROBLEM

The taxpayer who contemplates some business venture, but who, in view of the possible tax consequences would like to have a binding advance ruling upon the consequences of his act, might well throw his hands up in resignation. One writer has described the position of the Bureau with respect to this taxpayer as being analogous to the following:

posed Revision of the Revenue Laws, H. R. 75th Cong., 3rd Sess. (1938) 79, recommendation No. 48. (Emphasis added.)

¹⁰⁷ See Note, 52 HARV. L. REV. 300, 304 (1938) which suggests some of the reasons why such a provision might have been omitted.

¹⁰⁸ Maguire, Surrey and Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L. J. 509 and 719, 734 (1939). The courts have tended to restrict its operation, however. See e.g., *Central Hanover Bank and Trust Co. v. United States*, 163 F. 2d 60 (2d Cir. 1947), *reversing*, 67 F. Supp. 920 (S. D. N. Y. 1946).

¹⁰⁹ Maguire, Surrey and Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L. J. 509 and 719; Note, 52 HARV. L. REV. 300 (1938).

¹¹⁰ *Commissioner v. Duckwitz*, 68 F. 2d 629, 630 (7th Cir. 1934) where advice was given to a taxpayer by a Solicitor in the Bureau of Internal Revenue that a certain business was a partnership and not a corporation. The Court of Appeals stated: “The Board properly rejected . . . respondent’s contention . . . [concerning] estoppel of the government because of careless and unofficial expression of opinion by the Solicitor. . . . *The ruling of the Board [is] so obviously sound that we refrain from discussing [it] in detail.*” (Emphasis added) *Walker Hill Co. v. United States*, 162 F. 2d 259 (7th Cir.), *cert. denied*, 332 U. S. 771 (1947); *Barnett Investment Co. v. Nee*, 72 F. Supp. 81 (W. D. Mo. 1947), both of these cases are discussed in Note, *Reliance on Advice of Government Officials*, 33 CORNELL L. Q. 607 (1948); *Chicago Flag & Decorating Co. v. United States*, 119 F. 2d 413 (7th Cir. 1941); *Darling v. Commissioner*, 49 F. 2d 111 (4th Cir.), *cert. denied*, 283 U. S. 866 (1931); *Ritter v. United States*, 28 F. 2d 265 (3rd Cir. 1928); *Searles’ Real Estate Trust*, 25 B. T. A. 1115 (1932).

"... a young man broached marriage to a young woman in this fashion, 'Buy your trousseau, send out the invitations, arrange for the honeymoon, meet me at the altar, and I will tell you then whether I will marry you.'"¹¹¹

But what can the taxpayer do? He can get a ruling only in very limited types of situations, and even if he gets the ruling, he can never be absolutely sure that the Bureau will uphold it. The fact that the Bureau upholds the *vast majority* of these rulings¹¹² is of little value to the taxpayer when it is realized that such ruling is not *legally* binding. In any event, Bureau personnel may or may not choose to upset his ruling if it later develops that it was erroneous.

The possibility of obtaining a closing agreement is open to the taxpayer seeking a determination of the tax consequences of a particular transaction.¹¹³ These agreements may pertain to completed transactions or to future transactions.¹¹⁴ If pertaining to a future transaction, such an agreement is "subject to any change in or modification of the law enacted subsequent to the date of the agreement and applicable to such taxable period."¹¹⁵ But if there is no such change in the applicable law, the agreement is binding upon the government and the taxpayer except upon a showing of fraud, malfeasance, or misrepresentation of a material fact.¹¹⁶ However, such agreements are difficult to obtain, and must be approved by the Secretary, the Under Secretary or an Assistant Secretary of the Treasury.¹¹⁷ If the agreement sought pertains only to a completed tax period, it is somewhat less difficult to obtain, requiring only the approval of the Commissioner.¹¹⁸ Also, a closing agreement pertaining to past transactions is not affected by changes in the law under which it was made. Thus, if Congress subsequently enacts retro-

¹¹¹ Herman Oliphant, *Declaratory Rulings*, 24 A. B. A. J. 7, 8 (1938).

¹¹² See Wenchel, *Taxpayer's Rulings*, 5 TAX L. REV. 105, 113-14 (1950).

¹¹³ INT. REV. CODE §3760. See Wenchel, *Taxpayer's Rulings*, 5 TAX L. REV. 105, 117 (1950); Atlas, *The Doctrine of Estoppel in Tax Cases*, 3 TAX L. REV. 71, 81 (1947).

¹¹⁴ Paragraph A, Section 801 (Title V—Miscellaneous Provisions) of the Revenue Act of 1938, amended what is now INT. REV. CODE §3760, by striking out the words "ending prior to the date of the agreement," which had theretofore limited the operation of the section to completed transactions. Act, May 28, 1938, c. 289 §801, 52 STAT. 573 (1938). See T. D. 4855, 1938-2 CUM. BULL. 252. See also, Cramp Shipbuilding Co., 14 T. C. 33 (1950) (involved a closing agreement applicable to future years).

¹¹⁵ T. D. 4855, 1938 CUM. BULL. 252.

¹¹⁶ INT. REV. CODE §3760(b).

¹¹⁷ *Id.*

¹¹⁸ Under the authority vested in him by Reorganization Plan No. 26 of 1950 (15 FED. REG. 4935 (1950)), the Secretary of the Treasury has given to the Commissioner all the rights and duties with respect to closing agreements relating to the tax liability of only past periods. Thus, no approval by the Secretary, the Under Secretary or an Assistant Secretary is necessary in such a case. Mim. 6772 (March 3, 1952).

active legislation favorable to the taxpayer,¹¹⁹ or if the statute under which the tax was agreed to is subsequently declared unconstitutional the agreement precludes the taxpayer from taking advantage of this change.¹²⁰ Also, if the Commissioner subsequently requires an inconsistent method for computation of the tax liability for a later year, even if based upon the transaction involved in the closing agreement, the agreement will not preclude him from so acting.¹²¹

The possibility of a binding advance ruling by the Commissioner has been suggested. These rulings, termed "declaratory rulings," would have some similarity to a taxpayer's ruling as rendered today, but they would have the binding effect of a closing agreement. A House subcommittee in 1938 recommended that the Commissioner be given authority to make such rulings, but the recommendation was not enacted into law. Rather, Congress amended the section on closing agreements, allowing them to be made as to future transactions.¹²² The mechanics of the two operate somewhat differently, and the procedure for obtaining a closing agreement is a great deal more cumbersome than that of the proposed "declaratory ruling."¹²³

As pointed out, the closing agreement offers one possible solution for the taxpayer who wishes to have a final determination of his tax liability for past or future years. Another solution could be provided if Congress would follow the provisions of certain other Acts¹²⁴ and allow the

¹¹⁹ *Guggenheim v. United States*, 77 F. Supp. 186 (Ct. Cl. 1948), *cert. denied*, 335 U. S. 908, *rehearing denied*, 336 U. S. 911 (1949).

¹²⁰ *Western & Southern Life Ins. Co. v. Dean*, 9 F. Supp. 36 (D. Ohio 1934); *Bankers Reserve Life Co. v. United States*, 42 F. 2d 313 (Ct. Cl. 1930).

¹²¹ *Smith Paper Co., 31 B. T. A. 28* (1934), *aff'd sub nom. Export Leaf Tobacco Co. v. Commissioner*, 78 F. 2d 163 (2d Cir.), *cert. denied*, 296 U. S. 627 (1935). Such a case would not seem to form a sound basis for the application of a "duty of consistency" (see page 378), on the part of the Commissioner. The taxpayer has been instrumental in binding himself, and would not seem to be in a position to seek to have the agreement extended to any year not expressly covered. Such agreements may constitute a "determination" within the meaning of §3801 of the Code. Thus, such an agreement may form the basis for an adjustment under the provisions of that section (see page 379 and supporting notes). INT. REV. CODE §3801(a) (1) (A). U. S. Treas. Reg. 111, §29.3801(a) (1)-2.

¹²² *Report of a Subcommittee of the Committee on Ways and Means on a Proposed Revision of the Revenue Laws*, H. R. 75th Cong., 3rd Sess. (1938) 79, recommendation No. 49 (recommended authority for declaratory rulings with binding effect). For the amendment to the section on closing agreements that was actually enacted, see note 115 *supra*. The author's discussions with members of the government who were present when this proposal was made lead to the conclusion that the Bureau, on second thought, decided that it did not want the power to make declaratory rulings. The opinion seems to have been that such power might make the Bureau a giant "legal aid" clinic for taxpayers and their counsel. Staffing such an organization would be an almost impossible task.

¹²³ For a discussion of the mechanics of the declaratory ruling, see Herman Oliphant, *Declaratory Rulings*, 24 A. B. A. J. 7 (1938); Traynor, *Declaratory Rulings*, 16 TAX MAG. 195 (1938).

¹²⁴ The Securities and Exchange Act §209(b), 53 STAT. 1173 (1939), 15 U. S. C. A. §77 sss (c) (1951): "No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regu-

taxpayer who relies in good faith upon the representations of a government agent to set up these representations as a defense on that particular matter. However, a better solution to the complex problem presented by the reliance of citizens upon representations or interpretations by various government agents or by the courts, would seem to be in the hands of the courts. The courts are well suited to appraise and permit equitable defenses in cases such as those discussed herein. They can weigh the asserted right of the citizen to expect that his government will "always be a gentleman"¹²⁵ against the obvious need of the government for an efficient and impartial administration of the revenue laws. It would be difficult, if not impossible, to achieve a satisfactory balance between these two conflicting concepts by way of a statute.¹²⁶ The *Stockstrom* case, where the taxpayer relied upon the interpretation by the courts, the actions and representations of the Bureau, and the apparent acceptance by Congress of the same interpretation, represents an excellent use of an equitable defense to prevent a patent injustice. The majority of the court felt that "taxpayers expect, and are entitled to receive, ordinary fair play from tax officials."¹²⁷ It is difficult to see how such a doctrine could to any appreciable extent disrupt the collection of revenue by the government.

lation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

See also, The Portal-to-Portal Act, §§9, 10, 61 STAT. 84 (1947), 29 U. S. C. §251 *et seq.* (Supp. III, 19, 50) and the discussion of the operation of these sections in LIVENGOOD, *THE FEDERAL WAGE AND HOUR LAW* 10, 23 (1951). This act contains a provision similar to that of the Securities and Exchange Act quoted above.

Even one of the Revenue Acts, at one time, allowed reliance upon administrative rulings to prevent liability for a tax. Revenue Act of 1926 §1108(b), 44 STAT. 114 (1927): "No tax shall be levied, assessed, or collected under the provisions of Title VI of this Act [excise taxes] on any article . . . if at the time of the sale or lease there was an existing ruling, regulation or Treasury Decision holding that the sale or lease of such article was not taxable, and the . . . [taxpayer] parted with possession or ownership of such article, relying upon the ruling, regulation, or Treasury Decision."

¹²⁵ *Stockstrom v. Commissioner*, 190 F. 2d 283, 289 (1951).

"The conflicting policies throughout the field are those of the necessity on the part of the government of collecting taxes as expeditiously as possible and of accurate and thoroughgoing statutory enforcement. Then too, there is the danger that the government might be estopped by the hasty curb-stone opinions of its tax officers in regard to a person's tax liability when the opinions subsequently turn out to be erroneous. . . . Lastly, there is the consideration that the personnel of the department is ever changing, and proof of the actual transactions would be difficult." Note, *Reliance on Advice of Government Officials*, 33 CORNELL L. Q. 607, 613 (1948).

¹²⁶ See *Proceedings of the Seventh Tax Clinic of the American Bar Association*, 16 TAX MAG. 663, 694 (1938). Mr. Randolph Paul stated: "I do want to emphasize the seriousness of the subject, and I don't believe that the cure can be effected through the operation of the estoppel principle. I tried myself to deal with the estoppel one time and I ran into sixty or seventy pages on the subject and I don't believe we are going to be able to put that into a comprehensible statute."

¹²⁷ 190 F. 2d at 289.