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Tax: Restraining the Assessment or Collection of Taxes: Section 7421(a) of the Internal Revenue Code

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employee's taxable income, why should a non-reimbursed part of the same kind of expense be measured by a different scale?

As was pointed out in the dissent, the conclusion of the majority in *Mendel* flies in the face of the Service's pronouncements, and disregards the subsequent cases based thereon¹² which hold such expenditures not to be allowable as deductions. Revenue Ruling 54-429 sets out three distinct provisions relating to moving expenses: (1) reimbursements are not taxable to an employee if the entire amount of the reimbursement is expended for moving; (2) any excess of the reimbursement over the actual moving cost is taxable to the employee; and (3) any expense incurred by the employee in excess of the reimbursement is personal, and thus not deductible by the employee.¹³

Were it not for the third provision of that ruling, the *Mendel* case might be seen as a logical extension of the first. In reaching its conclusion, however, the court apparently chose to disregard the third provision, which specifically disallowed deduction of moving expenses incurred by the employee in excess of an allowance or reimbursement by his employer.

In support of the *Mendel* case, it should be said that the court probably took a more realistic view than did the Commissioner in promulgating his ruling. The effect of the ruling would be to accept the employer's estimate in making an allowance or reimbursement as a conclusive statement of the cost of moving the employee's family and personal effects. To strictly adhere to the ruling would be to disregard the ordinary and necessary cost of moving in individual cases as a basis for distinguishing business expenses from personal expenses incurred by the employee.

John B. Jarboe

TAX: RESTRAINING THE ASSESSMENT OR COLLECTION OF TAXES: SECTION 7421(a) OF THE INTERNAL REVENUE CODE

The prompt payment of taxes is important to any government. Taxpayers invariably resist the collection of taxes, therefore "all governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them."¹

Under the authority granted by Article I, section 8 of the Constitution² Congress can prescribe the conditions under which

¹² H. Willis Nichols, Jr., 13 T.C. 916 (1949), and *United States v. Woodall*, 255 F.2d 370 (10th Cir. 1958).

¹³ Rev. Rul. 54-429, 1954-2 CUM. BULL. 53.

¹ *Cheatham v. United States*, 92 U.S. 85, 87, 23 L.Ed. 561, 562 (1876).

² This section provides, in part, that "Congress shall have Power To lay and collect Taxes, . . ." and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."

courts may interfere with the collection of taxes. Section 7421 (a) of the Internal Revenue Code of 1954 states: "Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This statute was first enacted, in essentially the same form, in 1867.³

Although the courts acknowledged that the assessment and collection of taxes must be accomplished without judicial interference,⁴ equity jurisdiction of the courts has been invoked if (1) the taxpayer had no adequate remedy by ordinary process of law, or the enforcement of the tax would (2) result in a multiplicity of suits, (3) produce irreparable injury, or (4) the assessment or attempted collection would throw a cloud upon the taxpayer's title to property.⁵ However the general rule has been that a taxpayer must pay his taxes and sue for a refund before he could seek judicial intervention.

The wording of section 7421(a) is clear and unambiguous. Nevertheless it has been held to be inapplicable under certain conditions. A suit to restrain collection can be maintained if the court determines that the government has not complied with all statutory procedural requirements. An example is the recent case of *Dierks v. United States*.⁶ Counsel for Mr. Dierks entered into a written stipulation with the Internal Revenue Service, admitting a tax and penalty liability of \$247,996.19. This stipulation also provided a waiver to all restrictions regarding assessment and collection of the tax deficiency. At the time this agreement was made Mr. Dierks was in a coma. Shortly thereafter he died. It was contended that this stipulation was invalid, therefore an injunction was sought to restrain the government from asserting a lien against his estate until the validity of this document could be determined. Under the provisions of section 6213(a) of the Internal Revenue Code collection activities are restrained until a decision of the tax court has become final.⁷ Since the tax court's decision would not be final until the validity of the stipulation had been ascertained, the district court granted a preliminary injunction.

Despite the plain wording of the prohibitory statute, courts have intervened if it was determined that a taxpayer's case came within one of the judicially defined exceptions. These exceptions are (1) the penalty exception, (2) the nontaxpayer exception, and (3) the extraordinary and exceptional circumstances exception.

³ Revenue Act of 1867, ch. 169, § 10, 14 Stat. 475.

⁴ *Cheatham v. United States*, 92 U.S. 85, 23 L.Ed. 561 (1876).

⁵ *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 20 L.Ed. 65 (1871).

⁶ 215 F.Supp. 338 (S.D.N.Y. 1963).

⁷ The Code Provides: "Except as otherwise provided in sec. 6861 [jeopardy assessments] no assessment of a deficiency in respect of any tax . . . shall be made, begun, or prosecuted . . . until the decision of the Tax Court has become final."

This latter category was, for practical purposes, eliminated as an exception by the Supreme Court in *Enochs v. Williams Packing & Nav. Co.*⁸

The Penalty Exception

Section 7421(a) and its predecessors specifically relate to a tax. Consequently if the court determines that the tax is a criminal penalty, then a suit to restrain the attempted assessment or collection can be maintained.

The complainant in *Lipke v. Lederer*⁹ contended that the tax assessed against him was not a tax, but was punishment for violation of the National Prohibition Act. The Supreme Court agreed and reversed the district court's decree denying an injunction. Irrespective of the label placed on a tax the Court declared the primary function or purpose of the tax controlled in determining whether it was a criminal penalty. A distinction was drawn between the functions of a tax (to provide support for the government) and a penalty (punishment for infringement of the law). Since there could be no assessment until there had been a violation of the National Prohibition Act, the 'tax' was classified as a criminal penalty. Therefore it was not within the scope of the prohibitory statute, and the assessment could be restrained.

Another case, *Regal Drug Corp. v. Wardell*,¹⁰ also involving the imposition of a tax for violation of the National Prohibition Act was decided by the Supreme Court later in the same year (1922) as its decision in the *Lipke* case. In reversing the district court's order denying injunctive relief the Court affirmed the *Lipke* decision.

A distinction has been drawn between a tax which is in effect a criminal penalty, and a tax which is an administrative penalty. If the court determines that the penalties are an integral part of the tax statute, then they are said to be "administrative penalties and are within the impeding statute just as much as primary taxes."¹¹ Accordingly the Second Circuit Court of Appeals in the recent case of *Botta v. Scanlon*¹² declared that a penalty imposed equal to the amount of the tax not paid was merely a method to ensure payment of the tax, and not a criminal penalty.

Although penalties imposed for failure to file a return or for fraudulent underpayment are in excess of the tax due, they are not classified as criminal penalties.¹³

⁸ 370 U.S. 1, 82 Sup.Ct. 1125, 8 L.Ed.2d 292 (1962).

⁹ 259 U.S. 557, 42 Sup.Ct. 549, 66 L.Ed. 1061 (1922).

¹⁰ 260 U.S. 386, 43 Sup.Ct. 152, 67 L.Ed. 318 (1922).

¹¹ *Reams v. Vrooman-Fehn Printing Co.*, 140 F.2d 237, 241 (6th Cir. 1944).

¹² 314 F.2d 392 (2d Cir. 1963).

¹³ The Supreme Court in *Helvering v. Mitchell*, 303 U.S. 391, 402, 58 Sup.Ct. 630, 634, 82 L.Ed. 917, 923-924 (1938), in discussing the penalty for fraudulent underpayment, declared: "That Congress provided a distinctly

The Nontaxpayer Exception

Since the revenue laws are a system to regulate tax assessment and collection, they relate to taxpayers, and not to nontaxpayers. The Internal Revenue Code provides a method whereby a taxpayer may maintain an action after taxes have been paid and refund has been denied by the Commissioner.¹⁴ No procedure is prescribed for nontaxpayers. If the Collector levies upon property of a nontaxpayer to collect a tax owed by the taxpayer, the nontaxpayer is not within the scope of the prohibitory statute and collection activities can be restrained.¹⁵

In *Helvey v. Wiseman*¹⁶ the petitioner's name had been forged on a joint tax return by her ex-husband. After being reassured by her ex-husband's attorney that she would not become involved in a tax dispute between the Collector and her ex-husband, she signed a tax petition. Subsequently she received no notice of the hearing nor of the assessment against her property. When a lien was asserted against this property she sought injunctive relief based on these facts, and also on the fact that if these taxes were paid there would be "no remedy whereby she could sue to recover the taxes"¹⁷ The district court expressed the opinion that the Internal Revenue Service could not create or assess income taxes against someone who did not have any income. Notwithstanding the prohibition of section 7421(a), a permanent injunction was granted.

The Collector, in *Rothensies v. Ullman*,¹⁸ attempted to levy upon the joint bank account of a husband and wife to collect taxes owed by the husband. The bank refused to honor this levy because under the laws of the state of Pennsylvania estates of tenants by entireties could not be attached or levied upon for an obligation due by either spouse individually. After the district court quashed the warrant of distraint the government failed to obtain a supersedeas within the required 10 day period. The husband and wife withdrew the entire balance from their account in the interim between the district court's decree sustaining the bank's action and the appeal by the government. The Third Circuit Court of Appeals held there was no subject matter upon which the judgment of the court could operate, therefore the district court's order was sustained. The court, however, stated this did

civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal sanction." See also: *Harvey v. Early*, 160 F.2d 836, 837 (4th Cir. 1947); *Burke v. Mingori*, 128 F.2d 996 (10th Cir. 1942).

¹⁴ INT. REV. CODE OF 1954, § 7422.

¹⁵ *Long v. Rasmussen*, 281 Fed. 236 (D.C.Mont. 1922).

¹⁶ 199 F.Supp. 200 (W.D.Okla. 1961).

¹⁷ *Id.* at 205.

¹⁸ 110 F.2d 590 (3d Cir. 1940).

not preclude the Collector from distraining upon any other property of the taxpayer for payment of the tax.

The Collector of Internal Revenue is authorized to levy "upon all property and rights to property"¹⁹ and homesteads are not specifically exempt.²⁰ In *Bigley v. Jones*²¹ the district court held that the law of the state must be considered in determining whether the property sought to be seized is the property of the taxpayer or his wife. Under Oklahoma law the wife has an indivisible and vested interest in homestead property, therefore the property is not subject to levy and sale for the satisfaction of a tax liability of the husband.²²

Injunctive relief was granted in *New York Cas. Co. v. Zwermer*²³ to restrain the Collector from attaching the balance due a contractor on a construction project. There were three claims against this fund: (1) unpaid claims for labor and material against the contractor, (2) reimbursement due the bonding company for payments it had made, and (3) the claims of the Internal Revenue Service for taxes owed by the contractor. Since the total amount of these claims was greater than the amount due the contractor, the Casualty Company sought to restrain the government's collection activities until it had been paid. The court granted injunctive relief, stating that the Casualty Company had a prior equitable lien upon the fund which was superior to the government's tax lien.

A contractor in the recent case of *Logan Planing Mill Co. v. Fidelity & Cas. Co.*,²⁴ had difficulty in securing a contractor's bond. To assist him, Logan Mill agreed to indemnify the surety company. An agreement was reached whereby funds due the contractor on a construction contract would be paid directly to a Mr. Lassiter as trustee for Logan Mill and the surety company. After the government sought to collect taxes due from the contractor by attaching a lien against this fund, Logan Mill brought a quiet title action. The district court held that Logan Mill was entitled to this money because of the rights they had acquired by subrogation. Moreover, the contractor was determined not to be the owner of this fund at the time the tax was assessed. The court recognized that the purpose of section 7421 is to prevent suits by taxpayers to contest liability and to bar collection, but "the prohibitions of section 7421 have no applicability to suits to protect property of a nontaxpayer which the government has seized to satisfy a taxpayer's liability."²⁵

¹⁹ INT. REV. CODE OF 1954, § 6331(a).

²⁰ INT. REV. CODE OF 1954, § 6334.

²¹ 64 F.Supp. 389 (W.D.Okla. 1946).

²² However property of tenants by entireties, which is not a homestead, may be subject to a lien to collect taxes owed by the husband. See *Pilip v. United States*, 186 F.Supp. 397 (D.Alaska 1960).

²³ 58 F.Supp. 473 (N.D.Ill. 1944).

²⁴ 212 F.Supp. 906 (S.D.W.Va. 1962).

²⁵ *Id.* at 912.

The Extraordinary and Exceptional Circumstances Exception

Section 7421(a), if literally construed, would bar all suits restraining the assessment or collection of taxes. In addition to the penalty and nontaxpayer exceptions, the extraordinary and exceptional circumstances exception has evolved as a third basis for circumventing the statute. Development of this latter exception was in four phases: (1) when the Court merely indicated that such circumstances might be sufficient to render the prohibitory statute inapplicable,²⁶ (2) a case in which extraordinary and exceptional circumstances were found to exist,²⁷ (3) followed by a decision in which this exception reached its zenith.²⁸ The cycle was completed (4) by a decision which virtually eliminated extraordinary and exceptional circumstances as an exception to section 7421(a).²⁹

The Supreme Court in *Dodge v. Osborn*³⁰ stated that the alleged unconstitutionality of a tax was insufficient to overcome the statutory prohibition against suits to restrain assessment or collection of taxes but indicated that "extraordinary and entirely exceptional" circumstances might be sufficient.

Extraordinary and exceptional circumstances were found to exist in the *Hill v. Wallace*³¹ case. Members of the Chicago Board of Trade sought to prevent the Board from being designated as a 'contract market.' Without this designation, every transaction of the Board would be subject to a heavy tax and a criminal penalty would be levied for every sale on which the tax had not been paid. In delivering the opinion of the Court Chief Justice Taft declared that payment of the tax by the 1600 members of the Board, with suits to recover the tax would "necessitate a multiplicity of suits, and, indeed, would be impracticable."³² He concluded that "these exceptional and extraordinary circumstances . . . make section 3224 [now section 7421] inapplicable."³³

The taxpayer in *Graham v. DuPont*³⁴ failed to convince the Court that his situation was so extraordinary and exceptional as to circumvent the prohibitory statute. Taxpayer alleged that he had no remedy at law because a suit to recover the tax would be barred by a statute of limitation. In denying relief the Court stated that a taxpayer could not delay making his payment until his right to sue to recover had expired, and then claim that this was an extra-

²⁶ *Dodge v. Osborn*, 240 U.S. 118, 36 Sup.Ct. 275, 60 L.Ed. 557 (1916).

²⁷ *Hill v. Wallace*, 259 U.S. 44, 42 Sup.Ct. 453, 66 L.Ed. 822 (1922).

²⁸ *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 52 Sup.Ct. 260, 76 L.Ed. 422 (1932).

²⁹ *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 82 Sup.Ct. 1125, 8 L.Ed.2d 292 (1962).

³⁰ 240 U.S. 118, 36 Sup.Ct. 275, 60 L.Ed. 557 (1916).

³¹ 259 U.S. 44, 42 Sup.Ct. 453, 66 L.Ed. 822 (1922).

³² *Id.* at 62, 42 Sup.Ct. at 456, 66 L.Ed. at 828.

³³ *Ibid.*

³⁴ 262 U.S. 234, 43 Sup.Ct. 567, 67 L.Ed. 965 (1923).

ordinary and entirely exceptional circumstance as to invoke the equity jurisdiction of the Court.

In *Miller v. Standard Nut Margarine Co.*³⁵ a dispute had arisen between the government and Standard as to whether a product was subject to an oleomargarine tax. Standard relied upon a letter from the government stating that his product was not taxable as oleomargarine, upon a treasury ruling to the same effect, and upon a court decision allowing another manufacturer to recover taxes paid upon a similar product.³⁶ Standard's petition for an injunction to restrain collection by the Revenue Service was sustained by the Supreme Court on the basis that by no legal possibility could a valid tax have been assessed against Standard and that "the enforcement of the [tax] . . . against [Standard] . . . would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law,"³⁷ therefore, "the reasons underlying section 3224 [now section 7421] apply, if at all with little force."³⁸ These factors were held to constitute such extraordinary and exceptional circumstances as to warrant the Court's intervention. Justice Butler, who delivered the opinion of the Court, stated that injunctive relief would not be granted merely because a tax was illegal. If, however, in addition to illegality of the tax, extraordinary and exceptional circumstances were present, then the statute would be inapplicable. Justice Stone did not concur with the majority view that equitable circumstances were sufficient to remove the bar of the prohibitory statute. He declared that this statute should preclude all relief, "whatever the equities alleged."³⁹

Subsequent decisions of lower courts interpreting the *Miller* case are not in harmony. Courts which liberally interpreted the extraordinary and exceptional circumstances rule granted injunctions.⁴⁰ Illegality was interpreted in terms of whether the tax would be of no effect to a particular taxpayer and not illegal in the sense that the tax was absolutely void.⁴¹

Taxpayers had difficulty in securing judicial intervention in courts which strictly construed the *Miller* decision. For instance, the court in *Reams v. Vrooman-Fehn Printing Co.*⁴² said "hardship in raising money with which to pay taxes is now common to all tax-

³⁵ 284 U.S. 498, 52 Sup.Ct. 260, 76 L.Ed. 422 (1932).

³⁶ *Id.* at 505, 52 Sup.Ct. at 261, 76 L.Ed. at 427.

³⁷ *Id.* at 510-511, 52 Sup.Ct. at 263-264, 76 L.Ed. at 430.

³⁸ *Id.* at 510, 52 Sup.Ct. at 263, 76 L.Ed. at 430.

³⁹ *Id.* at 511, 52 Sup.Ct. at 264, 76 L.Ed. at 430-431.

⁴⁰ *E.g.*, *Midwest Haulers v. Brady*, 128 F.2d 496 (6th Cir. 1942); *Yoshimura v. Alsup*, 167 F.2d 104 (9th Cir. 1947); *John M. Hirst & Co. v. Gentsch*, 133 F.2d 247 (6th Cir. 1943).

⁴¹ *Midwest Haulers v. Brady*, *supra* note 40, at 498.

⁴² 140 F.2d 237 (6th Cir. 1944). A strict or liberal interpretation of the *Miller* decision has been applied by the Sixth Circuit Court of Appeals, depending upon the factual situation of each individual case.

payers, but this is not a special circumstance conferring equity jurisdiction . . . to prevent collection by injunctive process."⁴³ In another case⁴⁴ the fact that the taxpayer was the sole support of his wife, three small children, and his wife's mother, and owned no personalty of value, was not such exceptional circumstance as would warrant judicial intervention. Nor would the fact that the taxpayer might be forced to discontinue publication be sufficient to render section 7421(a) inapplicable.⁴⁵

In 1962 the Supreme Court, in *Enochs v. Williams Packing & Nav. Co.*,⁴⁶ removed any doubt as to the interpretation of section 7421(a). Taxpayer sought to restrain the collection of social security and unemployment taxes for the years 1953, 1954, and 1955. He contended that he was not liable for these taxes as the persons who operated his fishing boats were not employees as claimed by the government. A permanent injunction was granted taxpayer by the the district court,⁴⁷ which was affirmed by the Fifth Circuit Court of Appeals.⁴⁸ The lower court's decisions were reversed, and the injunction was dissolved by the Supreme Court.⁴⁹ In rendering its opinion the *Miller* decision was not overruled; however, Chief Justice Warren applied a strict interpretation to section 7241(a), dispelling any notion that the broad equity principles enunciated in the *Miller* decision would be sufficient to overcome the express language of the statute. After stating that "the object of section 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes,"⁵⁰ he declared that if Congress had intended to grant injunctive relief from taxes lawfully due merely because there was an inadequacy of legal remedy, they would have said so in explicit language. Only after it has been determined that section 7421(a) is inapplicable will the question of adequacy of legal remedy be pertinent. Noting that the primary object of this statute was for the purpose of permitting the collection of taxes without judicial intervention, Chief Justice Warren restated the rule that a taxpayer must pay, then bring suit to recover the taxes. If, however, "it is clear that under no circumstances could the government ultimately prevail, the central purpose of the act is inapplicable and, under the *Miller* case, the attempted collection may be enjoined if equity

⁴³ *Id.* at 241-242, quoting *California v. Latimer*, 305 U.S. 255, 262, 59 Sup.Ct. 166, 83 L.Ed. 159 (1938).

⁴⁴ *Long v. Gray*, 130 F.Supp. 194 (W.D.Ky. 1955).

⁴⁵ *Publishers New Press v. Moysey*, 141 F.Supp. 340 (S.D.N.Y. 1956), *citing Milliken v. Gill*, 211 F.2d 869 (4th Cir.), *cert. denied* 348 U.S. 827, 75 Sup.Ct. 47, 99 L.Ed. 652 (1954).

⁴⁶ 370 U.S. 1, 82 Sup.Ct 1125, 8 L.Ed.2d 292 (1962).

⁴⁷ *Williams Packing & Nav. Co. v. Enoch*s, 176 F.Supp. 168 (S.D.Miss. 1959).

⁴⁸ 291 F.2d 402 (5th Cir. 1961).

⁴⁹ 370 U.S. 1, 82 Sup.Ct 1125, 8 L.Ed.2d 292 (1962).

⁵⁰ *Id.* at 5, 82 Sup.Ct. at 1128, 8 L.Ed.2d at 295.

jurisdiction otherwise exists."⁵¹ In determining whether the government could ultimately prevail, only the facts existing at time of suit would be considered. All that is required is that the government have acted in "good faith."⁵²

The Supreme Court's decision in *Enochs* stressed the illegality of the tax portion of the *Miller* case. Although traditional equity principles were alluded to, they were not a factor in the Court's decision. In *Miller* the Court had stated that "by no legal possibility"⁵³ could a valid tax have been assessed against Standard. This concept was emphasized in *Enochs* when Chief Justice Warren declared that only "if it is clear that under no circumstances could the government ultimately prevail"⁵⁴ would section 7421(a) be inapplicable. Only after it has been determined that the statute is inapplicable will equity principles be considered.

Subsequent lower court decisions reflect the restrictive edicts of the *Enochs* decision. Traditional equity concepts have been minimized and the express wording of section 7421(a) has been emphasized.

In the recent case of *Reale v. Church*⁵⁵ the government sought to collect from an officer of a defunct corporation social security and withholding taxes which the corporation had failed to pay. The government contended that the taxpayer, as sole stockholder and president of this corporation, had the statutory duty to "collect, truthfully account for, and pay over these taxes."⁵⁶ Taxpayer alleged that an affiliated manufacturing company had agreed to retain and pay these taxes. He also pleaded that he would lose his job, and was without funds to pay the taxes in order to comply with the statutory requirements of paying, then suing for a refund. The district court sympathized with the taxpayer's plight, but denied his request for injunctive relief because "this court cannot . . . conclude from the facts and the law . . . that the government cannot establish its claim."⁵⁷

In *Turner v. Burton*⁵⁸ excise wagering deficiencies were assessed against petitioner who contended that he was not in the gambling business and therefore the assessment should be enjoined. In conformity with the *Enochs* decision the court declared that the legality of an assessment could not be determined in an injunction proceeding. Since "under the most liberal view of the law and the facts"⁵⁹ the government could establish its claim, injunctive relief was denied.

⁵¹ *Id.* at 7, 82 Sup.Ct. at 1129, 8 L.Ed.2d at 296.

⁵² *Ibid.*

⁵³ 284 U.S. at 510, 52 Sup.Ct. at 263, 76 L.Ed. at 430.

⁵⁴ 370 U.S. at 7, 82 Sup.Ct. at 1129, 8 L.Ed.2d at 296.

⁵⁵ 213 F.Supp. 503 (S.D.N.Y. 1962).

⁵⁶ INT. REV. CODE OF 1954, § 6672.

⁵⁷ 213 F.Supp. 503, 504.

⁵⁸ 213 F.Supp. 267 (N.D. Ohio 1962).

⁵⁹ *Id.* at 269.

The illegality aspect of the *Enochs* decision was stressed in *Cohen v. Gross*.⁶⁰ Taxpayer had been discharged as a bankrupt in 1959, at which time the government had filed proof of claim for income taxes for the years 1954, 1955 and 1956. Assessment, however, was not made until 1960. In denying injunctive relief the court emphasized that "it [was] . . . simply impossible for the taxpayer to show such clear illegality"⁶¹ as expressed in the *Enochs* decision.

The Second Circuit Court of Appeals in *Botta v. Scanlon*⁶² interpreted the *Enochs* decision to mean that there must be (1) no adequate remedy at law and in addition (2) it must be apparent from present facts that the government could not prevail before the court would restrain collection. This court specifically acknowledged the restrictive elements of the *Enochs* decision, declaring that "any implication in [their prior decisions] . . . that either one of these circumstances may alone be sufficient is overruled [by the *Enochs* decision]."⁶³

Even under the restrictive requirements of the *Enochs* decision, it would seem that under certain conditions the provisions of section 7421(a) are inapplicable. If the taxpayer can prove that the tax sought to be assessed or collected is a criminal penalty, or that the government has not strictly complied with statutory procedural provisions of the Internal Revenue Code, or that he is not the person who owes the tax, then equity relief may be granted. In other factual situations it will be extremely difficult for a taxpayer to overcome the formidable barriers delineated in the *Enochs* decision since the Supreme Court has indicated that section 7421(a) is to be literally construed.

Buford L. Allen

⁶⁰ 316 F.2d 521 (3d Cir. 1963).

⁶¹ *Id.* at 523.

⁶² 314 F.2d 392 (2d Cir. 1963).

⁶³ *Id.* at 394.

