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# Avoiding the Anti-Injunction Statute in Suits to Enjoin Termination of Tax-Exempt Status

# AVOIDING THE ANTI-INJUNCTION STATUTE IN SUITS TO ENJOIN TERMINATION OF TAX-EXEMPT STATUS

The interest of the government in efficient tax collection traditionally has resulted in rigid enforcement of assessment and collection procedures.[1] A policy which postpones litigation until a taxpayer's liability has been assessed enhances the flow of revenue into government coffers.[2] As one court has observed, "the general principle has long prevailed unchanged that the Government is not to be balked in its tax collection by taxpayers' litigation, for this would threaten its continued operation and might even endanger its very existence." [3]

Judicial interference in tax matters was first restrained by application of the equitable principle that injunctive relief cannot be granted unless the plaintiff establishes that his legal remedies are clearly inadequate.[4] In 1867, Congress recognized the policy against judicial interference by prohibiting taxpayer injunction suits.[5] The original anti-injunction stat-

1. *See, e.g.*, Cheatham v. United States, 92 U.S. 85, 88 (1875). *See also* Lenoir, *Congressional Control Over Suits to Restrain the Assessment or Collection of Federal Taxes*, 3 ARIZ. L. REV. 177 (1961).

2. A taxpayer has two procedures through which he may litigate a disputed tax. Upon receipt of a notice of deficiency, he may bring suit in the Tax Court without first paying the tax assessed against him. Alternatively, he may pay the tax and, upon making a claim for overpayment, sue for a refund in either a federal district court or the Court of Claims. Jury trial and the powers of equity are available only in a refund suit, thereby enhancing the desirability of that remedy. *See* J. CHOMMIE, FEDERAL INCOME TAXATION §§ 252-59 (1968); Mills, *Remedy Problems in Federal Civil Tax Litigation*, 5 ARIZ. L. REV. 32 (1963).

3. Quinn v. Hook, 231 F. Supp. 718, 719 (E.D. Pa. 1964).

4. Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109 (1935).

5. Internal Revenue Act of 1866, ch. 184, § 19, 14 Stat. 152.

It has been said that the legislative history of the anti-injunction statute is "shrouded in darkness." Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109 (1935). The Supreme Court, however, has examined the purpose of the Act on several occasions. For example, in Cheatham v. United States, 92 U.S. 85 (1875), the Court stated: "If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." *Id.* at 89. In the State Railroad Tax Cases, 92 U.S. 575 (1875), the Court observed:

> [Section 7421(a)] shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. . . . It is founded in the simple philosophy derived from the ex-

ute, the constitutionality of which was upheld soon after its enactment,[6] was modified intermittently; however, its essential provisions remain unchanged and are included in section 7421(a) of the Internal Revenue Code of 1954. The present version of the statute provides that, with certain exceptions,[7] "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." [8]

Although section 7421(a) appears unequivocal in its prohibitions, it has been held not to bar all suits for injunctive relief. Two recent federal appellate decisions illustrate various approaches which may be taken by taxpayers seeking to enjoin Internal Revenue Service action, notwithstanding the existence of the anti-injunction statute. Both *Bob Jones University v. Connally*[9] and *Americans United, Inc. v. Walters*[10] involved non-profit organizations whose existence depended upon charit-

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> perience of ages, that the payment of taxes had to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice.

*Id.* at 613-14.

6. Pullam v. Kinsinger, 20 F. Cas. 44 (No. 11,463) (C.C.S.D. Ohio 1870).

7. These exceptions include INT. REV. CODE OF 1954, §§ 6212(a),(c), 6213(a), which permit suits in the Tax Court to litigate the legality and correctness of deficiency assessments, and INT. REV. CODE OF 1954, §§ 7426(a),(b), which relate to foreclosure proceedings and judicial sales of property on which the United States has a tax lien.

8. INT. REV. CODE OF 1954, § 7421(a). The procedural effect of the statute is to deprive the courts of jurisdiction of cases in which it is sought to enjoin the assessment or collection of a tax.

The Declaratory Judgment Act provides in pertinent part: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . ." 28 U.S.C. § 2201 (1970) (emphasis supplied). There has been dispute whether the exclusion of tax cases from the Declaratory Judgment Act is subject to the same equitable considerations which have created exceptions to section 7421(a). Several decisions have held the prohibition against declaratory judgments in tax cases absolute. *See, e.g.*, Martin v. Andrews, 238 F.2d 552 (9th Cir. 1956); Red Star Yeast & Products Co. v. LaBudde, 83 F.2d 394 (7th Cir. 1936). However, the Supreme Court appears to have rejected this position. *See, e.g.*, Samuels v. Mackell, 401 U.S. 66 (1971); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943). Although the focus of this Comment will be upon section 7421(a), the analysis will be applicable as well to the Declaratory Judgment Act.

9. No. 72-1075 (4th Cir., Jan. 19, 1973).

10. No. 71-1299 (D.C. Cir. Jan. 11, 1973).

able contributions. Each organization sought to enjoin the official revocation of its tax-exempt status under section 501(c)(3) of the Code.[11]

Bob Jones University is a religiously oriented educational institution which admittedly practiced racial discrimination in its admissions policy. The Treasury's threatened action was based upon a policy ruling which withdrew tax-exempt status from schools which discriminated on the basis of race. Americans United, Inc. is an organization formed for the purpose of fostering the principles of separation of church and state. The government claimed that since a substantial part of the corporation's activities involved political lobbying, the organization was no longer entitled to the exemption.[12]

There is an important distinction between the cases; although both organizations claimed tax-exempt status under section 501(c)(3), Americans United also qualified for tax exemption under section 501(c)(4).[13] Thus, unlike Bob Jones University, which brought suit to avoid tax liability which would have resulted from revocation of its tax-exempt status, Americans United based its action upon the claim that the revocation of its section 501(c)(3) status would result in the loss of contributions from benefactors who would no longer be entitled to deductions

11. Section 501(a) of the Internal Revenue Code exempts certain organizations from taxation, including those meeting the following description in section 501(c)(3):

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

INT. REV. CODE of 1954, § 501(c)(3).

12. Organizations devoting a "substantial part" of their activities to lobbying are specifically excluded from the tax exemption afforded by section 501(c)(3). Incorporated as "Protestants and Other Americans for the Separation of Church and State," Americans United, Inc. supplemented its various non-profit educational activities with concerted efforts to prevent the passage of federal legislation that would give government support to parochial schools.

13. Like organizations defined in section 501(c)(3), organizations meeting the following requirements are exempted from taxation:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

INT. REV. CODE of 1954, § 501(c)(4).

under section 170.[14] Two individual taxpayers joined as plaintiffs, complaining of the threatened loss of tax deductions for contributions to the organization.

The issue of the applicability of the anti-injunction statute was ultimately decided in favor of Americans United but against Bob Jones University. The cases are readily distinguishable; the action in *Bob Jones* was characterized as a suit to restrain the government's assessment and collection of a tax, thus raising the bar of section 7421(a), while the action in *Americans United* was brought primarily to preserve the tax deductible status of contributions made to Americans United.

This Comment will examine these and related cases in developing the argument that a suit, although brought against the government in its tax-collecting capacity, may not be within the purview of section 7421(a). Integral to the discussion will be an examination of the limited exceptions to the operation of section 7421(a).

## Considerations Affecting Applicability of Section 7421(a)

Applicability of section 7421(a) requires that the government action which is being challenged must involve *the assessment or collection of a tax* and that the suit be one to restrain that assessment or collection.[15] For most purposes, a "tax" has been defined as a rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or state.[16] Whether a particular levy is a tax generally has been determined on a case-by-case basis.[17]

### *Gravamen of the Action*

Since Americans United was not threatened with loss of its tax-exempt status, it argued that its suit was not one to enjoin the assessment or col-

14. Because the definition of tax-exempt organizations under section 501(c)(3) is nearly identical to that of organizations to which contributions are deductible under section 170(c)(2), loss of section 501(c)(3) status would automatically result in loss of the benefits of section 170(c)(2). The same generally is not true of organizations which are exempt from taxation only because they are within the provisions of section 501(c)(4).

15. *See* text accompanying note 8 *supra*.

16. Hamilton v. Dillin, 11 F. Cas. 332, 335 (No. 5,979) (C.C.N.D. Tenn. 1871).

17. *See, e.g.*, State v. Durupt, 148 F.2d 918 (8th Cir. 1945) (sums owing on former landowner's contract of purchase from county after expiration of time of redemption from tax sale); Chicago, St. P., M. & O. Ry. v. City of Randolph, 122 F. Supp. 302 (D. Neb. 1954) (special assessment levied by municipal corporation against railroad); United States v. Cain, 113 F. Supp. 304 (S.D. Miss. 1953) (Self Employment Contributions Act).

lection of taxes but was designed to preserve the flow of contributions to the corporation which might no longer be forthcoming were its section 501(c)(3) status terminated. The district court did not accept this characterization of the complaint, holding that maintenance of the suit, either by the individual or corporate plaintiffs, was barred by the anti-injunction provisions of section 7421(a). While upholding the lower court's decision as to the individual plaintiffs, the court of appeals reversed the determination that the action by the corporation was barred by section 7421(a).

In distinguishing the claims of the corporate and individual plaintiffs, the court stated: "The corporation, alleging constitutional violations of an identical nature to that of the individual appellants, irreparable injury and an inadequate legal remedy . . ., does so in a posture removed from a restraint on assessment or collection." [18] Judge Tamm, writing for the court, concluded: "The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." [19] Thus, the court based its characterization of the suit upon the corporation's "primary design" to preserve a flow of tax-deductible contributions, holding immaterial any effect which such action might have upon the tax liability of the contributors of Americans United.[20]

Implicit in Judge Tamm's refusal to accept the government's allegation that the suit involved the assessment and collection of taxes was the belief that if it is not clear that the government will incur a loss of revenue if an injunction is granted and if the plaintiff has demonstrated that failure to issue such injunction will cause it irreparable harm, section 7421(a) should not apply to prohibit equitable relief. Thus, in *Americans United* it was clear that under no circumstances would the corporate plaintiff be subjected to increased tax liability as a result of loss of its section 501(c)(3) exemption; moreover, since there was no assurance that its benefactors would continue to make contributions which would not be tax-deductible, there was at most only a possibility that those contributors would incur additional liability. When viewed from this perspective and in light of other equitable considerations in the case, the holding that Americans United had established its jurisdictional claim

18. No. 71-1299 at 16 (D.C. Cir. Jan. 11, 1973).

19. *Id.* at 15-16.

20. The applicability of section 7421(a) to a suit to enjoin assessment or collection of the taxes of another is discussed at notes 28-33 *infra* & accompanying text.

does not appear to conflict with the manifest purpose of the anti-injunction statute "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." [21]

*Penalties and Other Invalid Assessments*

Even though it is conceded that a proposed government assessment is, at least on its face, a tax, an attempt may be made to avoid the prohibitions of section 7421(a) on the theory that the government's action was motivated by a purpose other than the collection of revenue. A dissent to the court of appeals opinion in *Bob Jones* urged that section 7421(a) was inapplicable on grounds that the threatened revocation of the section 501(c)(3) exemption involved something more than the imposition of tax liability. Stating that the "manifest purpose" of section 7421(a) is to assure the government of "prompt collection of its lawful revenue," the dissent continued:

> However, the United States is not primarily concerned here with the collection of revenue. The district court expressly found that the "primary purpose" of the Treasury officials in threatening to revoke the University's tax-exempt status and tax deductible benefits to donors is *not* to assess and collect taxes, but through the use of taxing powers "to require private educational and religious institutions to comply with certain political and social guidelines." [22]

The majority of the court of appeals in *Bob Jones* rejected this argument for two reasons. First, there was no evidence that the government's motive in revoking the university's section 501(c)(3) status was to punish it for its segregation policies. Moreover, many taxes have a concomitant "social" purpose, and courts generally have agreed that this factor does not by itself preclude application of section 7421(a).[23]

Closely related to the argument that section 7421(a) should not be applicable where a proposed assessment has a "social" purpose is the theory that section 7421(a) should not bar a suit to enjoin the assessment or collection of a tax which the government may not levy. There are

21. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

22. No. 72-1075 at 13, 14 (4th Cir. Jan. 19, 1973).

23. *See, e.g.*, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Bailey v. George, 259 U.S. 16 (1922); Head Money Cases, 112 U.S. 580 (1884); Singleton v. Mathis, 284 F.2d 616 (8th Cir. 1960).

instances in which courts, by rejecting the government's contention that the attempted exaction was a valid tax, have found section 7421(a) inapplicable and granted an injunction.

In one group of cases, the refusal to apply the anti-injunction statute was based upon a determination that an alleged tax operated as a penalty.[24] The Supreme Court in *Lipke v. Lederer*,[25] after stating that the assessment of a tax designed to punish the taxpayer must be preceded by proper notice and an opportunity for a hearing, held that legislation such as the anti-injunction statute may not be applied in a manner which would deny an individual his constitutional rights.

Section 7421(a) also has been held inapplicable where the alleged liability results from an illegal exaction "in the guise of a tax." [26] For example, in *Miller v. Standard Nut Margarine Co.*,[27] a corporate taxpayer sought to enjoin the imposition of an oleomargarine tax on its product. Upon a finding that the government had issued interpretive rulings expressly stating that the taxpayer's product did not meet the definition of oleomargarine, the Supreme Court granted an injunction.

*Non-Taxpayer Status of Plaintiff*

Prior to 1966, some courts had held that section 7421(a) did not foreclose suits in which the plaintiff sought to adjudicate questions unrelated to his own tax liability. For example, jurisdiction was taken in suits to enjoin the voluntary payment of taxes by corporations[28] and in suits by property owners to enjoin the wrongful levy of their property to pay another's taxes.[29] However, the precedential value of these older authorities is questionable in light of the 1966 amendment to section 7421(a) prohibiting an injunction "by any person, whether or not such person is the person against whom [the] tax was assessed." [30]

24. Regal Drug Co. v. Wardell, 260 U.S. 386 (1922); Central of Ga. Ry. v. Wright, 207 U.S. 127 (1907). The Code provides, however, that a penalty for non-payment of a tax is itself to be considered a tax. INT. REV. CODE of 1954, § 6671(a). *See also* Shaw v. United States, 331 F.2d 493 (9th Cir. 1964); Botta v. Scanlon, 314 F.2d 392 (2d Cir. 1963).

25. 259 U.S. 557 (1922).

26. Miller v. Standard Nut Margarine Co., 284 U.S. 498, 506 (1932).

27. 284 U.S. 498 (1932).

28. *See, e.g.*, Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

29. Cf. Floyd v. United States, 361 F.2d 312 (4th Cir. 1966); Enterprises Unlimited, Inc. v. Davis, 340 F.2d 472 (9th Cir. 1965); Maule Industries, Inc. v. Tomlinson, 244 F.2d 897 (5th Cir. 1957).

30. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, Title 1, § 110(c), 80 Stat. 1144.

To permit an action simply because the plaintiff is not the person against whom the tax was assessed could result in frustration of the purposes of the anti-injunction statute. This possibility was noted in a dissent to the first decision permitting a stockholder to restrain the voluntary payment of a tax by a corporation: "[N]o form of expression can conceal the fact that the real object of this suit is to prevent the collection of taxes imposed by Congress, notwithstanding the express statutory requirement that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' " [31] Recognizing this argument, many courts refused to permit suits by non-taxpayers even before the 1966 amendment.[32]

The court of appeals in *Americans United* recognized that the non-taxpayer status of the plaintiff was not dispositive of the jurisdictional issue, stating: "We do not adopt the doctrine that section 7421(a) is inapplicable as long as a party does not seek to restrain the collection or assessment of its own taxes." [33]

## Equitable Considerations

If it is determined that a suit is within the purview of section 7421(a), such suit must be dismissed unless a court can satisfy itself that there are equitable grounds for permitting an exception to the operation of the statute. In *Miller v. Standard Nut Margarine Co.*,[34] the Supreme Court

In McGlotten v. Connally, 338 F. Supp. 448, 453 n.25 (D.D.C. 1972), the court stated that the only purpose of the amendment was to prohibit injunctive suits by creditors holding a lien on a taxpayer's property. However, in seeking the passage of the amendment, the Treasury Department had stated:

> Subsection (c) of section 110 of the bill amends section 7421(a) of the code. That section presently prohibits injunctions against the assessment or collection of tax. The cases decided under this provision raise a question as to whether this prohibition applies against actions by persons other than the taxpayer. New section 7426 will specifically allow actions by third parties to enjoin the enforcement of a levy or sale of property. The amendment to section 7421 makes clear that third parties may bring injunction suits only under the circumstances provided in new section 7426(b)(1) of the code.

*Hearings on the Federal Tax Liens Act Before the Ways and Means Committee of the House of Representatives*, 89th Cong., 2d Sess., at 58 (1966).

31. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 612 (1895) (White, J., dissenting).

32. *See, e.g.*, Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455 (1903); Gardner v. Helvering, 83 F.2d 746 (D.C. Cir. 1936), *cert. denied*, 301 U.S. 684 (1937).

33. No. 71-1299 at 17 (D.C. Cir. Jan. 11, 1973).

34. 284 U.S. 498 (1932).

held that the predecessor of the present anti-injunction statute was merely declaratory of the equitable principle that an injunction may be granted if the taxpayer can establish irreparable harm and the absence of an adequate legal remedy. Thus, for many years it was held that the statute could be avoided in "exceptional circumstances." [35] Then, in *Enochs v. Williams Packing & Navigation Co.*,[36] the Supreme Court clarified the extent of the judicial exception to section 7421(a), holding that an injunction could be granted only if the taxpayer demonstrated that under no circumstances could the government prevail[37] and that irreparable harm would result from the denial of equitable relief.[38]

In *Bob Jones*, the court of appeals was not convinced that the government would have been absolutely unable to prevail in a test of its action. On the contrary, since the Supreme Court in *Green v. Connally*[39] recently had withdrawn tax-exempt status from a Mississippi segregation academy because of that school's discriminatory practices, it appeared possible that the university's first amendment argument would have been rejected had the merits of the case ultimately been reached. Thus, failure to meet the first part of the *Enochs* test precluded injunctive relief.

The court did, however, concede the university's argument that termination of its section 501(c)(3) tax-exempt status could result in irre-

35. Even before *Miller*, the Supreme Court had stated, without elaboration, that the anti-injunction statute would not bar injunctions in cases involving an "extraordinary and entirely exceptional circumstance." Dodge v. Osborn, 240 U.S. 118, 122 (1916). In Hill v. Wallace, 259 U.S. 44 (1922), it was held that denial of equitable relief would result in a multiplicity of suits. However, the Supreme Court later suggested that *Hill* involved a penalty and that the refusal to apply the anti-injunction statute in that case did not result from "exceptional circumstances." Graham v. duPont, 262 U.S. 234 (1923).

36. 370 U.S. 1 (1962), *noted in* 61 MICH. L. REV. 405 (1962).

37. Whether the government under no circumstances can prevail is to be determined on the basis of the facts available to the government at the time of the suit with a liberal view in favor of the government. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

38. Courts have employed divergent standards in determining whether the requirement of irreparable harm has been met. *See, e.g.*, Midwest Haulers, Inc. v. Brady, 128 F.2d 496 (6th Cir. 1942) (destruction of business and intangible business assets was a sufficiently special circumstance); Morton v. White, 174 F. Supp. 446 (E.D. Ill. 1959) (loss of home, business and all worldly possessions was merely a hardship).

39. 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971). After noting that the school's tax-exempt status was dependent on its being a "charitable" institution, the district court examined the common law definition of "charitable" and held that that definition did not include an institution which pursued practices contrary to public policy. The court concluded that a segregated school was not in the public interest and therefore could not be a "charitable" institution. *See* Note, *The Internal Revenue Code and Racial Discrimination*, 72 COLUM. L. REV. 1215 (1972).

parable injury. The university had emphasized that it not only would incur tax liability but also would be removed from the list of organizations to which donors may make tax deductible contributions. The courts have not agreed on the degree of harm necessary to constitute irreparable harm under the *Enochs* test.[40] For example, under circumstances similar to those in *Bob Jones*, a federal district court in *Green v. Kennedy*[41] held that a potential loss of charitable contributions did not constitute irreparable injury, stating: "Some contributors may be deterred by the doubt which this litigation casts on the deductibility of their contribution, but the schools are not entitled to have potential contributors kept ignorant of the fact that serious questions about the validity of these deductions have been raised." [42] A similar conclusion was reached in *Crenshaw County Private School Foundation v. Connally*,[43] in which an injunction against the withdrawal of tax-exempt status from an Alabama segregation academy was refused.

The basis of the decision in *Green* was that if the government's attempt to withdraw tax-exempt status failed, the contributors would be allowed a retroactive deduction for all gifts made during litigation. This argument, however, overlooks the fact that potential contributors, fearing that the university's action would fail, probably would withhold their gifts until final disposition of the deductibility issue. Because organizations such as Bob Jones University depend on charitable contributions for support, a temporary loss of their source of income clearly could result in irreparable harm.

An important consideration in determining whether irreparable injury will be suffered by the taxpayer whose suit is barred is the availability and adequacy of alternative remedies. Whatever taxes Bob Jones University would have to pay while its claim was being litigated could be recovered if it prevailed on the merits. It is unlikely, however, that the university could recover all contributions lost while its tax-exempt status was being determined. Nevertheless, the university would at least have the opportunity for an adjudication of its substantive claims as soon as it was served with a notice of deficiency.[44] Additionally, by litigating

40. *See* note 38 *supra.*

41. 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

42. *Id.* at 1139.

43. 343 F. Supp. 495 (N.D. Ala. 1972).

44. *See* note 2 *supra.*

its own claim for exempt status, it simultaneously would obtain an adjudication of the deductibility of contributions to its support.

Although it was determined that the action in *Americans United* was not within the purview of section 7421(a), it nevertheless was necessary to find irreparable harm as a normal prerequisite to injunctive relief. Moreover, a finding of irreparable harm, in the sense that a plaintiff would not have alternative remedies should an injunction be denied, may lend support to an argument that section 7421(a) is not applicable in the first instance. In *McGlotten v. Connally*,[45] it was held that section 7421(a) could not be used to deprive a plaintiff of his *only* remedy. The court stated:

> Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected.[46]

Similarly, since *Americans United* could claim a section 501(c)(4) exemption even if its section 501(c)(3) status were terminated, it would never incur a tax liability and thus would not be able to secure judicial review through the traditional procedures. It is submitted that the absence of alternative remedies normally available in suits to restrain the assessment or collection of taxes buttresses the holding of the court of appeals that section 7421(a) was not applicable to the action in *Americans United*.

## Conclusion

Although, as in *Bob Jones*, it often is clear that the purpose of a suit is to restrain the assessment or collection of a tax, there are cases in which the applicability of section 7421(a) requires closer scrutiny. Thus, a court should not defer to the characterization given a case by the Internal Revenue Service, but should decide, as was done in *Americans United*, whether the suit actually involves the assessment or collection of a tax.

45. 338 F. Supp. 448 (D.D.C. 1972).
46. *Id.* at 453-54.

*Americans United* and *Bob Jones* indicate many of the factors which may be decisive in determining whether section 7421(a) is a bar to a taxpayer injunction suit. That the plaintiff is not the person against whom the tax is assessed is not sufficient to avoid the application of the statute. The statute may be avoided, however, if production of revenue appears to be but an incidental effect of the government's action, particularly if the proposed assessment amounts to a penalty. Nevertheless, application of the statute may not be avoided merely because the tax involves a social purpose as well as a revenue producing purpose, so long as the tax is not punitive in nature. Similarly, the statute is not rendered inapplicable merely because of the *alleged* illegality or unconstitutionality of the tax.

Examining the gravamen of the action is an appropriate means of determining whether the purpose of section 7421(a) would be contravened by issuance of an injunction. As a mixed question of law and fact, the gravamen issue must be decided on a case-by-case basis. Support for the conclusion that an action is not within the scope of the anti-injunction statute may be found in the lack of alternative remedies. Although inadequacy of alternative remedies is not alone a sufficient basis for invoking equitable principles in order to avoid the operation of the statute, the complete absence of an alternative legal remedy may be strong indication that the action is outside the scope of the statute.