The tax effects of a man's economic behavior are a determinant of his actions both in choosing among alternatives and in deciding whether or not to proceed with a pending transaction. Yet, the Internal Revenue Code is so complex and comprehensive that it is often impossible for tax counsel, let alone laymen, to predict the tax consequences of transactions. The uncertainty engendered by these business facts of life represents a disruptive factor in economic planning and, occasionally, can cause the total abandonment of the proposed transaction. But given the vast number of contemplated transactions for which tax factors are material or pivotal, formal court procedures for providing the necessary certainty in advance would prove burdensome.

I. The Availability of Rulings

The Internal Revenue Service has evolved a program which gives to individual taxpayers valuable guidance as to the tax consequences of their proposed transactions. Though many administrative agencies offer pretransaction guidance,¹ in no other agency has this function assumed such major proportions, in terms of time and staff,² or come to be relied


² The Tax Rulings Division is functionally divided into ten branches with a staff as of May 1, 1964, of 428 allocated as follows:

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<th>Organization</th>
<th>Strength</th>
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<tr>
<td>Actuarial and Insurance Tax Branch</td>
<td>15</td>
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<tr>
<td>Corporation Tax Branch</td>
<td>66</td>
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<tr>
<td>Employment Tax Branch</td>
<td>24</td>
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<tr>
<td>Estate and Gift Tax Branch</td>
<td>19</td>
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<tr>
<td>Exempt Organizations Branch</td>
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<tr>
<td>Excise Tax Branch</td>
<td>54</td>
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<tr>
<td>Individual Income Tax Branch</td>
<td>64</td>
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<tr>
<td>Pension Trust Branch</td>
<td>32</td>
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<td>Reorganization Branch</td>
<td>40</td>
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<tr>
<td>Tax Rulings Division—General</td>
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Letter From John W. S. Littleton, Director of the Tax Rulings Division, to the University of Pennsylvania Law Review, May 1, 1964, on file in Biddle Law Library, University of Pennsylvania Law School. In fiscal year 1963 the Division disposed of 34,967 requests for rulings from taxpayers. 1963 IRS Ann. Rep. 6. The Division participated in 11,350 formal and informal conferences with taxpayers in regard to these requests. Ibid.
upon by the public to such an extent as the Internal Revenue Service’s rulings program. Since the Commissioner of Internal Revenue is the tax collector, the one who institutes tax litigation, and the taxpayer’s adversary in such litigation, it is natural that taxpayers will strive to obtain his advance stamp of approval. It is therefore understandable that the rulings program, in the words of the Service, “has a very broad impact on our national economy and on proper and reasonable tax administration.”

Enhancing the impact of advance rulings is the Commissioner’s policy of considering himself bound by his rulings even though they may not be legally binding.

A. Evolution of the Present Program

The procedural framework in which the rulings program operates, as well as the areas in which he will issue advance rulings, is formulated by the Commissioner and published in the form of Revenue Procedures. There is no formal limitation upon his discretion in establishing procedures, since section 7805(a) of the Code broadly authorizes the Commissioner to “prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.” Within this broad authorization, periodic changes in the procedures have occurred, repre-

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3 See Technical Information Release 610, 7 CCH 1964 STAND. FED. TAX REP. ¶6670 (July 9, 1964) [hereinafter cited as T.I.R. 610]; Caplin, Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles, N.Y.U. 20TH INST. ON FED. TAX. 1 (1962); Clark, Practical Considerations in Obtaining Rulings and in Filing Claims for Refund, TULANE 6TH INSTITUTE ON FED. TAXATION 257 (1957); Redman, New Procedures Re Letter Rulings; Request for Washington Assistance, U. So. CAL. 1963 TAX. INST. 411; Sugarman, Federal Tax Rulings Procedure, 10 TAX L. REV. 1 (1954); WencheL, Taxpayer’s Rulings, 5 TAX L. REV. 105 (1950); Yager, When and How Should the Practitioner Ask for Rulings and Technical Advice?, 14 J. TAXATION 38 (1961). But see Lore, Revision of Ruling Procedures Now Issued; “No Ruling” Areas Outlined, 18 J. TAXATION 114 (1963): “There are, of course, some who feel that it would be better to have no rulings at all, in which case action would be predicated solely upon advice of counsel. True, this would involve more litigation, but the court decisions might furnish greater latitude than that which currently exists as reflected by the ruling policy of the Service.”

4 T.I.R. 610.

5 Rev. Proc. 62-28, 1962-2 CUM. BULL. 496, 505:

Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued or to a taxpayer whose tax liability was directly involved in such ruling if (1) there has been no misstatement or omission of material facts, (2) the facts subsequently developed are not materially different from the facts on which the ruling was based, (3) there has been no change in the applicable law, (4) the ruling was originally issued with respect to a prospective or proposed transaction, and (5) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment.


7 INT. REV. CODE OF 1954, §7805(a) [hereinafter all sections cited refer to INT. REV. CODE OF 1954 unless otherwise indicated]; see Caplin, supra note 3, at 7.
senting a continuing effort to reconcile the needs of taxpayers with the administrative burdens imposed by this program.

In 1913 the Commissioner honored all requests for rulings upon prospective transactions but did not purport to be bound by them. As the volume of rulings increased, the Commissioner found it necessary to limit advance rulings to transactions for which prior approval of the Commissioner was a statutory requisite of nontaxability. The resultant clamor for advance guidance testified to the importance of advance rulings to taxpayers, and Congress responded by passing a statute in 1938 providing for the “closing agreement.” This device was a formal contractual arrangement under which the Commissioner promised to tax the transaction in an agreed manner, and the taxpayer promised that the facts would not change. What Congress did not foresee was that a rulings procedure involving pending transactions must be expeditious and devoid of cumbersome formalities to be useful to taxpayers. Though now a seldom-used fossil, the closing agreement at least represents a public and legislative recognition of the necessity of advance guidance.

In 1940, after the insufficiency of the closing agreement became apparent, the Commissioner responded to this need by eliminating the “red tape” and issuing informal rulings. The Commissioner published in 1953 his policy of ruling upon prospective transactions and in 1959 his policy of considering himself bound by them, thereby rendering explicit what had obtained in practice.

B. The Function of the No-Ruling List

Ideally, the taxpayer would desire an advance assurance as to the tax consequences of all his transactions. The Commissioner, however, must balance the need for rulings with such administrative practicalities as the availability of staff. Until 1960 it was uncertain whether the Commissioner would act upon any given request. To provide some certainty the Commissioner published a list of both general and specific areas in which he

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8 Id. at 2-3.
10 See Oliphant, Declaratory Rulings, 24 A.B.A.J. 7 (1938); Traynor, Declaratory Rulings, 16 Taxes 195 (1938).
13 For fiscal year 1963, there were two requests made for closing agreements, and such two agreements were consummated. 1963 IRS Ann. Rep. 7.
either would always refuse or ordinarily would refuse to rule.\textsuperscript{17} Revised lists have been published in 1962\textsuperscript{18} and 1964,\textsuperscript{19} each diminishing the number of no-ruling areas to some extent.\textsuperscript{20}

Despite the incidental benefit that may have accrued to the taxpayer by the enlargement of the areas in which rulings will be given, the primary purpose of the no-ruling list has remained one of saving taxpayers the time and expense of preparing a ruling request in the listed areas.\textsuperscript{21} This suggests that the list is regarded more as a convenience for taxpayers than as an articulation of the Commissioner's policies offered for public scrutiny and censure.

Interviews with several members of the Philadelphia tax bar revealed a gratitude for the service rendered by the Commissioner through his rulings program, and a reluctance to advocate the need for reassessment of the philosophy thereof.\textsuperscript{22} This attitude may be attributable to a reluctance to "rock the boat." It was nonetheless admitted that a refusal to rule has a discouraging effect upon a prospective transaction. A stock phrase used by tax counsel in substantial transactions is: "subject to favorable rulings of the Internal Revenue Service."\textsuperscript{23}

C. The Effect of a Refusal To Rule—the Warwick Fund

Two recent and related refusals to rule, involving an investment "swap fund," offer an opportunity to examine the effects of such a refusal upon a prospective transaction which has potentially significant tax consequences.

A "swap fund" is a mutual fund whereby investors receive shares of the fund in exchange for their own appreciated shares of stock, thereby gaining diversification and expert management.\textsuperscript{24} If this exchange is a taxable one, the appreciation in the member's shares constitutes capital gain recognizable upon transfer to the fund;\textsuperscript{25} however section 351 provides that transfers of "property" to a corporation for stock thereof is nontaxable if

\textsuperscript{17}Rev. Proc. 60-6, 1960-1 CUM. BULL. 880.

The Tax Rulings Division indicates that "ordinarily will not" means almost never. Interview With Harold T. Swartz, Assistant Commissioner-Technical, and John W. S. Littleton, Director of the Tax Rulings Division, in Washington, D.C., March 5, 1964.


\textsuperscript{20}See generally Caplin, supra note 3, at 6-11; 21 J. TAXATION 156 (1964).

\textsuperscript{21}Letter From John W. S. Littleton to University of Pennsylvania Law Review, May 1, 1964, on file in Biddle Law Library, University of Pennsylvania Law School, stating this to be the "basic philosophy" of the no-ruling list.

\textsuperscript{22}Interviews With Members of the Philadelphia Tax Bar, in Philadelphia, Feb.-April 1964.

\textsuperscript{23}Redman, supra note 3, at 411.

\textsuperscript{24}See Warwick Fund Ruling Withdrawn; IRS Policy Questioned, 19 J. TAXATION 197, 198 (1963) [hereinafter cited without title].

\textsuperscript{25}INT. REV. CODE OF 1954, §§ 1221-22.
The first attempts to establish such a fund utilized a corporate form, the most famous being the Centennial Fund, which elicited a favorable tax ruling, under section 351, from the Commissioner. But the Commissioner decided to reconsider his position and established a moratorium on all corporate swap fund rulings, and subsequently announced his refusal to rule. The risk of taxability and the likelihood of litigation discouraged the use of the corporate form and caused investment promoters to seek an alternative.

As to Centennial, the cause of the Commissioner's uncertainty might have been that the intent of Congress in allowing tax-free corporate organization under section 351 was arguably to favor the operations of a distinct going concern. It is arguable that Centennial was a mere pooling of assets rather than a commencing of operations by a distinct corporation. To avoid the section 351 problems the Warwick fund planned to organize in partnership form, since transfer of appreciated assets to a partnership would be nontaxable. Again, the Commissioner first ruled favorably, but upon reconsideration revoked the ruling and published his refusal to rule upon this type of transaction. The tax counsel for the Warwick Fund stated that the effect of this refusal to rule was the demise of the fund before it was even introduced to the public. A major reason would appear to have been the contemplated difficulty of convincing a sufficient number of individuals holding highly appreciated stocks to subscribe without the final assurance of the Commissioner that this would not be a taxable exchange.

Although various reasons have been advanced by tax counsel and scholars for the Commissioner's refusal to rule in the Warwick Fund situation, the Tax Rulings Division marks the swap fund area as one of genuine uncertainty upon which it is premature to formulate a concrete position.

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27 See Redman, supra note 3, at 440-41.
30 See ibid. The refusal to rule is stated in the most recent list to be applicable to the issue of "classification of a newly organized unincorporated investment organization as a trust, partnership, or an association taxable as a corporation, where there is a transfer of appreciated stocks or securities in exchange for an interest therein, as a result of solicitation by promoters, brokers or investment houses." Rev. Proc. 64-31, 1964 Int. Rev. Bull. No. 30, at 17.
32 Reasons offered range from the Commissioner's not wanting to grant Warwick a competitive advantage over those who would still form a corporate swap fund to the ruling request having been channeled through the Individual Branch of the Tax Rulings Division which was not thought to be as familiar as the Corporations Branch with problems of a corporate nature. One writer accused the Commissioner of harboring basic hostilities toward the swap fund device. 19 J. Taxation 197, 198 (1963).
33 Interview With Harold T. Swartz, Assistant Commissioner-Technical, and John W. S. Littleton, Director of the Tax Rulings Division, in Washington, D.C., March 5, 1964.
swap-fund partnership constitutes an association taxable as a corporation under section 7701 falls within those matters which are "inherently factual," an established "ordinarily will not rule" area.

Whatever the reason for the Commissioner's failure to rule, the fact remains that proposed undertakings were permanently discouraged as a result. These instances illustrate the power of the Commissioner to exert an indirect control upon the form or direction of segments of the economy by use of the no-ruling device. The Commissioner displayed an awareness of this problem when he acknowledged that "in view of the complex tax laws and high tax rates, it is understandable why taxpayers frequently hesitate to move on important business transactions without some official assurance of the tax consequences." This effect of a refusal to rule must represent a focal point for any meaningful appraisal of the no-ruling system.

D. The Areas of No-Ruling: An Evaluation

The list does not itself purport to explain the Commissioner's reasons for not ruling in particular areas. However, it is important that the rulings program be grounded upon principles consistent with the Commissioner's realization of the importance of rulings and the effect of refusing to rule. The Commissioner should not refuse to rule unless either the nature of the question or the administrative burden render ruling unfeasible.

The present no-ruling policies of the Service will serve as a point of departure for the development of principles consistent with the concept of rulings being granted whenever feasible. The most recent no-ruling list, promulgated July 27, 1964, specifies three general and eighteen specific areas where rulings will not be issued and also two general and seven specific areas in which rulings "ordinarily will not be issued." For purposes of analysis, there are three basic categories into which this list can be divided: 1) where the matter is "inherently factual"; 2) where the Commissioner's position is unsettled; 3) where the Commissioner's concept of "sound tax administration" dictates that he not rule.

1. Areas "Inherently Factual"

Even before the publication of the no-ruling list, the Commissioner stated his no-ruling policy to be that he would not rule "where the determination requested is primarily one of fact." The examples which he offered indicate what was meant by a "determination of fact":

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34 Ibid.
36 T.I.R. 610.
37 The Commissioner stated in T.I.R. 610 his recognition that "rulings are of utmost importance to many taxpayers in planning their business and tax affairs," and that the rulings program "is a significant feature of our self-assessment [tax] system."
(1) market value of property, (2) whether compensation is reasonable in amount, (3) whether a transfer is one in contemplation of death, (4) whether retention of earnings and profits by a corporation is for the purpose of avoiding surtax on its shareholders, or (5) whether a transfer or acquisition is within section 1551 or section 269 of the Code [in which the issue is whether the purpose of the transaction is to avoid taxation].\(^40\)

The present no-ruling list specifies additional areas whose factual nature is the probable reason for not ruling.\(^41\) The Commissioner further states in his most recent no-ruling procedure that rulings will not “ordinarily” be issued “where the determination requested is primarily one of fact.”\(^42\)

The law-fact dichotomy is an infamously imprecise one; a meaningful evaluation of the no-ruling policy demands that the kinds of questions which have been denoted as being factual be isolated and the reasons for not ruling in each explored. These areas can be categorized according to their location along the spectrum of feasibility.

a. Where a Material Fact May Not Become Known Until After the Transaction Occurs

In such a case, even if there were extensive investigation to discover all relevant facts and to verify the taxpayer’s assumptions, a decision upon the ultimate fact could not be confidently made. An example is whether a gift is one in contemplation of death, since the estate tax consequences depend, \textit{inter alia}, upon the length of time intervening between the gift and date of death.\(^43\) The reason for not ruling in such a case is not an excessive administrative cost or burden, but lack of clairvoyance.\(^44\)

b. Where the Issue Is One of Motive, Purpose, or Relationship

In many such cases the ultimate issue depends upon inferences drawn from a myriad of variables, the outcome of which would turn upon a slight change of any variable or introduction of a new one.\(^45\) Moreover, while all

\(^{40}\)Ibid.

\(^{41}\) \textit{E.g.}, whether advances to thin corporations constitute loans or equity investments (§163); whether “substantially all” premiums of a contract of insurance are paid within a period of four years from the date on which the contract is purchased (§264(b)); the amount of working capital attributable to the business or portion of the business terminated which may be distributed in partial liquidation (§346); matters relating to the validity of family partnerships where capital is not a material income producing factor (§704(e)). In the “ordinarily” will not rule category are questions of useful lives of assets and depreciation rates. Rev. Proc. 64-31, 1964 INT. REV. BULL. No. 30, at 14.


\(^{44}\) See generally Blair-Smith, \textit{Forms of Administrative Interpretation Under the Securities Laws}, 26 IOWA L. REV. 241, 252-56 (1941).

\(^{45}\) \textit{E.g.}, questions under INT. REV. CODE OF 1954, §§269 (whether a corporate acquisition was made to evade or avoid federal taxes), 341 (whether a corporation will be considered to be “collapsible”), 1551 (disallowance of surtax exemption). These are all current no-ruling or “ordinarily” will not rule areas.
relevant facts might be extant at the time of the ruling request, it would require extensive investigation to extricate them. This would not be of overriding significance if the Commissioner could attach credence to the facts as stated by the taxpayer; however, issues such as intent and relationship are particularly susceptible to coloration of the facts by the taxpayer in his favor.

Weighing against a no-ruling policy for questions of intent in particular is the fact that such requests often entail consequences of considerable impact; the very establishment of a corporate enterprise or its form of operation often hinges upon the treatment given to such a ruling request. For example, the impact of a refusal to rule on issues such as whether the purpose of an acquisition is to avoid taxes under section 269, or problems of "collapsible corporations" arising under section 341 is considerable. This impact can be compared to that which accompanies refusals to rule upon questions of depreciation rates, valuation, or reasonable compensation. The consequences of not ruling on the latter questions would be less likely to alter significantly the course of the taxpayer's economic behavior.

Although the Commissioner is justified in not wanting to give an advance stamp of approval regarding such issues as intent, it should be possible for him to rule whether, on the face of the ruling request together with any facts learned in conference, he does find an intent to avoid taxes. The Commissioner presently refuses to rule upon "the results of transactions which lack bona fide business purpose and have as their principal purpose the reduction of federal taxes."\(^\text{46}\) In deciding not to rule under this general category, the Commissioner resolves an issue of intent identical to that raised by the above proposal. The Commissioner could indicate the elements of the proposed transaction which lead to the conclusion that there is an intent to avoid taxes, thereby providing a basis for the taxpayer to revamp the transaction to meet the objections, or adjust his bargaining position to meet a high tax.

A practice mitigating the hardship of not ruling on questions of intent is the Commissioner's willingness to rule as to the tax consequences flowing from all other aspects of a transaction while issuing a caveat that the favorable ruling on these aspects is subject to future application of, for example, section 269 to the facts as they develop.\(^\text{47}\)

c. Where There Is a Substantial Risk That the Facts Presented in the Ruling Request Will Not Be Those of the Transaction if and When Consummated

The taxpayer should not be able to test various hypothetical transactions in a quest to determine the most favorable. The transaction should be in that state of imminence or finality that the Commissioner does not


\(^{47}\) Interview With Harold T. Swartz, Assistant Commissioner-Technical, and John W. S. Littleton, Director of the Tax Rulings Division, in Washington, D.C., March 5, 1964.
waste his time giving legal advice in answer to "trial balloons." This policy is furthered by the Service's demand for a complete statement of facts of the transaction and the submitting of all documents, and by their refusal to honor requests which contain alternative plans.\(^{48}\)

The Commissioner's refusal to rule upon "a matter involving the prospective application of the estate tax to the property of the estate of a living person"\(^ {49} \) may also be grounded upon the volatility of the operative facts and the indefiniteness of the time at which the taxable event will occur. The latter factor also may have induced the addition to the 1964 list of a new "ordinarily will not rule" category: "The tax effect of any transaction to be consummated at some indefinite future time."\(^ {50} \)

d. Where the Ultimate Factual Issue Depends Upon Facts Subject to Documentation or Verification Without Substantial Risk of Change

The facts in such instances would not be the object of mere conjecture, nor are they substantially variable. Therefore, the Commissioner can make a determination at the time of the ruling request with as much facility as he could upon the consummation of the transaction. For example, a stock option could be just as easily and more accurately valued immediately prior to the contemplated transfer of the options than upon audit of the return for the year of transfer, since the valuation would occur closer to the taxable event. The same also would be true of a prospective transfer of a painting to a museum.\(^ {61} \) If a taxpayer is contemplating the purchase of a contract of insurance, the Commissioner should be able to rule whether or not "substantially all premiums" will be payable within four years of purchase within section 264(b).\(^ {52} \) Here, the taxpayer can submit documentary proof of contractual payment dates and these facts can be subsequently verified upon each year's audit by check stubs.

As problems become more complex and variable, such as issues of thin capitalization or reasonable compensation, the more the considerations applicable to questions in prior discussed categories will militate against ruling in these instances. Those categories do not present clearcut lines; in the "gray" areas each request should be subjected to analysis to determine the feasibility of ruling.

As is true of all rulings, the additional cost of ruling in the factual areas in which it is feasible within the above analysis stems from the necessity of investigating the transaction twice: the ultimate factual issue must first be decided at the time of the ruling, and the facts later verified


upon audit of the return for the year in which the transaction occurs, to ensure that there has been no departure from those facts given in the request. Therefore, a liberalization in ruling policy through the granting of rulings necessitates additional manpower. This might be accomplished only by an increase in the portion of the Service's budget allocated to rulings, or an increase in the Service's budget by Congress.

An alternative is to charge a fee for costs of ruling on questions in the last category. This practice would leave it to the taxpayer to decide whether the cost involved is less than the value to him of the certainty. Just as counsel bills his client, the Tax Rulings Division could maintain records for hours of labor spent upon a given request. The Assistant Commissioner-Technical stated that such a proposal had been "loosely considered" but that computation of an administrable fee schedule would be difficult and that charging a fee is contrary to the concept of the rulings program as a public service. A more administrable system would be to charge a uniform filing fee for all ruling requests to defray the cost of ruling in the additional areas. Most members of the tax bar interviewed indicated a willingness to pay a fee to obtain rulings in factual areas. Such proposals should therefore be given serious consideration if funds cannot be obtained elsewhere.

2. Where the Commissioner's Position Is Unsettled

Falling within this category are three basic situations in which rulings will not be issued or will be delayed: (1) where the Commissioner's prior position has been overturned by a district court or the Tax Court, and he is contemplating appeal; (2) where issuance of regulations is pending; (3) where the Commissioner is otherwise uncertain as to the nature of a proposed transaction and does not want to take a position until the effects thereof are known, or is awaiting judicial guidance as to a difficult problem of interpretation.

The tax bar almost unanimously agreed that the Commissioner should not be compelled to take a stand without time for evaluation. If he were to issue a ruling and regulations were later published embodying a different tax result, this would place others contemplating the same transaction at a competitive advantage or disadvantage, given the Commissioner's published policy of not revoking a ruling retroactively if the taxpayer has changed his position.

However, not ruling in such situations causes considerable hardship, since the very fact of new legislation or a reconsideration of a position is the reason for the increased need for certainty. Thus the Revenue Act

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63 Interview With Harold T. Swartz, Assistant Commissioner-Technical, and John W. S. Littleton, Director of the Tax Rulings Division, in Washington, D.C., March 5, 1964.
64 See note 5 supra.
of 1964 will give rise to considerable uncertainty, but the Commissioner
will probably refuse to rule on these new sections as to questions which
will be resolved by regulations.

However, the issue becomes one of how much time the Commissioner
should take while prospective transactions are held in abeyance. Mitiga-
tion of the resulting hardship can be achieved only by expediting the
promulgation of regulations and eliminating undue procrastination in eval-
uating an uncertain issue and assuming a position. The Service has re-
cently taken steps to insure a more rapid issuance of regulations 56 in
response to complaints by members of the tax bar of Service slothfulness
on this score.67 At the same time, four years elapsed before the Service
assumed a position and issued rulings upon the issue whether know-how
constitutes property which can be transferred tax free in exchange for stock
under section 351.68 The Service’s policy in streamlining the issuance of
regulations should be extended to the achievement of shorter evaluation
periods during which rulings are refused.

3. Sound Tax Administration

The Commissioner places a general limitation upon issuance of rulings
by the statement that he will rule “whenever appropriate in the interest
of sound tax administration.”69 The meaning of this phrase is indicated
by this pronouncement:

Certain plans may have tax attractiveness if a narrow reading
of the Code provision is assumed. In fact, the correct tax inter-
pretation may be uncertain or borderline in light of the entire
legislative history. Others may appear to be designed solely, or
at least primarily, for tax avoidance purposes—or may fall into
the category of what is commonly called a “tax gimmick.” In
these situations, where the correct tax result is in doubt, it does
not appear to be “wise administration” for the Service to give its
official blessing by issuing a favorable advance ruling.70

Such policies have evoked concern,71 since it is possible that the no-ruling
device is in this way utilized as a weapon to discourage transactions to
which the Commissioner is hostile but to which the Code attaches favorable

...
tax consequences. Some of the tax counsel interviewed asserted that the reason for not ruling in the Centennial and Warwick situations was that the Commissioner thought them to be a "tax gimmick." Another issue for which the Commissioner's refusal to rule had been criticized and his motives questioned was whether a distributee ceases to have interest in the corporation after a stock redemption where the spouse is the sole or principal shareholder after redemption, under section 302(c)(2)(A)(1). If there is no termination of interest, the payment in redemption is treated as a dividend and not a distribution of capital. Section 302(c)(2)(A) provides a clear exception to the section 318(a) rules which attribute a spouse's stock to the taxpayer. The impression of tax counsel that the Commissioner simply disagreed with the statute and that this does not justify not ruling might have prompted the Commissioner to delete this issue from the most recent no-ruling list.62

A general area in which the Commissioner refuses to rule as a matter of sound tax administration is upon "the results of transactions which lack bona fide business purpose and have as their principal purpose the reduction of Federal taxes."63 There was some feeling among the members of the tax bar interviewed that the Commissioner should rule favorably in all cases where the Code calls for a favorable tax result, and that loopholes are for Congress to close.64 But the role of the Commissioner in the scheme of tax law interpretation must be remembered. It is apparent that Congress would expect that the Commissioner not rule favorably in a case where the letter of the statute might be complied with, but Congress could not have intended a favorable tax result. But that does not mean that he should not rule at all. If it be true that the questioned transaction does not fall within the spirit of the Code section, he has warrant to rule adversely. If his judgment is justified, it is difficult to believe that the courts will demand a literal reading of the given section.

The Supreme Court has given the Commissioner grounds for ruling adversely in the situation where there is a lack of bona fide business purpose. In Knetsch v. United States,65 despite dictum that it is the intent of Congress and not the motive of the taxpayer which is important, the Court held the loan transaction a sham, "for it is patent that there was nothing of substance to be realized by Knetsch from this transaction beyond a tax reduction."66 The Court seems to be inferring that it is not the intent of Congress to allow transactions to be favorably taxed when there is no valid business purpose.

66 Id. at 366.
Therefore, if the Commissioner’s refusal to rule stems from a doubt that the transaction is one to which Congress intended to attach favorable consequences, it seems reasonable to expect him to rule adversely and to not utilize the no-ruling device as an indirect weapon for discouraging it. If, on the other hand, there are no grounds for wariness, and it is clear that Congress has expressed its will on the subject—which was true of the 302 redemption of stock—refusing to rule is indefensible.

E. Revenue Procedure 64-31

The latest no-ruling list, embodied in Revenue Procedure 64-31, represents a movement toward the principle of ruling whenever feasible. The Commissioner has, by deletions from the list, expressed his willingness to rule in areas which have heretofore been considered factual, such as whether an amount paid to an employee is a gift or compensation; determination of earnings and profits available for distribution of dividends to shareholders; year of inclusion in income of amounts realized pursuant to deferred income arrangements; qualification of corporations for treatment as “Western Hemisphere trade corporations” or section 931 corporations. Most important, the statements issued by the Service preparatory to the publication of the new list manifest the Commissioner’s awareness of the impact of a refusal to rule, the importance of the rulings program to sound tax administration, and his desire to subject his policies to continuing scrutiny.

F. The Basis of a Principled Program—Full Disclosure

It has been noted that the Service’s philosophy of the no-ruling list has been to save the taxpayer time and money. However, the greater the Commissioner’s discretion to refuse to rule apart from the listed areas, the less the list serves this purpose. The Commissioner broadly reserves the right to “decline to rule in advance on any question whenever warranted by the facts and circumstances . . . .” Greater certainty for the no-ruling program could be provided through an articulation by the Service of what kinds of “facts and circumstances” will lead to the exercise of the discretion to decline to rule. A step toward full disclosure would be the giving of reasons to the taxpayer whose ruling request is refused.

67 “[G]etting an unfavorable ruling has some advantages too. Perhaps the proposed transaction can be revamped to meet the IRS objections. At the very least it permits the parties to bargain with full knowledge of the possibility of tax litigation.” Yager, When and How Should the Practitioner Ask for Rulings and Technical Advice?, 14 J. TAXATION 38 (1961).
71 T.I.R. 610; see note 37 supra; text accompanying note 3 supra.
72 See text accompanying note 21 supra.
These reasons might then be published in the Revenue Procedure with the addition of that area to the no-ruling list.

The Commissioner has refused to rule in some areas not appearing on the no-ruling list. One example is the tax consequences of the installment sale of a business when payment is to be based upon profits of that business; another was whether know-how constitutes property within section 351, upon which rulings are now issued. The Director of the Tax Rulings Division states: "We have not felt the necessity of public announcement involving any such areas." Besides limiting the value of the list as a timesaver, this policy limits the usefulness of any evaluation of the Commissioner's no-ruling program since untold areas might be hidden from scrutiny. This suggests another important purpose which could be served by full disclosure: to lay bare the Commissioner's policies to the scrutiny of the tax community, which can act as a check upon the reasonableness of those policies.

II. PRETRANSACTION REVIEW

The demise of the Warwick Fund demonstrated the devastating effect a refusal to rule can have upon a transaction. But an adverse ruling has at least as profound an effect upon a proposed transaction. While the effect of a refusal to rule arises out of uncertainty, the effect of an adverse ruling stems from the certainty that the taxpayer will have to litigate in order to obtain favorable tax consequences.

It is nonetheless apparent from the broad authority granted the Commissioner to issue regulations that Congress intended to vest in him the initial responsibility for interpreting the Internal Revenue Code. His power to discourage transactions is only an indirect effect of this responsibility. But there is often no external check upon the exercise of that responsibility when he refuses to rule or rules adversely, since the transaction may never be consummated and therefore no tax assessed. Theoretically, a misinterpretation of the Code as to the tax effects of a transaction or a genuine uncertainty of the Commissioner as to the proper interpretation of the Code which results in his inability to rule, could permanently suppress a transaction or class of transactions.

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74 Letter From John W. S. Littleton, Director of the Tax Rulings Division, to the University of Pennsylvania Law Review, May 1, 1964, on file in Biddle Law Library, University of Pennsylvania Law School.
75 See Cohen, supra note 58, at 38.
76 Letter From John W. S. Littleton, Director of the Tax Rulings Division, to the University of Pennsylvania Law Review, May 1, 1964, on file in Biddle Law Library, University of Pennsylvania Law School.
77 See text accompanying notes 24-32 supra.
79 Besides the general power to issue "all needful rules and regulations," see text accompanying note 7 supra, the Commissioner is delegated specific rule-making powers in many individual sections of the Code. For a compilation of such sections see Balter, Relief From Abuse of Administrative Discretion, 46 MARQ. L. REV. 176, 183 n.27(b) (1962).
Pretransaction recourse to the courts could, in averting these results, serve two functions: (1) a pretransaction check on the Commissioner’s exercise of discretion in ruling adversely or refusing to rule; (2) a source of guidance for the Commissioner in areas where he is uncertain.

The Commissioner’s unchecked power and his need for guidance were both recently illustrated. The former is exemplified by the events leading to the sad plight of the complainant in Prather v. Commissioner. In 1954 he decided to change his method of accounting under the newly enacted section 481, a provision ameliorating the effects of the bunching of income accompanying such a change. Another Code section required the approval of the Commissioner prior to a change in accounting methods. However, the Commissioner, disapproving of the tax benefits given under section 481, refused to give his approval to taxpayers seeking a change in accounting method. In the words of the Court of Appeals for the Ninth Circuit: “Promptly after the August 16, 1954 enactment the Commissioner started one of his most successful ‘sitdowns’ in the history of American tax law.” Prather proceeded to change his accounting practices despite the failure to obtain the Commissioner’s approval. Had he been well counseled, he might have been discouraged from doing so. The resulting tax consequences absent the requisite approval “about ruins the Prathers and takes the fruits of a business they built up for over 13 years.”

The explanation for the Commissioner’s “sitdown” offered by some members of the tax bar was that he was attempting to force Congress to modify section 481 because it contained a loophole costly to the Treasury. The fact that the section was amended may prove either that he was right, or that he possesses a coercive power upon Congress. In any event Prather shows the extent of an unbridled power, one which could as easily be exercised when to do so would be justified neither by the Internal

80 322 F.2d 931 (9th Cir. 1963).
82 Int. Rev. Code of 1954, § 446(e). Such prior approval is analogous to a favorable ruling. Several other Code sections contain similar requirements. E.g., § 162 (change of bad debt reduction method), § 167 (change in depreciation methods), § 367 (exchanges involving foreign corporations), § 442 (change in period of accounting), § 472 (change to LIFO inventory).
83 Prather v. Commissioner, 322 F.2d 931, 933 (9th Cir. 1963).
84 Id. at 932. The court further states:
One must be sympathetic with the taxpayers here, but even on a “fireside equity” basis it can be said for the government that late in 1954 and early in 1955 it was common knowledge that the commissioner was fighting Section 481 as enacted in 1954 with everything at his command. His announced policy of not approving any changes in accounting methods may have been what prompted taxpayers to “go it alone” and unilaterally change their accounting and reporting basis.
Id. at 935.
85 Id. at 932. It should be noted that Prather acquired the opportunity to change back to his old accounting method through the amendments to § 481 effected by the Technical Amendments Act of 1958, ch. 866, § 29, 72 Stat. 1629, which would have mitigated this hardship. However, Prather failed to make the required election in time.
Revenue Code nor by a congressional intent. Even if the taxpayer were able to force a ruling in an action for mandamus, the Commissioner's sitdown could with equal success take the form of mass adverse rulings—that is, unless there is an avenue of pre-transaction review open to the taxpayer.

The need of the Commissioner for guidance is exemplified by the four-year delay in the issuance of a ruling on the question whether know-how is property under section 351. Until 1960 the Commissioner ruled that know-how was property, but then initiated a no-ruling policy to study the issue further. In December 1961 he announced that the study had been completed and that a ruling would be forthcoming. However, it was 1964 before any ruling was issued. Former Commissioner Caplin admitted that he would have welcomed judicial guidance on this question.

Court review is presently sought only after the transaction occurs and the Commissioner attempts to tax the transaction in a given way. But this provides neither a sufficient check on the Commissioner's ruling powers nor a source of guidance for the Commissioner. If the adverse ruling or refusal to rule discourages the transaction, then by definition there cannot be posttransaction review.

Members of the tax bar who were interviewed could not conceive of the possibility that any form of pretransaction review was either available or had ever been contemplated, but many remembered instances when they would have used it were it available. This Note will explore two possible channels of review currently available—the district court and the Tax Court—with regard both to review of an adverse ruling and to relief from a Commissioner's refusal to rule.

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86 See text accompanying notes 164-65 infra.
87 Cohen, supra note 58, at 38.
88 Ibid.
90 There are seemingly no decided cases whereby a taxpayer attempted pre-transaction review of a tax ruling. Although the court in the recent case of Walsh v. Commissioner, CCH 1964 STAND. FED. TAX REP. (64-1 U.S. Tax Cas.) ¶ 9491 (S.D.N.Y. March 23, 1964), viewed the complaint as one for review of an adverse ruling, it would appear that the transaction in question had already occurred; the court surmises that the taxpayer's intent was to state a claim under INT. Rxv. CODE OF 1954, § 6213, which is applicable only after the taxpayer receives a notice of deficiency in tax. The United States Attorney's office for the Southern District of New York explains the action as follows:

What happened in this case was that a tax deficiency was assessed against John E. Walsh, Jr. and a notice of same was sent to him. After his time to appeal the notice to the Tax Court of the United States had run, he brought the above action in the District Court. . . .

The adverse ruling referred to in the complaint was no doubt an assessment although as the judge indicated it was never clearly brought out. It is also to be noted that the adverse ruling is not a revenue ruling.

A. Review of an Adverse Ruling in the District Courts

1. The Administrative Procedure Act

The judicial review section of the Administrative Procedure Act, section 10, provides the focus for any analysis of the availability of review of agency actions. It represents an affirmative legislative policy that "questions of law are for courts rather than agencies to decide in the last analysis . . . ." In the case of transactions which will not be consummated in the face of an adverse ruling, the "last analysis" must take the form of pretransaction review.

Section 10 grants the right of review to "any person suffering legal wrong because of any agency action . . . ." The act defines "agency action" to include "the whole or part of every agency rule," the term "rule" being defined as "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Since a revenue ruling is designed to interpret the Internal Revenue Code, it qualifies as an "agency action." The taxpayer seeking review of an adverse ruling would also have to show a "legal wrong" within the act. The legislative understanding as to what constitutes "legal wrong" is revealed by the House and Senate reports' definition as constituting "such a wrong as is specified in subsection 10(e)." This section includes, inter alia, "agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (3) in excess of statutory jurisdiction, authority, or limitations . . . ." Any taxpayer issued an adverse ruling which he deems contrary to the Internal Revenue Code could allege a legal wrong within this broad language. Thus the taxpayer meets the basic "agency action" and "legal wrong" requirements, and therefore is entitled to review. However, still other hurdles are planted in the path of review both by the act and the courts.

a. Threshold Section 10 Prerequisites

Section 10 applies to all agencies except when "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."
As to the latter requirement, the Commissioner has the authority to issue "all needful rules," but it cannot be said that the contents of his rulings are "by law committed to agency discretion." In another context one court recently asserted that "rulings may not be arbitrary or unreasonable, or extend the scope or terms of a tax statute, and are entitled to no more weight than the reasons sustaining them." However, the contention that judicial review has been precluded by statute has more force, since Congress has acted on two occasions to insulate the Internal Revenue Service from judicial proceedings. Section 7421 of the Code itself bars any suit "for the purpose of restraining the assessment or collection of any tax . . . ." In addition the act authorizing the courts to render declaratory judgments specifically excepts tax matters. It is further arguable that the philosophy of the Internal Revenue Code and the scheme of taxpayer relief therein provided preclude pretransaction review by implication.

i. Restraint on Assessment of Tax

The manifest purpose of Congress in foreclosing suits "for the purpose of restraining the assessment or collection of any tax" was to avoid the disruption of the orderly processes of tax collection. First, it would not be the purpose of a pretransaction suit to accomplish such restraints; all that would be sought is relief from the hardship of having either to proceed at one's peril or to abandon the transaction. It is true that a pretransaction suit, if successful, would have the indirect effect of restraining the collection or assessment of a tax upon the consummated transaction, but such an effect is not the primary "purpose" of such a suit. Second, in the posttransaction situation, which was the focus of section 7421 of the Code, the hardship of being forced to abandon the transaction is not present. Paying the tax and then claiming a refund is a reasonable alternative in light of the purported disruptive effect upon the Commissioner's processes that would otherwise occur. It is worthy of note that the Attorney General's Committee on Administrative Procedure, in a study prior to the passage of the Administrative Procedure Act, stated its belief that pretransaction court decisions on tax matters would not affect the Commissioner's processes of collection and assessment. Finally, it has been asserted that the policy of the section, even as applied to posttransaction suits, retains little vitality in light of the provision made for pre-collection suits in the Tax Court.

99 INT. REV. CODE OF 1954, § 7805(a); see text accompanying note 7 supra.
101 INT. REV. CODE OF 1954, § 7421(a).
103 INT. REV. CODE OF 1954, § 7421(a).
104 See Borchard, Declaratory Judgments 850 (2d ed. 1941).
106 Borchard, op. cit. supra note 104, at 854.
ii. Declaratory Judgment Act

The policy prompting the "tax matter" exception to the Declaratory Judgment Act is germane to whether judicial review of pretransaction rulings is precluded by statute. Such review could be considered to be declaratory in the sense that the court might grant noncoercive relief in the form of declaring the ruling to be contrary to the Internal Revenue Code. The Declaratory Judgment Act was passed in 1934 and the "tax matter" exception inserted in 1935.\(^{107}\) The legislative history accompanying this exception indicates the objections to declaratory judgments in such matters to be the shifting of the initial consideration of questions of tax liability from the Service to the district courts, and also, as was the concern of the Tax Code section, the disruption of the orderly collection of taxes.\(^{108}\) The latter objection has been shown to be of little weight as applied to pretransaction review. The former objection also is inapplicable because the initial consideration of tax liability in the pre-transaction context still would rest with the Commissioner, since the basis of court review would be his ruling.

iii. The Internal Revenue Code—The Philosophy of Taxation

Taxes levied by the Internal Revenue Code, as opposed to criminal penalties, are not calculated to deter socially undesirable behavior, but to finance the operations of government, redistribute income, and foster the growth of industry by granting certain incentives. It is not the direct intent of the Code that taxpayers should refuse to act because of unfavorable tax consequences; it is arguably more consistent with the nature of a tax as paying one's fair share that he first act, and then government will inform him what is due. It might seem to follow that a taxpayer should not have a right to know the tax consequences in advance, and that since the rulings program is the governmental concession to economic reality, the taxpayer should have no further right to guidance from the courts.

In fact much of the economic behavior of taxpayers is not determined according to its tax consequences. But the cases in which review should be available are only those in which tax consequences do act as a deterrent, in which advance assurance is necessary, and in which the impact of an adverse ruling would render it unreasonable to expect the taxpayer to proceed at his peril. The threat of an allegedly improper tax is as worthy of being judicially dispelled as the threat of an allegedly improper agency regulatory order. To assert that even in such cases the taxpayer has no right to pretransaction review since taxes are not calculated to control his conduct is to obscure reality by a veil of fiction.

iv. The Internal Revenue Code—The Scheme of Posttransaction Relief

The Internal Revenue Code provides for civil action by taxpayers for refund of taxes in the district court\(^{109}\) and for redetermination of a post-

\(^{107}\) See S. Doc. No. 10, pt. 9, 77th Cong., 1st Sess. 35 (1941).
\(^{108}\) Ibid.
\(^{109}\) INT. REV. CODE OF 1954, § 7422.
assessment tax deficiency in the Tax Court.\textsuperscript{110} It might be argued that Congress intended this scheme of relief to be exclusive. However, by providing for a scheme of posttransaction review, the necessity of which is patent, does not imply that Congress affirmatively intended to preclude pretransaction review, the need for which might not have been recognized when these relief provisions were provided. In fact where Congress thought it necessary to foreclose resort to the courts in tax matters, it did so specifically in section 7421 and the Declaratory Judgment Act.

The House Judiciary Committee reporting on the Administrative Procedure Act stated:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. . . . To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.\textsuperscript{111}

Furthermore, the Supreme Court has indicated that exemptions from the review provisions will not be presumed.\textsuperscript{112} In light of this pronouncement, the legislative policy of the act as expounded above, and the weak policy justification for applying the two limiting statutes to pretransaction review, the argument for statutory preclusion consists of a chain of weak links which do not reinforce each other.

\textbf{b. Form of Relief}

Section 10(b) of the act provides that, in the absence of special statutory review proceedings, the form of action may be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction . . . .) . . . ."\textsuperscript{113} The Attorney General's Manual on the Administrative Procedure Act indicates that, once agency action is found reviewable, the court should select the appropriate remedy.\textsuperscript{114} The same considerations which lead to the conclusion that the Declaratory Judgment Act exception and section 7421 of the Internal Revenue Code do not constitute statutory preclusion of review, also lead to the recognition of the ability of courts to select the injunctive and

\begin{itemize}
  \item \textsuperscript{110} INT. REV. CODE OF 1954, § 6213(a).
  \item \textsuperscript{111} H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946).
  \item \textsuperscript{112} See Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956); Kaminsky, Judicial Review of Procedures in the Internal Revenue Service, 36 TAXES 172 (1958).
  \item \textsuperscript{113} Administrative Procedure Act § 10(b), 60 Stat. 243 (1946), 5 U.S.C. § 1009(b) (1958).
  \item \textsuperscript{114} U.S. DEP'T OF JUSTICE, ATT'Y GEN. MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 97 (1947).
\end{itemize}
declaratory forms of relief as appropriate ones.\footnote{115} If there is otherwise a right to review, to conclude that there is no form in which to bring the action would constitute a reversion to the medieval logic of the writ system.

2. Ripeness

"Ripeness" is a compendious legal conclusion, the determination of which depends upon the weighing of a myriad of factors concerning the posture of the case and the hardship to the plaintiff which would accompany the nonassumption of jurisdiction.\footnote{116} To say that a case is ripe for review may merely be another way of saying that the court is willing to assume jurisdiction.

One relevant factor, which was made a requirement of review in the Administrative Procedure Act for an action not rendered reviewable by statute, is that it be a "final agency action for which there is no other adequate remedy in any court . . . ." \footnote{117} Davis asserts that advisory opinions are not reviewable, impliedly because they are not "final orders."\footnote{118} However, court decisions indicate that there is a flexible judicial attitude toward the concept of the "final order," as well as to other factors of "ripeness." The Supreme Court has decided three cases which involved elements analogous to those which would confront the Court were it considering review of an adverse tax ruling.

In \textit{CBS v. United States} ,\footnote{119} a broadcasting network challenged regulations issued by the FCC providing that broadcasting licenses would be denied to individual stations entering into certain types of contracts with the networks. The complaint alleged that the effect of the published policy was to prohibit the type of agreement specified therein, and that many stations did not want to continue with already-established contractual arrangements, because they feared the loss of their licenses. The Commission characterized the regulations as "announcements of policy," and argued that "the order promulgating them is no more subject to review than a press release similarly announcing its policy."\footnote{120} The Court, in holding that the order was reviewable, stated:

\begin{quote}
The regulations are not any the less reviewable because their promulgation did not operate of their [sic] own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellants, with whom they contract. If
\end{quote}

\footnote{115 The action for review of an adverse ruling against the Commissioner can be brought "in any judicial district in which: (1) a defendant in the action resides, or ... (4) the plaintiff resides . . . ." 28 U.S.C. § 1391(e) (Supp. IV, 1963) (venue statute for actions against any agency or officer thereof).


120 Id. at 422.}
an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance.

It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails.\textsuperscript{121}

Mr. Justice Frankfurter dissented on the ground that "Congress has not conferred upon the district courts jurisdiction over 'practical business consequences.'" \textsuperscript{122} Apparently, he further recognized the applicability of the Court's reasoning to revenue rulings since he stated in his dissent:

Suppose, for example, that the Commissioner of Internal Revenue issues a ruling that profits derived by radio stations from their network operations are subject to a tax deemed by them to be onerous and illegal. Could a network successfully bring suit in equity prior to the imposition of such taxes to invalidate the ruling on the ground that its practical consequence was the cancellation of or refusal to renew network affiliations? One had supposed that the answer was clearly no. But surely in principle the problem is essentially that of the cases before us.\textsuperscript{123}

In \textit{Frozen Food Express v. United States},\textsuperscript{124} the ICC, after conducting an investigation, determined that certain commodities were not "agricultural" within the Motor Carrier Act, the result being that shippers and carriers of such products were not exempt from obtaining a certificate of "convenience and necessity."\textsuperscript{125} A carrier failing to obtain a certificate when the statute so directs risks an order to cease and desist from carrying those commodities.\textsuperscript{126} The plaintiff, a motor carrier, brought an action to enjoin use of the order and have it set aside. The district court held that the determination of the Commission was not subject to judicial review.\textsuperscript{127} The Supreme Court, noting the "immediate and practical impact"\textsuperscript{128} on carriers and shippers, directed the district court to adjudicate the merits. The statements of Mr. Justice Harlan in dissent setting forth the countervailing considerations indicates the relevance of this case to the reviewability of an adverse tax ruling:

\textsuperscript{121} Id. at 417-18.
\textsuperscript{122} Id. at 438 (Frankfurter, J., dissenting).
\textsuperscript{123} Id. at 442.
\textsuperscript{124} 351 U.S. 40 (1956).
\textsuperscript{125} Id. at 41.
\textsuperscript{126} Id. at 44.
\textsuperscript{128} Frozen Food Express v. United States, 351 U.S. 40, 44 (1956).
To be sure, the order does serve as a warning to carriers that the Commission interprets the act in a particular way, and it is true that courts will give the Commission's views some indeterminate weight in construing the statute.

[T]his Court should be wary of establishing a procedure which would prematurely throw into the courts questions of statutory construction not arising in the context of concrete facts, and which does not bring to the courts even the benefit of final interpretation by the agency assigned to administer the statute . . . .

. . . . But the carriers subject to the Interstate Commerce Act are in no way worse off now than they were before this order issued; there is no greater liability or risk under the statute occasioned by the order, which has no more effect than would any other informal expression of views by the Commission. If anything, carriers are in a better position, since they can now make a more reasoned judgment as to the applicability of the statute as to particular commodities, and this may have been the principal reason for the Commission making public its findings.\(^\text{129}\)

The same considerations might be advanced as rendering undesirable a review of any adverse tax ruling, but eight members of the Court in *Frozen Food* did not find them persuasive in a related context.

*United States v. Storer Broadcasting Co.*\(^\text{130}\) was an action challenging an FCC order amending its rules concerning multiple television station ownership. The order announced that ownership of more than five stations constituted a concentration of control inconsistent with the public interest such that licenses for further stations would not be granted to a multiple owner. The Court, after raising the issue of reviewability on its own initiative, held the order to be a final agency action within the Administrative Procedure Act. The Court quoted with approval the reasoning of the *CBS* case, and asserted: "The Rules now operate to control the business affairs of Storer. . . . [It] cannot cogently plan its present or future operations."\(^\text{131}\) Thus, as in the other two cases, the Court took cognizance of the hardship visited upon one planning his business affairs who must proceed at his peril, in the face of agency rules and regulations that attach unfavorable consequences to that course of behavior. The Court concluded in all three cases that this fact warranted the assumption of jurisdiction despite the desirability of deciding the issues raised upon presentation of the concrete facts of a consummated transaction.

The radio network and individual stations contemplating a new contract, the carrier desirous of transporting certain agricultural commodities,
and the broadcasting company planning to obtain control of an additional television station were in no more precarious a planning posture than the taxpayer who has been given an adverse ruling that renders prohibitive the tax upon a proposed corporate acquisition or reorganization. The fact that a tax ruling may be addressed to a particular individual rather than being of general application does not necessarily weaken the case for review, and in fact the likelihood of agency action against the complainant is enhanced since it is alerted to the transaction. Moreover, the taxpayer who solicits a ruling should not be held to assume the risk of statutory misinterpretation any more than does one who seeks a court's declaratory judgment.

3. The Declaratory Order—A Statutory Analogy

In the Administrative Procedure Act Congress has provided for the issuance of orders which, like rulings, can be issued before application of the law by an agency to a concrete set of historical facts. Section 5(d) of the act provides that "the agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." 132 It is clear from the legislative history of the act that these orders were to be judicially reviewable,133 which is a reason for providing that they have "like effect as in the case of other orders." Like declaratory orders, tax rulings are issued to "remove uncertainty," and two bills that would have specifically excepted tax matters from the scope of 5(d) failed to pass 134 for unknown reasons.

The impediment to labelling a tax ruling a "declaratory order" is the introductory clause of section 5 of the act which limits the application of this section to cases "required by statute to be determined on the record after opportunity for an agency hearing [and matters that are not] . . . subject to a subsequent trial of the law and the facts de novo in any court . . . ." 135 It is only in such cases that agencies are authorized to issue declaratory orders under section 5(d).136 The placement of the provision authorizing declaratory orders within section 5 has been criticized by scholars because of the limitation thereby imposed upon its use,137 and Davis specifically lamented that "this . . . apparently has the effect of preventing the Act from conferring a needed declaratory-order power upon the Internal Revenue Service . . . ." 138

134 H.R. 2602, 79th Cong., 1st Session, § 7(c) (1945) (Gwynne Bill); H.R. 184, 79th Cong., 1st Session, § 404 (1945) (Celler Bill).
138 1 Davis, op. cit. supra note 118, § 4.09, at 272-73.
The fact remains that the policy of the act prescribing reviewability for declaratory orders is applicable as well to other agency rulings of a similar nature. The Supreme Court seemed to recognize this analogy in the *Frozen Food* case, since it characterized the ICC order as being "in substance a declaratory one," citing section 5(d),\(^{139}\) despite the fact that the order did not comply with the statutory "hearing" and "record" requirements.\(^{140}\) The Court apparently considered these introductory clauses to be immaterial for review purposes. Therefore, while the declaratory order section of the Administrative Procedure Act is not directly applicable to revenue rulings, it is relevant to the question of the reviewability of these rulings in several respects. The similarity of declaratory orders to revenue rulings and the clear policy of reviewability for the former are persuasive reasons for the reviewability of the latter. Also, by considering a revenue ruling to be a declaratory order "in substance," a court can avail itself of a concrete statutory mold in which to rest assumption of jurisdiction.

4. Judicial Self-Limitation

Given the minimum "legal wrong" requirement for reviewability, courts must still exercise such self-limitation that they do not become overburdened, while at the same time preserving jurisdiction in the most worthy cases. Borchard, "father of the Declaratory Judgment Act,"\(^{141}\) suggested the possibility of review of tax rulings in the district courts by a certiorari procedure, limiting review to "cases in which the *bona fides* of the transaction and the imminence and public importance or widespread application of the facts require a final decision before consummation of a questioned transaction."\(^{142}\) However, a formal certiorari procedure is not necessary to enable the courts to consider such factors. The vague and flexible requirement of "ripeness," which is defined by Professor Jaffe as entailing a "balancing of certain typical and relevant factors for and against the assumption of jurisdiction,"\(^{143}\) provides a built-in certiorari device.

In addition courts can choose to hear only those cases in which they consider review necessary to avert irreparable hardship. In *Frozen Food*, *CBS*, and *Storer*, the Court stressed the hardship that would be visited upon the plaintiff if review were not granted before application by the agency of its rules.\(^{144}\)

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\(^{139}\) *Frozen Food Express* v. United States, 351 U.S. 40, 44 (1956).

\(^{140}\) There was no adjudicatory proceeding whatsoever but only public hearings at which various governmental agencies and officials and various shippers and carriers presented evidence. *Id.* at 41-42; see *Mullen, Should Broader Use Be Made of Declaratory Findings and Orders Under the Administrative Procedure Act?*, 24 ICC Prac. J. 156, 158 (1956).

\(^{141}\) Gellhorn, *Declaratory Rulings by Federal Agencies*, 221 Annals 153, 154 (1942).

\(^{142}\) Borchard, *op. cit. supra* note 104, at 922. Borchard also suggests the possibility that the Tax Court or a special administrative tribunal could take such cases. *Id.* at 922.

\(^{143}\) Jaffe, *supra* note 116, at 1275.

\(^{144}\) See text accompanying notes 119-31.
The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.\textsuperscript{145}

The test for hardship should relate to the impact of the ruling upon the proposed transaction. Factors relevant to this determination are the substantiality of the tax, the availability to the taxpayer of alternative forms of the same transaction, and the number of taxpayers whose potential tax status is directly determined by the ruling. If the taxpayer appears to be justified in his reluctance to proceed without knowledge of the tax consequences, the court might then weigh the effect on the taxpayer of not proceeding with the transaction.

Sufficient injury to warrant judicial review would certainly be present when the pending transaction is one for which a favorable pretransaction ruling or some form of the Commissioner's approval is a sine qua non of favorable tax consequences, and the amount of tax involved is substantial.\textsuperscript{146}

\textbf{B. Declaratory Review in the Tax Court}

The Tax Court is often conceived of as being a court rather than an agency,\textsuperscript{147} and if so, it would not come within the Administrative Procedure Act, and section 5(d), authorizing the issuance of declaratory orders,\textsuperscript{148} could not be invoked. However, section 7441 of the Internal Revenue Code states that "the Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States."\textsuperscript{149} All attempts to render the Tax Court a judicial court have failed,\textsuperscript{150} and it has further been held that the Tax Court is an agency within the Administrative Procedure Act.\textsuperscript{151} The Tax Court also satisfies the specific requirements of the introductory clause of section 5, which prove troublesome in attempting to classify the Commissioner's rulings as declaratory orders,\textsuperscript{152} since it is required to hold hearings\textsuperscript{153} and its decisions are not subject to a trial de novo in any court.

\textsuperscript{146} See note 82 \textit{supra} and accompanying text.
\textsuperscript{147} See generally Gribbon, \textit{Should the Judicial Character of the Tax Court Be Recognized?}, 24 Geo. Wash. L. Rev. 619 (1956).
\textsuperscript{148} The Administrative Procedure Act § 2(a), 60 Stat. 237 (1948), as amended, 5 U.S.C. § 1001(a) (1958), defines the word "agency" for purposes of the act's applicability as excluding "courts."
\textsuperscript{149} \textit{Int. Rev. Code of 1954}, § 7441.
\textsuperscript{150} For one legislative attempt that failed see H.R. Rep. No. 308, 80th Cong., 1st Sess., app. 13 (1947). See generally Gribbon, \textit{supra} note 147.
\textsuperscript{152} See text accompanying note 135 \textit{supra}.
The fact that a comprehensive enabling provision for Tax Court jurisdiction exists in the Revenue Code would not negate the application to it of section 5(d), since this section supplements the individual jurisdictional provisions of the agencies to which it applies. Therefore, a taxpayer receiving an adverse ruling should be able to request a declaratory order from the Tax Court in its “sound discretion” in order to “remove uncertainty.” “Sound discretion” provides the Tax Court with a device by which it can take into account factors similar to those suggested above in regard to district court jurisdiction, thereby limiting its burden to the more important cases. However, if the Tax Court follows the prevailing trend in the agencies of sparing use of the declaratory order, or if it refuses outright to issue them, the taxpayer would seem to have no recourse. United Gas Pipe Line Co. v. FPC held that a refusal to issue a declaratory order is not a final agency action subject to judicial review. However, the Senate Judiciary Print accompanying the Administrative Procedure Act clearly states that “private parties object to leaving the issuance of declaratory orders to agency discretion. However, the phrase ‘sound discretion’ means a reviewable discretion and will prevent agencies from either giving improvident declaratory orders or arbitrarily withholding such orders in proper cases.” The Pipe Line case is therefore open to question, although it is understandable that a court would be reluctant to determine what constitutes a “proper case” for a declaratory order.

Members of the bar who adhere to the historical suspicion, whether justified or not, that the Tax Court represents an arm of the Commissioner, would derive little comfort from the prospect of a ruling under section 5(d) of the act. It should be remembered, however, that declaratory orders by the Tax Court are judicially reviewable, presumably in the circuit courts.

155 See Kaminsky, supra note 112, at 173.
158 203 F.2d 78 (5th Cir. 1953). Davis asserts that this case “might better have been limited to the proposition that a court will not upset such a refusal in absence of abuse of discretion.” 1 Davis, op. cit. supra note 118, § 4.10, at 287. The 1956 Hoover Commission suggested that declaratory orders be made mandatory in all justiciable controversies. Stason & Cooper, Administrative Tribunals 518, 519 (3d ed. 1957) (Recommendation No. 44 of Hoover Task Force on Legal Services and Procedures).
159 Senate Comm. on the Judiciary, 78th Cong., 2d Sess., Committee Print on the Administrative Procedure Act, in Administrative Procedure Act — Legislative History 25 (1946).
160 Int. Rev. Code of 1954, § 7482(a) vests exclusive review of Tax Court decisions in the circuit courts of appeal.
C. Need for an Expedited Procedure

Taxpayers requesting a ruling usually want a relatively rapid answer since transactions usually are waiting in the balance. But review procedures are woefully slow, and a delay of several years may result if a ruling is challenged in either the district court or Tax Court and then reviewed in the court of appeals. Therefore, if some form of expedited procedure is not provided by the courts, this factor will discourage the seeking of review in cases where the transaction cannot await the exigencies of review.

D. Effect of Review of Adverse Rulings on the Rulings Program

The reaction of the Director of the Tax Rulings Division to the prospect of judicial review was that it would destroy the rulings system.\textsuperscript{161} He suggested that review is inconsistent with the goal of more rulings since the no-ruling list would be immeasurably lengthened. A reason advanced for such an effect on the rulings system was the formality associated with a reviewable as opposed to a private ruling. The Director of the Rulings Division averred that each ruling would have to be drafted in an "air-tight" manner, as is done for regulations, so that it could withstand judicial scrutiny. Because this would be more time consuming than is the present ruling preparation, the number of rulings would have to be materially lessened. Another fear of the Revenue Service generated by the prospect of review is that the threat thereof would be used by litigious counsel as a bargaining point in attempting to obtain a favorable ruling. Finally, it is feared that there would be a loss in flexibility in applying expedient rules of thumb to individual cases.

If in fact judicial review can be obtained only at the expense of impairing the rulings system, then the benefits to be derived from review may not warrant the cost. As a practical matter, some increase in formality would probably attend potential reviewability. It should be stressed, however, that review is contemplated only as a safety-valve for the exceptional hardship cases. Also, the reviewing body would overturn the Commissioner's decision only if it were contrary to the Internal Revenue Code or, perhaps, only if it were an unreasonable interpretation thereof.\textsuperscript{162} This standard of review would furnish little leverage to concession-minded counsel. Moreover, since it is likely that the Service presently assures itself that its rulings, though not formally drafted, reasonably interpret the Code, its major concern as to the need for greater formality would appear not to be warranted to the extent indicated by the Division. If, however,

\textsuperscript{161} Interview With Harold T. Swartz, Assistant Commissioner-Technical, and John W. S. Littleton, Director of the Tax Rulings Division, in Washington, D.C., March 5, 1964.

it does not, then review is necessary even at the cost of curtailing the number of rulings. It should be remembered that the last time the Service curtailed advance rulings the clamor which resulted reached the ears of Congress.163

III. Review of Refusals to Rule

A. Federal District Court Review

The chances of succeeding in an action for mandamus or mandatory injunction in the district court to compel the Commissioner to rule appear to be slim. The only possible limitation upon his discretion could be argued to lie within the language of section 7805(a), which authorizes the Commissioner to issue "needful" rules and regulations.164 Apart from the vagueness of the term "needful," it is doubtful that the courts would read this section as embodying any limitation upon the Commissioner's discretion to refuse to rule, since the language is that of authorization, not requirement. Adding further doubt to the possibility of such review is the holding in United Pipe Line165 that a refusal to issue a declaratory order is not a final order susceptible to review. A last hurdle is the historical reluctance of the courts to issue writs of mandamus in discretionary areas.166

B. Tax Court Order

Relief in the Tax Court would take a different form from that which would pertain to district court review. The taxpayer could ask for a declaratory order under section 5(d) of the Administrative Procedure Act,167 the effect of which is not to compel the Commissioner to rule, but for the Tax Court itself to rule upon the issue and thereby "remove uncertainty."

Such relief would rest within the "sound discretion" of the Tax Court, and it could therefore establish guidelines such as: the Commissioner must first refuse to rule; the taxpayer must show cause why the Commissioner's refusal was arbitrary, discriminatory, or otherwise an abuse of discretion; and the taxpayer must prove the imminence and bona fides of the transaction and the hardship that would result if taxability were not determined in advance. Such standards would leave primary discretion as to need for and feasibility of ruling with the Commissioner, a fact of which the Tax Court might want assurance before stepping into the breach.168

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163 See text accompanying notes 10-11 supra.
164 See text accompanying note 7 supra.
165 United Pipe Line v. FPC, 203 F.2d 78 (5th Cir. 1953); see text accompanying note 158 supra.
168 See text accompanying note 108 supra.
A case may arise where the Commissioner's refusal to rule results from his own need for guidance, as was true on the issue of whether know-how constituted property within section 351.169 In such a dilemma it would be beneficial for the Commissioner to join with interested taxpayers in seeking a declaratory order from the Tax Court to "remove uncertainty." 170

IV. CONCLUSION

Not every factor which courts consider can be discussed within the framework of a statutory or legal standard. Behind a court's decision whether to assume jurisdiction will also be several unarticulated factors, such as its evaluation of its own competence to comprehend complex tax matters and, in particular, its confidence in the expertise and integrity of the agency. The case presented for review raises a close enough question that courts could refuse to accept jurisdiction on the basis of such factors without appearing wholly unjustified within articulated statutory and legal standards. Therefore, the more confidence the public and the courts retain in the integrity of the rulings program, the less likely it is that the arguments for review will be honored. Such arguments are nonetheless important even if to be held in abeyance for such a case when the courts will deem it timely to invoke them. If nothing else, this possibility in itself acts as a check on the abuse of the power residing in the Service through the rulings program.

Stephen M. Goodman

169 See text accompanying notes 87-89 supra.