THE INFERNAL REVENUE CODE

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Several years ago, while I was an attorney with the Tax Division of the Justice Department, I began collecting quotations from court opinions lamenting the complexity or impenetrability of this or that section of the Code. More recently, having found myself with some free computer research time, I attempted to fill in some of the gaps. This compilation is the result. I have intentionally limited the compilation to quotations from court opinions, with the exception of Learned Hand's famous quotation, which, of course, has itself been quoted innumerable times by courts.¹ Had I attempted to include statements found in treatises or articles, the effort would have been immense.

I do not intend this compilation as a general indictment of the Code or the tax laws. Rather, it is intended simply as a collection of comments various judges from time-to-time have felt compelled to make regarding their struggles with a particularly intractable provision of the Code. To be sure, there are portions of the Code that are infuriatingly complex and resistant to comprehension. By the same token, there are other portions that are understandable and workable, or at least as well as can be expected, given the inherent complexity of modern commercial life and the relentless ingenuity of tax advisors. Nevertheless, there is an indisputable need for simplification of certain areas of the tax law, even if the necessary consequence of simpler rules will be some loss of equity.

The Internal Revenue Code

In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have significance save that the words are strung together with syntactical correctness. Much of the law is now as difficult to fathom, and more and more of it is likely to be so; for there is little doubt that we are entering a period of increasingly detailed regulation, and it will be the duty of judges to thread the path—for path there is—through these fantastic labyrinths.²

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¹See infra note 2 and accompanying text.

²Learned Hand, Thomas Walter Swan, 57 Yale L.J. 167, 169 (1947).
Sections 38 and 48 (investment tax credit)

The labyrinthian analysis developed in the statute, regulations, cases, and legislative history to determine whether property qualifies as "tangible personal property" or "other personal property" (and thus as § 38 property given ITC treatment) is a meandering path of many steps.¹

Sections 46, 48, 368(a)(1)(D), and 381 (investment tax credit in reorganizations)

[T]he statutory provisions involved in the positions of both sides are highly complex. The statute presents what appears to be an endless chain of confusing cross-references, some of them backtracking to earlier provisions and then continuing forward seemingly ad infinitum. To find one's way through this statutory labyrinth one needs a thread at least as long as the one in the clew that Ariadne gave to Theseus. However, we are spared the necessity of struggling through all of the pertinent statutory provisions by reason of certain agreements between the parties. Nevertheless, enough remain to boggle the mind.²

Sections 151-250 (deductions)

Deductions from taxable income are not a matter of right. They exist only so long as Congress in its legislative wisdom determines that such deductions are appropriate. The complex history of the income tax contains examples without number of deductions that have been created, eliminated, increased, decreased, expanded, contracted, or ignored completely.³

Section 280A (rental of vacation homes)

In attempting to thread our way through the tortuous path of these exasperatingly convoluted provisions, we ....⁴

Sections 301-302 (dividend equivalency)

The critical issue for our present consideration is whether the cash credited to petitioner was essentially equivalent to a dividend within the meaning of sections 302(b)(1) and 301(a).

The colors of the cloth of dividend equivalency are not completely fast. Indeed, the fabric "bleeds," madras-like, to such an extent that the decided cases have been described as a "morass" and the underlying statutory provisions referred to as "exasperatingly complex." Under such circumstances, we believe it would be a sterile exercise to indulge in an analysis of all the factors involved and the weight to be given to each factor.⁵

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¹ Illinois Cereal Mills, Inc. v. Commissioner, 789 F.2d 1234, 1236 (7th Cir.), cert. denied, 479 U.S. 995 (1986).
⁵ Haserot v. Commissioner, 46 T.C. 864, 865 (1966), aff'd, 399 F.2d 828 (6th Cir. 1968) (citations omitted).
Pertinent excerpts from sections 301 and 302 are set forth in the margin. The general statutory framework, with the many confusing cross references, makes the study and application of these provisions a most exasperating task. Nevertheless, after threading our way through these provisions we finally come to rest, at least temporarily, in section 302(b)(1), which, in general, was intended to incorporate the preexisting law embodied in section 115(g)(1) of the 1939 Code. The words "in general" must be stressed, for the new provisions were not made fully coextensive with the old. Not only did paragraphs (2), (3), and (4) of the new section 302(b) single out and remove three specific types of redemptions from the more general test contained in section 302(b)(1) and the old section 115(g)(1), but section 302(c) of the 1954 Code made the constructive ownership rules of section 318(a) applicable (with certain exceptions not pertinent here) to the redemption tests. Thus, a new dimension has been added to the 1939 Code approach, and it is that new dimension, based upon section 318(a), that moves us to sustain the Commissioner herein. 8

Section 341 (collapsible corporations)

"[Section 117(m) [of the 1939 Code, the predecessor to section 341]] is a patchwork of interlaced problems of interpretations. For recurring obscurities of meaning it is hard to surpass. Neither well conceived nor well drafted, it is replete with vague concepts and obscure or faulty phraseology." 9

Section 385 (debt vs. equity)

Determining the legal conclusion of debt or equity from the foregoing facts requires an excursion into one of the most complex and frequently litigated sectors of tax law. It is an area with few sure guides. Some courts have suggested the use of a single test, be it the more mechanical debt equity ratio and availability of equivalent commercial debt tests, or the more ephemeral intent of the taxpayer test. Other courts have divined the answer from a composite consideration of a dozen or more factors. At end, the matter is an essentially factual, often intuitive and subjective determination, and of little precedential value beyond the case at hand. 10

Section 501(c) (exempt organizations)

Trying to understand the various exempt organization provisions of the Internal Revenue Code is as difficult as capturing a drop of mercury under your thumb. 11

Sections 503, 401, and 404 (prohibited transactions)

In a field as complex as the one before us, involving statutory provisions that are so confusingly interrelated and intricate as to be exasperating, it is particu-

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9 Commissioner v. Kelley, 293 F.2d 904, 907 n.8 (5th Cir. 1961) (quoting Adrian W. DeWind & Robert Anthoine, Collapsible Corporations, 56 Colum. L. Rev. 475, 534 (1956)).

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larly important not to embark upon any exploration of issues not properly presented.12

Sections 542-44 (personal holding companies)

At issue is whether, for the taxable years before us, petitioner is subject to the personal holding company tax imposed by section 541. The incidence of that tax is reserved for personal holding companies as defined in sections 542-544. The starting point of the irritatingly convoluted statutory path set forth therein is section 542(a) . . . .13

We are not without sympathy for petitioner’s situation as a result of the circumstances in which it finds itself. In view of the exasperatingly complex statutory provisions, it may well have stumbled unwittingly into the status of a personal holding company, subject to the burdensome special tax imposed upon such entities, without any intention to achieve the end Congress sought to discourage, namely, to shield those of its shareholders that might be in the upper brackets from the tax on dividends.14

Sections 701-61 (taxation of partnerships)

The distressingly complex and confusing nature of the provisions of subchapter K present a formidable obstacle to the comprehension of these provisions without the expenditure of a disproportionate amount of time and effort even by one who is sophisticated in tax matters with many years of experience in the tax field . . . . If there should be any lingering doubt on this matter one has only to reread section 736 in its entirety . . . and give an honest answer to the question whether it is reasonably comprehensible to the average lawyer or even to the average tax expert who has not given special attention and extended study to the tax problems of partners. Surely, a statute has not achieved “simplicity” when its complex provisions may confidently be dealt with by at most only a comparatively small number of specialists who have been initiated into its mysteries.15

Sections 801-20 (taxation of life insurance companies)

While there are many who complain that the Internal Revenue Code is incomprehensible, there are some few who revel in the intricacies of its labyrinthine composition. But those who take delight in such pursuits and who also understand the mystic processes of establishing reserves in the life insurance industry are an even rarer specie of the ornithological world. Such are the vagaries of assignments, however, that it has fallen to the lot of this panel to decide a case where the two sciences conjoin. We therefore tread into the thicket with some trepidation.16

12 Van Products, Inc. v. Commissioner, 40 T.C. 1018, 1028 (1963) (citation omitted).
13 Pleasanton Gravel Co. v. Commissioner, 64 T.C. 510, 516 (1975), aff’d, 578 F.2d 827 (9th Cir. 1978), cert. denied, 439 U.S. 1071 (1979) (footnotes omitted).
14 Bell Realty Trust v. Commissioner, 65 T.C. 766, 775, aff’d, 546 F.2d 413 (1st Cir. 1976).
15 Foxman v. Commissioner, 41 T.C. 535, 551 n.9 (1964), aff’d, 352 F.2d 466 (3d Cir. 1965).

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Sections 991-94 (DISCs)

The statute and regulations governing DISC's are a baffling maze of complicated rules and conditions.\(^{17}\)

Section 1014 (basis of inherited property)

[S]ection 113[(a)(5) of the 1939 Code, now section 1014,] has been criticized as "one of the most clearly illogical of all income tax provisions."\(^{18}\)

Section 1015 (basis of gift or trust property)

[We would be less than candid if we did not indicate at this point that after our brief trip into the labyrinth of the Treasury Regulations we emerged with grave doubts concerning the validity of the basis determination method prescribed by § 1.1015-4.\(^{19}\)]

Section 2013 (estate tax credit for previously taxed property)

One commentator has noted that § 2013 "can . . . be characterized as the most complex and confusing provision of the estate tax law." Without examining all the estate tax sections, we are inclined to agree.\(^{20}\)

Cf. section 812(c) of the 1939 Code (estate tax deduction for previously taxed property)

"[Section 812(c) is] the most complex and confounded provision of the entire federal deferral estate tax law."\(^{21}\)

Sections 2033, 2035-38, and 2043 (transfers included in estate)

The interrelation of section 2033, sections 2035-2038, and section 2043 is one of the most difficult problems in tax law.\(^{22}\)

Sections 2039, 401-03, and 501 (exclusions from estate)

Section 2039(c) provides that "[n]otwithstanding the provisions of this section or of any provision of law, there shall be excluded from the gross estate the value of an annuity or other payment . . . receivable by any beneficiary" under any one of four separately identified arrangements, each one of which calls for meticulous examination of other entirely separate and complex provisions of the statute.


\(^{18}\) Estate of Davison v. United States, 292 F.2d 937, 940 (Ct. Cl.), cert. denied, 368 U.S. 939 (1961) (quoting VICKREY, AGENDA FOR PROGRESSIVE TAXATION 139 (1947)).

\(^{19}\) Citizens Nat'l Bank of Waco v. United States, 417 F.2d 675, 680 (5th Cir. 1969).

\(^{20}\) Continental Illinois Nat'l Bank & Trust Co. of Chicago v. United States, 504 F.2d 586, 588 n.4 (7th Cir. 1974) (quoting Harry J. Rudick, The Estate Tax Credit for Prior Transfers, 13 TAX L. REV. 3 (1957)).

\(^{21}\) Bank of America Nat'l Trust and Savings Assn. v. United States, 237 F.2d 942, 947 (9th Cir. 1956) (quoting Harry J. Rudick, The Estate Tax Deduction for Property Previously Taxed, 53 COLUM. L. REV. 761 (1953)).

\(^{22}\) Estate of Vardell v. Commissioner, 307 F.2d 688, 694 (5th Cir. 1962) (Wisdom, J., dissenting).
Among the provisions thus brought into play are those in section 401(a), which in turn has more than 20 separately numbered paragraphs, some of which are further subdivided into subparagraphs (and sub-sub paragraphs) and some of which make applicable a considerable number of other provisions such as those in section 501(a), which further in turn makes applicable the highly detailed provisions of section 501(c) and (d), and back again to section 401(a), which still further in turn makes applicable still other statutory provisions, seemingly ad infinitum and ad nauseam. The matter is made further complicated by the necessity of tracking down the various public laws that have from time to time added some of the paragraphs to section 401(a) or made amendments thereto and determining the effective dates of any such new paragraphs or amendments. Section 2039(c) also brings into play still other statutory provisions which in turn make still further cross references to other provisions. It is virtually mind boggling to thread one’s way through this maze . . . .

Apart from its convoluted character, [section 2039](f)(2) suffers from distressingly opaque draftsmanship by reason of the necessity of examining the provisions in section 402(a), and particularly paragraph (2) of section 402(a), which is singled out for special consideration by the cross-reference in (f)(2) . . . .

In sum, since Peter elected to take advantage of the capital gains treatment for the $25,000 distribution as authorized by section 402(a)(2), the distribution fails to qualify as an amount not described in section 2039(f) by reason of paragraph (2) thereof, and in turn fails to qualify for the section 2039(c) exemption, with the ultimate consequence that the distribution must be included in the gross estate under section 2039(a). If this sounds like legal gibberish or gobbledegook, it is made necessary by the incredibly complex nature of the statute itself."

"We have already indicated our agreement with petitioner’s complaint about the complexity of the statute, and we sympathetically understand petitioner’s calling our attention to the comment in Judge Wilkey’s concurring opinion in “Americans United” Inc. v. Walters:

"[I]f 200 years ago men revolted on the principle that ‘Taxation without representation is tyranny,’ then today men may rise in righteous wrath because taxation with representation but beyond human comprehension is worse.”

The instant case requires us to revisit that fever swamp of statutory and regulatory provisions governing the taxation of lump sum distributions from qualified plans which are previously explored in Estate of Rosenberg v. Commissioner. Having done so, we are in full agreement with everything which was said in that case regarding the almost incomprehensible and mind-boggling provisions of sections 2039(a), (b), (c), and (f), the interrelated provisions of sections 402 and 403, and the provisions of respondent’s regulations with

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respect thereto. Nevertheless, having tortuously picked our way through this morass, we come to the conclusion that . . .

Sections 4973, 219, and 408 (excise tax on excess contributions to IRA)

I must comment briefly on the majority's statement that the IRA provisions are "relatively straightforward." Maybe the literal import of the provisions is clear to a lawyer, a certified public accountant, or a tax specialist. But to an ordinary, low or middle income taxpayer who is not covered by a qualified pension plan—the very type of person for whom a benevolent Congress created the tax benefit—the provisions are complex and the labyrinth of sanctions and penalties is beset with invisible boomerangs. How can a statute that contains complicated definitions of excess contributions, premature distributions, rollover transfers, and prohibited transactions be characterized as "relatively straightforward"? Unfortunately, the statute can become a horrible trap for an unwary and unsophisticated taxpayer.

Section 6311(b)(2) (banks' liability to the Service)

This case has required us to explore one of the lesser known chambers in a labyrinthine Internal Revenue Code honeycombed with obscure passageways.

Sections 6851, 6501, 6011-12, 871, and 874 (taxation of departing nonresident aliens)

We shall now embark on a voyage through the various sections of the Income Tax Regulations which are enough to boggle the mind of an English-speaking U.S. citizen.

Section 7805 (regulations)

We note, of course, that section 58(h) is phrased in terms of directing the Secretary of the Treasury to prescribe regulations to carry out the stated legislative objective, and that the Secretary, to this day, some eight years after the effective date of these new provisions, has not yet promulgated any such required regulations . . .

23 United States v. Second Nat'l Bank of North Miami, 502 F.2d 535, 549 (5th Cir. 1974), cert. denied, 421 U.S. 912 (1975). To be fair to the court, the remainder of the passage reads as follows:

But if unfamiliar and infrequently visited, section 6311(b)(2) may be understood without the specialized tools of statutory speleology. Framed in relatively straightforward English, its meaning is readily apparent; and though the unwary may find it a trap, passage around the danger is marked by accepted commercial practices and established principles of the law of negotiable instruments. Our federal tax code may appear to operate with a rigidity that makes its collectors bereft of human pity, conscience, or compassion; its operation is also an illustration that ours is a government of laws, not men.

Id.
Congress could hardly have intended to give the Treasury the power to defeat the legislatively contemplated operative effect of such provisions merely by failing to discharge the statutorily imposed duty to promulgate the required regulations.*

*We do not necessarily mean to assess blame for the current sorry situation solely upon the Treasury. In a recent statement reported in the May 2, 1984, issue of the Wall Street Journal, the Commissioner of Internal Revenue, Roscoe Egger, Jr., complained about the "complexities associated with the passage of frequent tax bills," and added that "[w]e are tied up in knots drafting regulations to explain the frequent changes in law." It was further reported that at last count there was a backlog of 377 regulations yet to be completed, some of them pending since 1976. It would seem that at least some responsibility for the situation rests with the Congress itself by reason of its frequent massive revisions of the Internal Revenue Code, and we take judicial notice of the fact that the current pending bill to revise the Code contains over 1,000 pages of complex provisions. Nevertheless, once having been enacted, every new provision becomes the law of the land, and we must deal with it as such.28

Afterthoughts

Bearing in mind that the Code is of nationwide application affecting tens of millions of taxpayers, it is difficult to understand why it is so constructed that so many of its provisions can confidently be dealt with by only a comparatively small number of highly skilled or trained persons who have expended a disproportionate amount of time and effort to master the mysteries of the particular intricate provisions under consideration. Surely, there must be a better way of constructing a fair and workable system of taxation.29

We have from time-to-time complained about the complexity of our revenue laws and the almost impossible challenge they present to taxpayers or their representatives who have not been initiated into the mysteries of the convoluted, complex provisions affecting the particular corner of the law involved. Our complaints have obviously fallen upon deaf ears.30

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30 Barrett v. Commissioner, 64 T.C.M. (CCH) 1080, 1082-83, 62 T.C.M. (P-H) ¶ 92,611, at 3126 1992 (citations omitted).