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Sec. 1491—Internal Revenue Code

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The author, a member of the California State Bar and consultant, Euro-Dutch Trust Company, George Town, Grand Cayman, B. W. I., explores the background and legislative history of Section 1491, clarifying its application in accordance with Congressional intent.

IT IS A COMMON PRACTICE for tax practitioners to refer to basic tax rules by Code numbers. “Section 337 liquidation,” “306 stock” and “1250 property” are part of a tax practitioner’s vernacular. A “1491 tax” is not part of that vernacular, although it should be. With more Americans doing business abroad, the likelihood of stubbing one’s toe against Section 1491 increases; for almost 35 years there were no cases, few rulings and meaningless Regulations. The years 1969 and 1970 each produced a revenue ruling, and major litigation looms over this section in the immediate future. Tax practitioners must be aware of Section 1491; and it is the purpose of this article to alert lawyers and accountants to the uncertainties and problems they face in a 1491 transfer.

Little has been written in depth on Sections 1491-1494 of the Internal Revenue Code since their adoption in 1932. Not only have tax writers been casual but the Internal Revenue Service has evaded the command of Congress under Section 1494 to adopt Regulations to spell out its application. Perhaps the Service feels that by keeping a maximum amount of vagueness and uncertainty, tax planners will be deterred from utilizing foreign entities. The sections are not long. The text is as follows:

**Code Section 1491.**—Imposition of tax.

“There is hereby imposed on the transfer of stock or securities by a citizen or resident of the United States, or by a domestic corporation or partnership, or by a trust which is not a foreign trust, to a foreign corporation as paid-in surplus or as a contribution to capital, or to a foreign trust, or to a foreign partnership, an excise tax equal to 27 1/2 percent of the excess of—

“(1) the value of the stock or securities so transferred, over—

“(2) its adjusted basis (for determining gain) in the hands of the transferor.”

* The author is indebted to William Murrish of Los Angeles, California, member of the California Bar, whose research and scholarship were of invaluable assistance in preparing this article.
Code Sec. 1492.—Nontaxable transfers.

"The tax imposed by section 1491 shall not apply—

“(1) . . . ;

“(2) If before the transfer it has been established to the satisfaction of the Secretary or his delegate that such transfer is not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes."

Code Sec. 1493.—(Defines foreign trusts).

Code Sec. 1494.—Payment and collection.

“(a) Time for payment.—The tax imposed by section 1491 shall, without assessment or notice and demand, be due and payable by the transferor at the time of the transfer, and shall be assessed, collected, and paid under regulations prescribed by the Secretary or his delegate.

“(b) Abatement or refund.—Under regulations prescribed by the Secretary or his delegate, the tax may be abated, remitted, or refunded if after the transfer it has been established to the satisfaction of the Secretary or his delegate that such transfer was not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes."

Some writers have recommended that taxpayers should request advance rulings for exemptions from the Section 1491 tax, as provided under Section 1492, although the chances of ever getting a favorable ruling may be almost impossible, as the more astute writers have observed.

The Commissioner’s position appears to be that the Tax Court is without jurisdiction to hear disputes under this section. The Tax Court may have jurisdiction, notwithstanding the fact that the tax under Section 1491 is called an excise tax and historically excise taxes are outside the jurisdiction of the Tax Court.

The approach of this article is to explore the areas of uncertainty that have been so long ignored and to clarify as much as possible the application of Section 1491 in accordance with Congressional intent so that the tax practitioner will be able to handle problems arising under Section 1491 in advising his clients and confronting the Office of International Operations. Perhaps even the Commissioner may be encouraged to promulgate some helpful Regulations.

Background and Legislative History

Section 1491 was passed to plug the obvious loophole of the 1920s, wherein taxpayers would transfer stock that had appreciated in value over cost to a foreign corporation or a foreign trust. The foreign entity, being a nonresident alien, and not subject to capital gains tax, could then sell the stock and avoid the capital gains tax. The tax has varied from 26 per cent to 27½ per cent, which has been close to or equal to the long-term capital gain rate. The Section 1491 tax has been called a "capital gains avoidance tax." I would suggest calling it a "quasi-capital gains tax." Most loophole-closing revenue acts are designed to preserve for the government the revenue which is being avoided and which it feels rightfully belongs to it. Section 1491 created a tax at the time of transfer to a foreign entity as if there had been a sale so that the capital gains tax revenues would not be lost. It was not adopted to punish anyone. The tax rates were about the same as the long-term capital gain rate. For short-term gains it could still be beneficial for the taxpayer to pay the Section 1491 tax. Today transfers to foreign corporations would have to contend with controlled foreign cor-
poration laws and foreign personal holding company laws all enacted subsequent to Section 1491.

The version of Section 1494 adopted by the House of Representatives was considerably different from that of the Senate. The House of Representatives provided for a blanket exemption for all transfers that were for a full and adequate consideration. Such transfers would normally be taxable in the United States and there would be no need for a capital gains avoidance tax. The Senate version was adopted, which on its face covered only those transfers which were principally for tax avoidance. Section 1492 was adopted to exempt by advance rulings transfers which the Service was satisfied were not in pursuance of a plan having as its principal purpose the avoidance of federal income taxes. Conceivably, a transfer that was not principally tax motivated would be allowed even if it did avoid taxes. Section 1494 was finally adopted providing that after a transfer, if the Service found that the transfer was not in pursuance of a plan, the principal purpose of which was tax avoidance, the tax is to be abated. Section 1494 directs the Commissioner to adopt Regulations.

Prior to 1954 these sections stood by themselves, separate and apart from the Income Tax Provisions of the Internal Revenue Code. In the 1954 Code they were made Chapter 5 of Subtitle A, and were thus codified as part and parcel of the Income Tax Sections of the Internal Revenue Code.

Information Section 6048 was recently adopted. The language of this section is similar to Section 1491, and provides that an Information Return must be filed for all transfers to foreign trusts. It makes no exceptions and no exemptions. This section would alert the IRS to transfers which would be subject to Section 1491. While the information section is even more carte blanche than Section 1491, the Regulations under Section 6048 wisely provide that the Information Return (Form 3520) need not be filed for any transfers made pursuant to a sale or exchange, which is made for a full and adequate consideration, thus picking up the language in the early House of Representatives version of Section 1494.

The few sparse Regulations adopted under Sections 1491-1494 simply repeat the statute and give a procedure for applying for exemptions and for filing the return (Form 926) required under Section 1494(1). A revenue ruling was promulgated in 1969, which held that a transfer to a revocable foreign trust would be taxed. There is nothing in the ruling to show that the transfer had as one of its principal purposes the avoidance of federal income taxes. Indeed, that ruling indicates that there would be no tax avoidance whatsoever, yet the tax applies. Consequently this ruling only adds to the confusion. A more intelligible revenue ruling was given on an intercorporate transfer in 1970.

Section 1491 has to be classified as an extreme example of uncertain and vague legislation. It is difficult to find any other statute so sweeping in its terms and so uncertain in its scope as this section. With the Regulations being completely silent on any guidelines, interpretations, or assistance, it is a kind of no-man's land in which the advice given by most tax specialists is to "don't transfer appreciated stock to a foreign entity." The American Bar Association book A Lawyer's Guide to International Business Transactions, edited by Surrey and Shaw, is one of the few treatises with enough courage to suggest that there is not a blanket taboo:

"Section 1491 . . . is apparently not applicable to sales for an adequate consideration. Section 1491 is of infrequent application, taxpayers seldom intentionally undertake a transaction that would result in the imposition of this excise tax." (Pp. 81-82.)

A common suggestion by most writers is to simply sell the stock, pay the capital gain and contribute cash. The problem here is that the taxpayer loses the benefits of installment sale capital gain deferral. In addition, liquidation of closely held securities and of unlisted stock is frequently out of the question. The utilization of foreign entities by resident aliens, people with foreign business operations, or people with foreign family assets is a desirable and worthwhile planning tool, having sound investment and business purposes. Section 1491 was not intended as a penalty section but was designed to prevent the transfers to foreign entities of appreciated securities without paying gains taxes or the equivalent. It was designed to guarantee to the government its share of the capital gain at the time of transfer. Congress never intended more than this.

Elements

The elements of Section 1491 are: stocks or securities, transferred to corpus "as paid-in surplus or as contribution to capital"), to a foreign corporation, trust or partnership, which have appreciated in value over basis, which are transferred with a principal purpose of avoiding federal income taxes; the tax is described as an excise tax at \( \frac{27}{2} \) per cent of the gain.

In analyzing these elements not much comment is needed on the definition of appreciated value, foreign corporations, trusts, or partnerships, or stocks or securities. The tax is assessed on the appreciated value of the stock, which means that the tax applies only to those securities which have a fair market value in excess of their basis for determining capital gains.

Foreign corporations and foreign partnerships are defined under our tax law to cover corporations and partnerships organized outside the 50 American states or American territories.

Foreign trusts are defined in Section 1493 and by definition would exclude those foreign trusts which do business in the United States, and consequently would be subject to normal capital gains taxes. Since the trust is English in origin and not an entity of the civil law, we are dealing almost exclusively with the trusts established and operated in the British Commonwealth and in nations which were formerly British colonies, who have adopted the common law and equity.

The limitation to stocks or securities can only be explained by history. This was the form of abuse of the 1920s and so the statute reached out to plug that loophole. Real property, tangible personal property, and many intangibles, such as patents and copyrights, would be exempt. There were never any Regulations defining securities but I believe it would be wise to assume that securities would be given a broad definition and would probably cover and include the entire range of "securities" which are covered by our Blue Sky laws, with which we are all so familiar.

The limitation of this section to stocks and securities makes no sense. Why this loophole was left open is unknown. It doesn't take much ingenuity for a tax planner to figure out how to transfer real property, personal property, and certain exempt forms of intangible property to a foreign entity prior to a sale so as to completely avoid a capital gains tax on these items. Most foreign trust companies are very reluctant to take in real property or items of personal property and so the use of the foreign
trusts, to avoid capital gains on these items, has probably been minimal.

**Transfers to Corpus**

The statute appears to only cover transfers to foreign corporations which in substance are "paid-in surplus or as a contribution to capital." This provision throws light on the intent of Congress with respect to all transactions covered under the section. It becomes clear that the statement in *A Lawyer's Guide to International Business Transactions* was correct—that Congress did not intend to cover bona fide sales for a full and adequate consideration. Such transactions are not capital transactions, such as paid-in surplus or contributions to capital.

A literal reading of the statute would make the tax applicable only to foreign corporations if the transfer were as paid-in surplus or contributions to capital. Transfers to foreign trusts and to foreign partnerships would have no such limitation or restriction. Such an interpretation would invite a construction which would raise certain doubts of constitutionality. A tax law must not be arbitrary or discriminatory and without rationality. Transfers to foreign trusts and partnerships carry the same substantive condition. It would be inexcusably arbitrary and discriminatory to do so and such a discrimination would be contrary to the intent of Congress. A statute is to be interpreted to preserve its constitutionality and not to be interpreted in such manner as to render it vague and uncertain and violating due process.

This is an easy matter because the Conference Committee Report of Congress, which summarized this section immediately prior to its final adoption, clarified this issue when it paraphrased the scope of the statute as imposing taxes on transfers "to foreign trusts, foreign partnerships, and foreign corporations; whether made as contributions to surplus or to capital." This language, given by the Committee in presenting the statute, takes the qualifying words "as contributions to surplus or to capital" as words generically limiting the transfers to all three types of foreign entities.

It is clear in reading the legislative history of this statute that Congress had a clear purpose and a clear intention. Congress did not intend to be discriminatory nor did it intend to be vague and uncertain. It is plainly evident that this is a capital gains avoidance tax enacted by Congress with no intention to cover bona fide sales. To the contrary it is precisely because the corpus transfers were not sales and hence were not subject to capital gains taxation that this section was adopted in the first place. To the extent that any transfer was a capital transaction, it would invite a Section 1491 tax. In any case in which full value was not paid there would be in substance a contribution to capital of the difference between the value of the security and the value of the consideration.

**Bona Fide Sales**

There was no intention to tax sales to foreign entities, which were subject to U. S. capital gains taxation, but rather the purpose was to check avoidance of such taxation by the device of transfers to foreign entities in the form of capital gains tax-free contributions to capital or surplus for the...
purpose of resale by such foreign entity beyond the reach of U. S. capital gains tax statutes. The House Committee stated:

“The purpose of the title is to check transfers of stocks or securities in which there is a large appreciation in value to foreign corporations or trusts for the purpose of avoidance of tax on capital gains.”

The House version of the statute had a provision for a blanket exemption for all transfers for a full and adequate consideration. This was eliminated by the Senate because it was believed that an interpretation could be given to this exemption which would provide a loophole for the continued avoidance of the capital gains tax. Commenting upon the elimination of that portion of the House bill, which exempted all transfers for adequate consideration, the Senate Committee said:

“In this connection your Committee believes that the bill should not either expressly or by implication permit the argument that an increment in value of shares or of a beneficial interest resulting from a transfer of stock or securities should be considered full consideration in money or money's worth. . . .”

The elimination of the “adequate consideration” exemption was to prevent some sophisticated “pepper corn” interpretation which could defeat the purposes of that legislation. This explanation is fully consistent with the blanket exemption of all bona fide sales transactions.

Principal Purpose of Tax Avoidance

The crucial test for any transaction under Section 1491 which involves appreciated securities is whether or not the full capital gains tax is being incurred by the transferor. It is self-evident that a transaction is not one that is pursuant to a plan of avoidance if the federal income tax is in fact being paid. Where the transferor is a settlor or a beneficiary under a foreign trust, the adequacy of the transaction should be scrutinized and the transaction should be properly weighed and examined to assure that the full gains tax is incurred so that public revenues are protected. To the extent that there is any reduction of capital gains taxation, Section 1491 should catch the deficiency. For example, if securities worth $60 per share—having a cost of $10 per share—are sold to a foreign entity for $40 per share, there would be a capital gain of $30, subject to taxation in the United States, but $20 would avoid capital gains taxation, and in substance would be a contribution to corpus. Under these facts the Commissioner should abate or remit under Section 1491 that amount of the tax which is subject to capital gains tax in the United States. The Commissioner should assess and collect a Section 1491 tax on that part of the transaction which was a corpus contribution, which would be $20.

It is conceivable that certain business or family purposes may require a person to transfer appreciated securities to a foreign entity which would in fact avoid U. S. taxation but which were not motivated for tax avoidance. Knowing the Commissioner's attitude toward foreign operations, it is doubtful if anyone could ever get to first base in such a transaction even if quite free of tax avoidance purposes.

Regulations

Most of the problems under Section 1491 could be eliminated if the Com-
missioner would adopt illuminating Regulations. Each of the elements discussed here should be defined by Regulations. The Regulations originally adopted simply parrot the statute and add nothing of any substance to assist the taxpayer. R. I. A. Tax Coordinator makes this comment on Section 1494:

"The law authorizes the Treasury, under regs., to refund or abate the tax after the transfer has taken place, if satisfied the transfer was not consummated for the purposes of tax avoidance. No such regs. have been issued." (Vol. 5, 0-9002 (1970).)

Information Returns

To protect the public revenues we have had a great increase in information returns over the past years. Congress has been vigilant in adopting information rules with respect to interest, dividends and many other transactions. There can be no denial that these information sections have been very effective in reminding taxpayers to report income receipts, which historically had been omitted by many taxpayers. With the advent of the computer, the government has even greater safeguards for the collection of taxes on income, dividends and other items.

In the foreign trust area, Section 6048 requires the filing of an information return to aid the Commissioner in collecting revenues which are incurred from transactions involving foreign trusts. This section requires information returns on any transfer of property by U. S. persons to a foreign trust. It is not limited to securities. The statute is unlimited in scope and is obviously a supporting arm for Section 1491. Under Section 6048 the Secretary had been empowered to adopt Regulations "as necessary for carrying out the provisions of the income tax laws."

In adopting Regulations under this section the Commissioner has provided that a transferor does not refer to a person who transfers money or property to a foreign trust pursuant to a sale or exchange which is made for a full and adequate consideration. The statute makes no such limitation but since bona fide sales incur full gains taxation, there is no need for an information return if the buyer happens to be foreign. This Regulation under Section 6048, an enforcing arm of Section 1491, confirms the exclusion of bona fide sales transactions from the scope of Section 1491.

Tax Penalty

The Office of International Operations of the IRS has formally taken the position that Section 1491 is a penalty statute, notwithstanding the fact that full capital gains may be paid in the United States.7

To enforce this penalty interpretation of Section 1491 is contrary to the legislative intention of Congress at every stage, and there is nothing in the House, the Senate or Conference Committee to indicate that any such objective or purpose was intended by Congress. Furthermore, such interpretation would violate the long established "void for vagueness" constitutional rule.8 It is no longer a taxing statute but a penalty statute, and one of the vices of an unduly vague penalty statute is that it permits the enforcing officers or the trier of the facts to create the actual standards of the supposed statute according to their individual and arbitrary judgment, unguided by any sufficient fixing of boundaries.

To permit the Service to enforce such a penalty tax, if it is not subjectively satisfied that a transaction is free of potential tax avoidance, would

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1 See Rev. Rul. 69-450, cited at footnote 1.
be to enforce a penalty law upon the basis of ambiguous, contradictory, misleading, and entrapping commands; it would constitute a trap in violation of due process of law. A person may not be subject to a legislative prohibition which he could not “with reasonable certainty know he was violating” at the time of his conduct. In short, a penalty must give “fair warning” of what it intended to prohibit. The government’s own words, acts, and omissions concerning Section 1491 and the meaningless Regulations issued thereunder contrasted with their concrete stand under Section 6048 would constitute on the part of the government “a trap.” The government has engaged in ambiguous, contradictory and misleading communications which entrap the taxpayer. Such a purpose was never intended by Congress, as is so obvious from reading the Congressional reports.

Judicial Review

Because the tax under Section 1491 is designated as an excise tax it would follow that the Tax Court has no jurisdiction since that tribunal has jurisdiction only over income, estate and gift taxes. This statement is a generalization. There is no such statute because the jurisdiction of the Tax Court extends to whatever Congress wants it to cover. It is true that historically the Tax Court does not have jurisdiction over genuine excise taxes, and an aggrieved taxpayer in a dispute about an excise tax must pay and sue in the district court or in the U. S. Court of Claims. A careful scrutiny indicates that the Tax Court must not be ruled out as a forum to settle disputes under Section 1491. A technical analysis of the statutes and Regulations makes a persuasive case for Tax Court jurisdiction. When public policy considerations are added to the technical analysis, the case is even stronger. No decisions have ever been made on the issue. There are no cases on Section 1491.

Technical Considerations

Section 7442 of the Code sets forth the jurisdiction of the Tax Court by referring to certain chapters of the Revenue Code of 1939, certain titles of the Revenue Act of 1926, and finally with respect to “laws enacted subsequent to February 26, 1926.” This effect is simply to refer the reader to all laws enacted since 1926. The Commissioner has in a number of situations objected to the jurisdiction of the Tax Court on matters which were not pure income, estate and gift items, and the Commissioner has been unsuccessful. The Vinson Act, which created a contractual liability in Navy contractors to return profits in excess of 10 per cent over costs, was argued by the Commissioner to not be a tax. The Tax Court asserted jurisdiction, observing that its jurisdiction was whatever Congress decided it should be and that Congress had expanded its jurisdiction to matters other than income, estate and gift taxes. Initially, not even gift taxes were expressly and directly conferred upon the Tax Court but the Tax Court assumed jurisdiction through an enforcement by reference provision created by Section 324 of the Revenue Act of 1924. The same situation occurred with respect to the personal holding company tax, the declared value excess profits tax instituted in

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10 Foster Wheeler Corp. v. Commissioner, CCH Dec. 10,730, 40 BTA 1 (1939); See also Difco Laboratories, Inc. v. Commissioner, CCH Dec. 16,350, 10 TC 660 (1947).
the 1934 Act,\(^\text{12}\) and in the Unjust Enrichment Act of 1936.\(^\text{13}\)

When the 1954 Code was adopted, Sections 1491-1494 came into being as Chapter 5 of Subtitle A of the 1954 Code. This new position made Section 1491 a part of “Subtitle A . . . Income Taxes.”\(^\text{14}\)

Sections 6212(a) and 6213(a) of the 1954 Code state that Tax Court review “is over any tax imposed by Subtitle A or B.” Those sections are quoted in full as follows:

Sec. 6212. Notice of Deficiency.
“(a) In General. If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.”

Sec. 6213(a). Restrictions Applicable to Deficiencies; Petition to Tax Court.
“(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.”

The Commissioner himself in his Regulations has also defined the Tax Court’s jurisdiction by words which require the inclusion of the Section 1491 tax. Section 601.102 states that taxes within the jurisdiction of the Tax Court include not only income and profit taxes but also “taxes imposed by subtitle A of the 1954 Code, relating to income taxes.” (Italics added.)

Under the 1932 Code the Commissioner issued Mimeograph Ruling 4016, XII-1 CB 83, providing for collection procedures of the tax established by Section 901 (Section 1491—1954 Code). That ruling was declared obsolete in 1967 by Rev. Ruling 67-406.\(^\text{15}\) The Mimeograph Ruling 4016 states that taxpayers do not have the privilege of filing a petition with the U. S. Board of Tax Appeals (Tax Court) for redetermination of additional taxes, determined by the Board under Section 901 of the Revenue Act

\(^{12}\)Will County Title Co. v. Commissioner, CCH Dec. 10,536, 38 BTA 1936 (1938); Difco Laboratories, Inc. v. Commissioner, cited at footnote 8.

\(^{13}\)Gebelein Inc. v. Commissioner, CCH Dec. 9990, 37 BTA 605 (1938).

\(^{14}\)Prior to the 1954 re-positioning of Section 1491, the Revenue Acts of 1932 and 1939 had this reference to the excise tax assessment procedures. Section 904 (1932), Section 1253 (1939):

\(^{15}\)1967-2 CB 420.
of 1932. The repositioning of this section as Chapter 5 under Subtitle A and the impact of the deficiency procedures applicable to Subtitle A, would make that ruling obsolete as of 1954.

**Policy Considerations**

There are very persuasive policy considerations to grant the Tax Court review of Section 1491 disputes.

In the first place while the tax is labelled an excise tax it is really a quasi-capital gains tax. Excise taxes are taxes much more ancient than income taxes. They are duty taxes on commodities such as spirits and tobacco, and they are sometimes levied on manufacture, sale or consumption within the country. Excise taxes have been defined to include taxes levied for a license to carry on certain business activities. Our excise taxes are English in origin, and historically were the import duties collected from goods and materials transported into the country. Section 1491 is a tax relating to income. It is measured by capital gain. It has no characteristics of a traditional duty or manufacturer's excise tax.

Requiring a taxpayer to pay and sue for a quasi-capital gains tax such as Section 1491 could work an extreme and sometimes disastrous hardship upon the taxpayer. The Supreme Court in 1960 ruled that with respect to income tax assessments a taxpayer could not sue for a refund until he had paid the entire tax. The taxpayer in that case argued that a taxpayer might suffer irreparable injury by being required to pay tax greater than they could possibly afford before they could be heard on whether or not the tax was lawful. The Court conceded that with respect to income taxes they might be in an amount so large that it would be oppressive to require the taxpayer to pay and sue, but that the taxpayer in matters of income had the opportunity for full litigation and review prior to payment by a petition to the Tax Court. The Court commented upon excise taxes by way of dictum and stated they were not subject to Tax Court review prior to payment but that the amount of taxes per unit were far below any amount that would work a harmful injury.

There is a strong possibility that in many Section 1491 circumstances the taxpayer may have parted with much of his estate for an installment contract, and where unlisted securities are concerned there is often a great disparity between values as fixed by the Service and by the taxpayers, as we all know in the estate and gift tax situations. Under such circumstances it is not at all unlikely for the Service to assess a 27½ per cent tax with interest that could well exceed the entire value of the asset transferred, and the taxpayer may find himself in the position where full payment would be impossible or disastrous to him. Thus in terms of equity and fairness, these factors weigh heavily to favor Tax Court jurisdiction over taxes imposed by Section 1491.

Unlike normal excise taxes a Section 1491 tax may not be divisible. Such assessments could cause irreparable and unfair injury without an adequate legal remedy, which would deprive the taxpayer of a reasonable, fair and timely hearing. Except where listed securities are concerned the assessments could be arbitrarily and disastrously high, based upon the Commissioner's speculation as to what the fair market value of unlisted securities might be. Being entirely at the mercy of the Commissioner with respect to the determination of the assessment for unlisted securities, the power to tax without your day in court would be the power to destroy. Tax Court review is required to pre-
vent the irreparable harm and intimidation that would occur in so many instances.

Another policy reason for Tax Court jurisdiction is the traditional equity rule against multiplicity of suits. Almost every Section 1491 transfer could involve income tax and gift tax issues. Hard questions of fair market value would apply to any sizable unlisted stock transfer. Gift tax and income taxes would be involved in such transfers. To have one forum decide value for gift tax purposes and also gain for true capital gain purposes, and then to require another forum to review the same issues, conceivably at the same time, would produce an unnecessary burden and expense and waste upon both the Commissioner and the taxpayer. To have one forum decide all questions of income, gain, gift and Section 1491 tax would be a wise policy. Even the question of a tax avoidance purpose could best be decided by the forum that determines the income tax consequence itself. The assessment of the proper income taxes by the same forum that determines whether or not there is a transfer to avoid tax would often decide the very heart of the tax avoidance issue. Dividing the issues between two forums would violate long established and sound rules of equity.

**Conclusion**

Congress may have to step in and answer the questions raised here. The Commissioner has had almost 40 years in which to carry out the Congressional mandate to adopt Regulations with respect to Section 1494. Regulations should define securities and should give intelligible and certain rules with respect to the meaning of transfers to corpus. Furthermore, the Regulations should give clear and definite guidelines as to what plans would either be or not be pursuant to a plan having as one of its principal purposes the avoidance of income taxes.

Procedurally, the jurisdiction of the Tax Court to review disputes under Section 1491 along with related disputes over income and gift tax problems should also be confirmed by regulation or statute. If the Commissioner does not take these steps it is doubtful that Congress, with its vast workload, will undertake to do anything. The alternative is that some district court could very well take the section apart at the seams and either throw it out as unconstitutional for obvious reasons or work a disaster upon some taxpayers. Both consequences would be unfortunate. The incredible thing about Section 1491 is that such a mess has been permitted for so long.

**NEW HIGH FOR TOTAL FEDERAL REVENUE COLLECTIONS**

Internal revenue collections for the fiscal year ended June 30, 1970 were $195.7 billion—$7.8 billion over last year's figures. The breakdown (in millions of dollars) by major categories is as follows:

| 1969 Corporation income taxes—$38,338 | 1970—$35,037 |
| 1969 Employment taxes—$33,069 | 1970—$37,449 |