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Deductibility of Treble Damage Payments as an Ordinary and Necessary Business Expense—The Future of Revenue Ruling 64-224

COMMENTS

DEDUCTIBILITY OF TREBLE DAMAGE PAYMENTS AS AN ORDINARY AND NECESSARY BUSINESS EXPENSE—THE FUTURE OF REVENUE RULING 64-224

I. Introduction

The United States Government, in 1960, obtained indictments and convictions against 29 manufacturers[1] of electrical equipment for conspiring to fix prices in violation of section 1 of the Sherman Act.[2] Fines of nearly $2,000,000 were imposed on the violators,[3] and more than 1800 civil suits[4] were brought for damages under sections 4[5] and 4A[6] of the Clayton Act. It has been estimated that these private damage suits will end in settlements totaling nearly $300,000,000.[7] On July 24, 1964, the Internal Revenue Service promulgated Revenue Ruling 64-224,[8] which stated that amounts paid in satisfaction of treble damage claims under sections 4 and 4A of the Clayton Act were deductible to the violating taxpayer as ordinary and necessary business expenses under section 162(a) of the Internal Revenue Code.[9] However, the payments made to the Government under section 4A were ruled non-deductible.[10]

Congressional reaction to this newly stated position[11] of the IRS was largely unfavorable. In the House of Representatives, Congressman Emanuel Celler,

1. Most of the companies pleaded guilty or entered pleas of nolo contendere. See Staff of the Joint Comm. on Internal Revenue Taxation, 89th Cong., 1st Sess., Study of Income Tax Treatment of Treble Damage Payments Under the Antitrust Laws 2 (1965) [hereinafter cited as Staff Study].

2. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

3. Staff Study 2. The fines ranged from a high of $437,500 down to $7,500. Ibid.

4. Ibid. As late as September 1965, 750 cases were still pending. See 1965 Reports of the Proceedings of the Judicial Conference of the United States 119.

5. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1964).

6. 69 Stat. 282 (1955), 15 U.S.C. § 15a (1964).

7. Staff Study 2. General Electric alone paid over $190,000,000 in settlements. Ibid. See 112 Cong. Rec. 16183 (daily ed. July 25, 1966) (remarks of Senator Long).

8. 1964-2 Cum. Bull. 52.

9. Int. Rev. Code of 1954, § 162(a) states in part: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

10. Rev. Rul. 64-224, 1964-2 Cum. Bull. 52. Under § 4A, the Government may only collect actual not treble damages. 69 Stat. 282, 15 U.S.C. § 15a (1964).

11. Rev. Rul. 64-224 is the first official stand that the IRS has taken on the issue of deductibility of treble damage payments. In 1956, in an unpublished memorandum, the IRS took a similar position when it allowed the Columbia Pictures Corporation to deduct its treble damage payments. It based its holding on the fact that the payments involved were private, made to private persons to redress private injury, as opposed to payments made to the Government as compensation for an injury to the public. See Staff Study 27. However, in 1960, the unofficial position of the IRS was unfavorable toward the deduction. See text accompanying notes 83-84 infra.

chairman of the House Committee on the Judiciary, commented that the ruling was

> bad law, bad public policy, and bad public administration [since it permitted] . . . an antitrust offender, already convicted of a criminal antitrust violation, to deduct treble damages paid to its victims after guilt has already been established, and consequent damages to the victims proved in a private action.[12]

Senator Philip Hart of Michigan, chairman of the Senate Antitrust and Monopoly Subcommitte, referred to the ruling as a "gift worth at least $150 million" to the electrical manufacturers convicted of price fixing conspiracies.[13] Both legislators sponsored bills to combat the effects of the IRS ruling.[14] To facilitate the Congressional study of the IRS ruling, the Staff of the Joint Committee on Internal Revenue Taxation[15] sought the views of the Senate and House Antitrust Subcommittees and those of the Internal Revenue Service, as well as the views of interested parties in industry. The results were published in a report released on November 1, 1965, in which suggestions were presented for possible legislative action.[16] These suggestions were adopted by Senator Russell Long of Louisiana in his proposed bill to amend the Internal Revenue Code.[17]

II. The Penal-Remedial Dichotomy

Although section 162(a) of the Internal Revenue Code of 1954 allows the deduction of ordinary and necessary business expenses from the taxpayer's gross income, the Supreme Court has held that there cannot be a finding of "necessity" where the "allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof."[18] The IRS, in issuing Revenue Ruling 64-224, stated that where the statute which is violated is "intended to punish the wrongdoers," a deduction in such case should be disallowed, since the intended punishment would be "mitigated by the allowance of an income tax deduction."[19] However, the IRS distinguished the payment of treble damages from the aforementioned category, stating that "if the purpose behind a statute compelling a wrongdoer to make payments is remedial in nature and is intended to provide a formula for the reparation of a private injury, such payments, if otherwise

12. 111 Cong. Rec. 1172 (1965).

13. 111 Cong. Rec. 22198 (1965).

14. H.R. 12319, 89th Cong., 2d Sess. (1966); S. 2479, 89th Cong., 1st Sess. (1965). Congressman Celler has reintroduced his bill in the 90th Congress. See H.R. 2514, 90th Cong., 1st Sess. (1967). Representative Celler and Senator Hart also issued a joint statement condemning the IRS ruling. Staff Study 44; Lamont, Controversial Aspects of Ordinary and Necessary Business Expense, 42 Taxes 808, 830 (1964).

15. The Joint Committee on Internal Revenue Taxation was chaired by Senator Harry F. Byrd, with Representative Wilber D. Mills as vice-chairman. Staff Study 1.

16. Staff Study 16-17.

17. S. 3650, 89th Cong., 2d Sess. (1966). See notes 119-130 infra and accompanying text.

18. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30, 33-34 (1958). (Citations omitted.)

19. Rev. Rul. 64-224, 1964-2 Cum. Bull. 52, 53.

proper, constitute allowable deductions from gross income."[20] The nature of the treble damage section under section 4 of the Clayton Act was further determined by the IRS to be remedial rather than penal.[21]

There is ample authority for placing section 4 treble damages on either side of the penal-remedial dichotomy.[22] Congress, the courts and legal publications have all seen fit to take positions reflecting support for each side. The available legislative history surrounding the enactment of section 7 of the Sherman Act[23] appears to be inconclusive.[24] A statement by Senator Sherman that "damages should be commensurate with the difficulty of maintaining a private suit against a combination"[25] is one indication that the treble damage provision was enacted to encourage the bringing of private suits by those damaged by violations of the antitrust laws. However, a strong statement to the effect that the multiple damage provision was intended as a punitive measure was made by Senator Hoar of Massachusetts[26] during the Congressional debates on the Act, when he commented that "this section . . . is a section establishing a penalty, threefold damages."[27]

Recent legislative history is, perhaps, more persuasive.[28] In 1955, the Clayton

20. Ibid.

21. Id. at 54. Although the Government is suing in its proprietary capacity when it brings a § 4A suit, see S. Rep. No. 619, 84th Cong., 1st Sess. 3 (1955), the IRS nonetheless treated the § 4A payments differently than those payments made under § 4, on the theory that damages paid to the Government under § 4A amounted to reparation for a wrong committed against the public. However, it is not certain whether any prevailing policies necessitate such treatment. See note 36 infra and accompanying text.

22. See authorities cited in Staff Study 2-6; Noall & Troxell, Tax Aspects of Antitrust Proceedings, 18 Tax L. Rev. 213, 233-37 (1963).

23. Section 4 of the Clayton Act was merely intended as a supplement "to the existing laws, and extends the remedy under section 7 of the Sherman Act to persons injured in their business or property by the wrongful acts of persons or combinations violating any of the antitrust laws, and allows the recovery of threefold damages therefor." H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1914). It would appear, therefore, that whatever legislative history accompanied § 7 of the Sherman Act, Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210, is still relevant, although that section has since been repealed. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283.

24. See Staff Study 3.

25. 21 Cong. Rec. 2456 (1890).

26. Senator Hoar was in charge of the bill, and has been recognized by at least one authority as "in large measure the author of the same in its final form . . . ." Haskell v. Perkins, 28 F.2d 222, 223 (D.N.J. 1928), rev'd on other grounds, 31 F.2d 53 (3d Cir.), cert. denied, 279 U.S. 872 (1929).

27. 21 Cong. Rec. 3146 (1890). Senator Hoar's remarks were made in answer to a proposed amendment which would have allowed suits under that section to be brought in state courts, as well as federal courts. He argued that this could not be done, since "no court enforces penalties except those created by the authority which creates the court," and therefore a state court would not have the jurisdiction to enforce a treble damage claim, such claim being "purely penal and punitive." Id. at 3147. These remarks were cited with approval in Haskell v. Perkins, supra note 26.

28. See S. Rep. No. 619, 84th Cong., 1st Sess. (1955).

Act was amended so as to allow the Government the right to sue civilly for any actual damage suffered as a result of an antitrust violation.[29] In explaining why private plaintiffs could recover treble damages, whereas the Government would only be allowed to recover actual damages suffered, a Senate Report commented that since "the United States is . . . charged by law with the enforcement of the antitrust laws . . . it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of proceedings."[30] This is perhaps the strongest indication that the primary purpose of trebling the damages in private suits was to provide an incentive for plaintiffs who would be faced with a long and costly lawsuit.[31]

The case law in this area has been equally inconclusive, largely due to the fact that, as one court has put it, the terms penal and penalty "are in fact among the most elastic terms known to law."[32] The Supreme Court, in *Huntington v. Attrill*,[33] recognized the fact that the words had been used commonly to include "any extraordinary liability to which the law subjects the wrongdoer . . . not limited to the damages suffered."[34] However, that Court held that "the test whether a law is penal . . . is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual. . . ."[35] It is this test, that of public versus private wrong, on which the IRS relied in support of its position in Revenue Ruling 64-224. This test also explains the IRS position on payments to the Government under section 4A as being non-deductible, since the money is being paid to a governmental body as reparation for a public wrong.[36]

29. Clayton Act § 4A, 69 Stat. 282 (1955), 15 U.S.C. § 15(a) (1964).

30. S. Rep. No. 619, 84th Cong., 1st Sess. 3 (1955). Under § 4A, the Government is considered solely as a buyer of goods. Ibid. A subordinate reason for allowing the Government to sue for only actual, rather than treble, damages was the fear that many small companies which dealt with the Government might fail if such liability were imposed. See 101 Cong. Rec. 5130 (1955) (remarks of Representative Keating); cf. note 87 infra.

31. See Donovan & Irvine, Proof of Damages Under the Anti-Trust Law, 88 U. Pa. L. Rev. 511, 524-25 (1940). The liberalizing of the requisites for proving damages has raised some question as to the continued need for a treble damage incentive. See text accompanying notes 67-68 infra.

32. Ward v. Rice, 29 F. Supp. 714, 715 (E.D. Pa. 1939). Accord, Huntington v. Attrill, 146 U.S. 657, 666-67 (1892).

33. 146 U.S. 657 (1892).

34. Id. at 667.

35. Id. at 668.

36. Rev. Rul. 64-224, 1964-2 Cum. Bull. at 54. Congressman Celler has stated that the "obvious unstated reason" why damages paid under § 4A were ruled non-deductible was that the Government would never have been fully compensated were the taxpayer allowed to deduct one-half of the payments from its income tax. Staff Study 58. Although the statement is true as to the effect of allowing a deduction in § 4A situations, this effect, in and of itself, should not be a sufficient reason for disallowing the deduction since the logical conclusion from such a policy would be the denial of a deduction for any payments made directly to the Government. It is obvious that such is not the intent of Congress since, for example, interest paid to the Government on a back tax liability is a deductible expense to the taxpayer. See 4A Mertens, Law of Federal Income Taxation § 26.09, at 44 (1966). The enactment of § 4A was necessitated by a Supreme Court ruling that the United States was

The courts, however, have not felt themselves bound by this strict definition in determining whether the treble damage provision was intended as a penalty against the antitrust violator. Many courts, although admitting that a prime purpose of the treble damage provision was to encourage the bringing of private suits, so as to aid the Government in the enforcement of the antitrust laws,[37] have reasoned that the augmented damages were adopted as a deterrent device, and are therefore a penalty imposed on the violator.[38]

Since the purpose of the antitrust laws is to protect against restraints on competition, every violation of such laws produces some amount of public harm, if it is assumed that the public is harmed whenever free competition is restrained.[39] Thus, even though the private plaintiff has been injured in his business,[40] there is the additional injury to the public which is involved in the private antitrust action. Therefore, the treble damage provision, under the public-private wrong test, is at least partly punitive in that one of its purposes is to remedy a wrong to the public.

The IRS, in support of its current position, relies on its stand on multiple damage recoveries under the Emergency Price Control Act of 1942.[41] Under section 205(e) of that act, the terminal buyer could bring an action to recover treble damages against a seller guilty of overcharges.[42] In I.T. 3627,[43] released in 1943, the IRS held such payments, when made to a consumer other than the United States, "remedial in nature" and fully deductible as an ordinary and

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not a "person" under § 8 of the Sherman Act and could not, therefore, sue for treble damages. United States v. Cooper Corp., 312 U.S. 600, 614 (1941). Had the Government been given the right to sue in its proprietary capacity under § 4, it would be difficult to imagine that the same treatment afforded private taxpayers would not have been extended to payments made to the Government. Certainly, from a policy basis, it is difficult to see why payments to the Government under § 4A should be non-deductible, especially in light of the fact that the section was not enacted as a further means of enforcement of the antitrust laws.

37. Cf. 96 Cong. Rec. 10438, 81st Cong., 2d Sess. (1950) (remarks of Representative Celler).

38. See, e.g., Leh v. General Petroleum Corp., 330 F.2d 288, 298 (9th Cir. 1964), rev'd on other grounds, 382 U.S. 54 (1965); Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), cert. denied, 355 U.S. 835 (1957); Banana Distribs., Inc. v. United Fruit Co., 158 F. Supp. 160, 163 (S.D.N.Y. 1957); Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176 (E.D. Tenn. 1940), aff'd, 123 F.2d 1016 (6th Cir. 1941).

39. "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

40. Unless a taxpayer has suffered some damage in his business or property, he lacks the standing to bring a § 4 suit. See Timberlake, Federal Treble Damage Antitrust Actions § 4.02, at 23 (1965).

41. Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942).

42. Emergency Price Control Act, ch. 26, § 205(e), 56 Stat. 34 (1942).

43. 1943 Cum. Bull. 111.

necessary business expense.[44] However, there is language in at least one case which creates some doubt as to whether the courts would have considered the entire treble damage recovery as remedial. In *Jerry Rossman Corp. v. Commissioner*,[45] a taxpayer unwittingly overcharged his customers in violation of the Emergency Price Control Act of 1942. Upon ascertaining the overcharge, and realizing that it would be impractical to return the charges to its customers, the taxpayer paid the aggregate overcharge to the government in one lump sum.[46] He then deducted the payments on his tax return as ordinary and necessary business expenses. In ruling the payment deductible, Judge Learned Hand, speaking for the court, classified the payment as remedial, despite the fact that a "punitive" portion equal to twice the amount of actual damages might have been assessed.[47] Thus, the language in *Rossman* seems to indicate that the additional two-thirds is in the nature of a penalty, rather than an enlarged remedial recovery.[48] It should be noted, however, that Judge Hand explicitly stated that even had the payment been considered a penalty, it would not automatically follow that the payment would have been deemed non-deductible. The court would then have had to decide whether the allowance of the deduction would frustrate any sharply defined Government policies embodied in the Emergency Price Control Act of 1942.[49]

In another line of cases, the penal-remedial issue has arisen under state laws providing for different periods of limitations for a penalty created by statute. In *City of Atlanta v. Chattanooga Foundry & Pipe Co.*,[50] cited by the IRS in Revenue Ruling 64-224, the United States district court held that the antitrust treble damage provision was not a penalty within the meaning of a Tennessee statute of limitations. The court stated that:

> The case . . . turns in part on the distinction between a penalty, as such, imposed by statute for a breach of its provisions, by way of punishment for the act, and in the public interest on the one hand, and a private remedy conferred on a person specially injured . . . by way of compensation for the injury sustained, on the other.[51]

44. I.T. 3627 stated in part: "Amounts paid pursuant to judgments in favor of consumers or tenants (other than the United States) in consumer actions under section 205(e) of the Emergency Price Control Act of 1942 and amounts paid in compromise of pending or contemplated litigation in such cases, are deductible as ordinary and necessary business expenses under section 23(a)1(A) [now § 162(a)] of the Internal Revenue Code." 1943 Cum. Bull. 111.

45. 175 F.2d 711 (2d Cir. 1949).

46. The Government agreed not to press the taxpayer for more. Id. at 712.

47. Ibid.

48. Ibid. It should be noted, however, that the court did not hold the excess two-thirds portion of the recovery to be punitive. It merely assumed the fact for the purpose of the argument before it. Id. at 713.

49. Judge Hand stated that "there are 'penalties' and 'penalties,'" and that in every case, the frustration question would have to be decided ad hoc. Ibid.

50. 101 Fed. 900 (E.D. Tenn. 1900), rev'd on other grounds, 127 Fed. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906).

51. Id. at 901-02.

This represents the majority view,[52] but there is a vociferous minority,[53] exemplified by the recent Ninth Circuit decision in *Leh v. General Petroleum Corp.*[54] In a well-documented opinion, Judge Barnes, a former Assistant Attorney General of the United States in charge of the Antitrust Division, after conceding that one purpose of the multiple damage provision was to award damages that were difficult of proof, concluded that:

> What is recovered under Section 7 of the Sherman Act . . . is no less a penalty on the wrongdoer than is the fine and imprisonment with which the sovereign can threaten the violator under Sections 1 and 2, or the forfeiture of articles transported in commerce, as provided for in Section 6.[55]

In two other situations, the purpose of the treble damage statute was indicated as punitive. In *Haskell v. Perkins*,[56] the question was whether the violator's estate should be liable for treble damages. The court held that punitive damages do not survive, and that since treble damages were punitive in nature, the estate of the wrongdoer would only be liable for actual damages.[57] In the other situation, the wrongdoer had a set-off in a treble damage action. The court held that the set-off should be taken after the damages have been trebled, so as not to frustrate "the punitive purpose of the law."[58] However, another line of cases has held that a claim for treble damages is assignable,[59] thereby suggesting a non-punitive purpose in the treble damage statute.[60]

As has been previously stated, a statute may be penal for one purpose and still be non-penal for another.[61] The pertinent question for tax purposes is whether the statute is a penalty within the doctrine of *Tank Truck Rentals*[62]—that is, whether the allowance of the deduction would frustrate the sharply defined public policies embodied in the antitrust laws.[63]

52. See, e.g., Reid v. Doubleday & Co., 109 F. Supp. 354, 362-63 (N.D. Ohio 1952); Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446, 449 (D. Utah 1950); Momand v. Universal Film Exch., Inc., 43 F. Supp. 996, 1008 (D. Mass. 1942).

53. See, e.g., Leh v. General Petroleum Corp., 330 F.2d 288, 298-99 (9th Cir. 1964), rev'd on other grounds, 382 U.S. 54 (1965); Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912, 914 (7th Cir. 1951), cert. denied, 342 U.S. 947 (1952).

54. 330 F.2d 288 (9th Cir. 1964), rev'd on other grounds, 382 U.S. 54 (1965).

55. Id. at 298-99.

56. 28 F.2d 222 (D.N.J. 1928), rev'd on other grounds, 31 F.2d 53 (3rd Cir.), cert. denied, 279 U.S. 872 (1929).

57. Id. at 223.

58. Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708, 716 (N.D. Cal. 1962).

59. See Momand v. Twentieth-Century Fox Film Corp., 37 F. Supp. 649 (W.D. Okla. 1941).

60. While the right to recover damages is generally considered a property right and therefore assignable, the right to recover punitive damages is not. See Oleck, Damages to Persons and Property § 68 (rev. ed. 1961).

61. Cox v. Lykes Bros., 237 N.Y. 376, 143 N.E. 226 (1924); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

62. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

63. See text accompanying notes 77-100, infra.

It would be difficult to controvert the fact that the primary purpose of the treble damage provision, at least at the time of its enactment, was to encourage the bringing of private suits.[64] It was felt that the nature of the damages suffered by the injured competitor were almost impossible to prove with any degree of exactness or certainty,[65] and that, therefore, the treble damages amounted to liquidated compensation for "accumulative intangible harm going beyond the ordinarily recoverable legal damages to the business or property."[66]

However, the ancient and strict requirements of proving the exact amount of damages have been largely abrogated in recent years.[67] The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws concluded that:

> The inducement of mandatory trebled damages is no longer necessary to encourage suits by injured persons. The development of both the procedural and substantive law, largely favorable to the plaintiff, plus the award of attorney fees, affords sufficient incentive to private antitrust actions.
>
> Also, liberal requirements for proof of damages suggest that, even in the absence of mandatory trebling, plaintiffs may secure ample recompense.[68]

In accordance with those findings, the Report recommended the elimination of mandatory trebling, and vesting in the trial judge the discretion to impose double or treble damages as he felt was necessary to punish the "purposeful violator," while leaving him free to refuse to impose "the harsh penalty of multiple damages on innocent actors."[69] Had this view been accepted, and multiple damage awards placed within the discretion of the trial judge, there would have been no question that the nature of the treble damages were punitive and not compensatory, since they would have been added only in cases of deliberate violations of the antitrust laws. However, this proposal met with stiff opposition[70] and bills introduced in Congress calling for discretionary trebling died in committee.[71]

The United States Supreme Court has held, in *Commissioner v. Glenshaw Glass Co.*,[72] that the additional two-thirds recovery in a treble damage action is includable in a taxpayer's gross income. In *William Goldman Theatres, Inc.*,[73]

64. See note 37 supra; cf. S. Rep. No. 619, 84th Cong., 1st Sess. (1955); 96 Cong. Rec. 10438 (1950).

65. See Donovan & Irvine, Proof of Damages Under the Anti-Trust Law, 88 U. Pa. L. Rev. 511, 512 (1940).

66. Vold, Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?, 28 Ky. L.J. 117, 159 (1940).

67. See, e.g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

68. 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 379.

69. Ibid.

70. See McConnell, The Treble Damage Issue: A Strong Dissent, 50 Nw. U.L. Rev. 342 (1955).

71. See, e.g., H.R. 4597, 83d Cong. 1st Sess. (1953).

72. 348 U.S. 426, 432-33 (1955).

73. 19 T.C. 637 (1953), aff'd sub nom. Commissioner v. Glenshaw Glass Co., 211 F.2d 928 (3d Cir. 1954), rev'd, 348 U.S. 426 (1955).

the taxpayer had been awarded $375,000 in treble damages but only reported $125,000 as taxable income. The Tax Court held the two-thirds portion to be punitive in nature, stating:

> It is proper for us to conclude that the part of the award which represents loss of profits is compensatory in that it makes the injured petitioner whole. Likewise, that part of the award in excess of compensation is punitive damages. Of the statutory threefold damages, we conclude that one part is compensatory and two parts are punitive . . . .[74]

On appeal to the Supreme Court, it was held that even if the damages were to be considered as punitive, they still must be reported as gross income.[75] Although the Court constantly referred to the two-thirds portion as "punitive," this was a fact agreed upon by both parties, and therefore was never litigated before the Court.[76]

III. Public Policy

There is nothing in the Internal Revenue Code of 1954 which disallows deductions on grounds of public policy. However, the Supreme Court, in *Tank Truck Rentals, Inc. v. Commissioner*,[77] expressly held a payment to be non-deductible on public policy grounds. There, the taxpayer had incurred fines of over $41,000 for violation of state maximum weight laws. In denying the deduction, the Court found that an allowance of the deduction would have frustrated the state policy behind such statutes, since it would have encouraged violation of the state law by increasing the odds in favor of non-compliance.[78] The Court carefully commented that the standards for deductibility had to be flexible enough to accommodate both the Congressional intent to tax net income only, and the presumption against a Congressional intent to encourage a violation of an expressed public policy.[79] Therefore, the *Tank Truck* Court held that "the severity and immediacy of the frustration resulting from allowance of the deduction" should be the test for determining deductibility.[80] In *Tank Truck*, the Court found that the taxpayer had weighed the cost of compliance with the maximum weight statute against the chances of detection, and had decided that it was economically advantageous to violate the statute.[81] The Court rea-

74. Id. at 640.

75. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

76. Had the Supreme Court found the two-thirds portion of the treble damage payment to be remedial, then there would have been no doubt as to its full inclusion in ordinary income. Therefore, the Court assumed it to be punitive, and then went on to hold that the full recovery would be taxed as ordinary income in either situation.

77. 356 U.S. 30 (1958).

78. Id. at 34.

79. Id. at 35.

80. Ibid.

81. The defendant had to operate his trucks through other states, all of which allowed a greater weight over their highways than did Pennsylvania. Rather than operate his trucks at less than full loads, he chose to chance being caught in a violation of the Pennsylvania maximum weight statute. Id. at 33.

soned that this calculated risk would be made more attractive if a tax deduction were to be allowed for payments of fines charged against the violators of the statute.[82] Thus, the frustration which would occur from an allowance of the deduction was judged to be severe and immediate.

The IRS, in issuing Revenue Ruling 64-224, appears to have completely reversed its prior public policy position on the deductibility issue.[83] In a 1960 letter to the Chief of the Joint Committee on Internal Revenue Taxation, Colin F. Stam, the IRS position was stated to be strongly against allowing the deduction in cases of "clear violations" of the antitrust laws, since to allow deductions in such cases would diminish the effectiveness of the existing antitrust legislation.[84] The Staff of the Joint Committee on Internal Revenue Taxation found that the courts probably would have supported this 1960 position had the situation been presented to them for adjudication.[85]

However, in 1965, Nicholas deB. Katzenbach, while Acting United States Attorney General, commented that the public policy behind the antitrust laws would not necessarily be frustrated by allowing the deduction:

> [U]nder today's maximum corporate tax rate of approximately 50 percent, with trebling of damages the adjudicated violator will still be out of pocket approximately 150 per cent of actual damages in a situation where he has already paid a tax on any income derived from the violation. In these circumstances, and in view of the potential disruption and expense of complex legal proceedings, it is unlikely that the allowance of deductions will make potential antitrust violators feel that a treble damage suit is a business risk to be assessed lightly.[86]

It would seem that if it is in the public interest to have vigorous private enforcement[87] of the antitrust laws, as a supplement to the enforcement supplied

82. Id. at 35.

83. Staff Study 8, 9.

84. Letter From Acting IRS Commissioner Bertrand M. Harding to Colin F. Stam, October 18, 1961, in Staff Study 28. However, the letter stated that the deduction would be allowed in cases where the taxpayer's acts were not clear violations of the antitrust laws, "since in those cases it could not be stated that there was a violation of a 'sharply defined policy.'" Ibid. Such a view would be consistent with the "hard core" approach suggested in the Staff Study and in S. 3650. See note 130 infra.

85. See Staff Study 9. The Report, however, found enough uncertainty in the public policy doctrine that it could not classify Rev. Rul. 64-224 as "wrong" or "improper." Ibid.

86. Letter From Nicholas deB. Katzenbach to Laurence N. Woodworth, February 8, 1965, in Staff Study 61-62. (Footnote omitted.)

87. Although it might appear that from the standpoint of antitrust enforcement it would be desirable to deny a deduction in all cases of treble damage payments, it has been pointed out that this would put a small competitor at a disadvantage with a corporate "giant" where both have been burdened with treble damage suits arising out of the same antitrust violation. Staff Study 38-39. Whereas the "giant" would have no trouble in raising sufficient capital to satisfy its treble damage debts, the smaller violator might be placed at a competitive disadvantage if disallowed a deduction on their treble damage payments and settlements. This possible harm to competition is borne out by the fact that the Attorney General settled on much more lenient terms with the small manufacturers than he did with General

by the Government,[88] the primary concern of Congress and the courts should be to supply sufficient incentive[89] to private plaintiffs, so that they will prosecute private actions in cases where they are injured due to violations of the antitrust laws. Therefore, it would seem that the prevailing rule which treats treble damage recoveries as taxable ordinary income[90] poses a more severe threat to the public policies behind the antitrust laws than does the policy of allowing the wrongdoing taxpayer to deduct the treble damage payments. For, if the private plaintiff feels that it is not worth his time and effort in bringing a long and costly[91] action if his actual recovery is substantially reduced,[92] the number of private suits will decrease sharply, and the private antitrust action will no longer be an effective supplement to Government enforcement of the antitrust laws. On the other hand, from the standpoint of the private plaintiff, whether or not

Electric and Westinghouse in the electrical equipment cases. General Electric Company, the largest company involved, paid nearly $7.5 million in settlements to the federal government, representing 10.73% of General Electric's sales to federal agencies. On the other hand, the Attorney General settled with the seven smallest manufacturers for amounts representing between 2 and 3 percent of their respective sales to federal agencies. Ibid. In the case of one of the smallest companies involved in the electrical equipment conspiracies, Lapp Insulator Company, Inc., approximately 100 lawsuits were instituted against it, of which 65 percent were successfully settled. This settlement program was entered into in reliance on Rev. Rul. 64-224 and, as was stated by the president of the company, any reversal of the ruling "would double the cost to us of the settlements previously negotiated and, in view of our limited capital resources, would seriously jeopardize our competitive position." Letter From Brent Mills to Laurence N. Woodworth, Feb. 16, 1965, in 111 Cong. Rec. 8101 (daily ed. April 26, 1965).

88. See, e.g., Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).

89. The incentive provided by Congress was the recovery of threefold the damages sustained and proved. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964); accord, S. Rep. No. 619, 84th Cong., 1st Sess. 2-3 (1955).

90. See Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

91. See Loevinger, Private Action—The Strongest Pillar of Antitrust, 3 Antitrust Bull. 167, 173 (1958).

92. It should, of course, be realized that even under the Glenshaw Glass ruling, the injured taxpayer would be recovering 150% of his proved damages. Furthermore, since any revenue which the private plaintiff would have collected if not for the antitrust violation would have been taxed at the rate of approximately 50%, the injured taxpayer has really recovered three times his actual loss. For example, if a private plaintiff proves $100 damage in his § 4 suit, the trebled award would be $300. Since the entire award is taxable as ordinary income, the taxpayer must pay $150 to the federal government. He is left with a net recovery of $150. Since the $100, had it not been lost, would have been taxed at 50%, the actual money lost by the plaintiff was only $50. Therefore, the $150 net recovery represents three times the amount lost.

For any substantial decrease to occur, the treble damage provision would itself have to be changed and, as noted previously, Congress has not seen fit to enact the proposed changes. See notes 70-71 supra and accompanying text. However, the United States Attorney General does not feel that the typical private plaintiff would no longer bring a § 4 action if the treble damage incentive were to be removed. See 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 379.

the deduction is allowed to the wrongdoer is not a primary consideration in arriving at his decision to bring a private action.[93]

The major difficulty in dealing with the public policy limitation on the deduction of ordinary and necessary business expenses lies in the indefinite guidelines set forth in *Tank Truck*. Although we are told that the test is the "severity and immediacy" of the frustration, the criteria for determining "severity and immediacy" is largely unclear. In *Tank Truck*, the taxpayer was fined for violating a state penal statute, and the payment of the fine was made to the same authority which was charged with the enforcement of such statute. In *Commissioner v. Sullivan*,[94] decided by the Supreme Court on the same day as *Tank Truck*, the taxpayer had received income from bookmaking establishments, illegal under state law. The taxpayer listed rents, utilities and wages paid to employees as deductible expenditures. Although such expenditures were in themselves illegal under state law, the Supreme Court allowed the deductions, reasoning that they had only a remote relation to the illegal act of operating a gambling business, and, therefore, the deductions would not frustrate the consequences of violating a law (as was the case in *Tank Truck*).[95] The Court found these expenses to be clearly ordinary and necessary. The latest Supreme Court decision on the deductibility issue was handed down last year in *Commissioner v. Tellier*.[96] In that case, the taxpayer deducted his legal expenses incurred in the unsuccessful defense of a criminal charge. In allowing the deduction, the Court stated that "where Congress has been wholly silent, it is only in extremely limited circumstances" that deductions will be disallowed.[97]

If the test to be applied is whether allowing the deduction will frustrate the consequences of violating a law, then perhaps the sources of enforcement of a particular law should be looked to as a "frustration indicator." In the *Tank Truck* situation, the fines levied by the state were the sole means of enforcing the maximum weight statute, and any dilution of the fine, brought about by the allowance of a tax deduction, would have a great effect on the consequences of violating such a law. In contrast, the payment of wages and rent in *Sullivan* were paid to individuals who were in no way charged with enforcement of the anti-gambling laws. The disallowance of the deduction would only be one small consequence of violating such laws, and the primary measures of enforcement, namely criminal penalties imposed by the state against gambling operators, would still operate as an effective enforcement of the anti-gambling laws. The

93. This is not to say that the private plaintiff has no interest whatsoever in the tax treatment of the treble damage payments from the standpoint of the wrongdoer. Deductibility might encourage larger settlements. Further, the private plaintiff would be concerned were the allowance of the deduction greatly to reduce the deterrent effect of the treble damage suit. However, the allowance of the deduction would not have such an effect on the deterrent effect of the private damage action. See text accompanying notes 91-93 infra.

94. 356 U.S. 27 (1958).

95. Id. at 28.

96. 383 U.S. 687 (1966).

97. Id. at 693-94. The Court cited as an example of these "limited circumstances" Commissioner v. Heininger, 320 U.S. 467 (1943).

situation of treble damage payments fits somewhere between these two extremes. The consequences that one might suffer if caught in an antitrust law violation can vary from a criminal conviction, whereby the offending corporation can be fined, or its officers fined or imprisoned, or both, to cease and desist orders, injunctions, and private treble damage judgments. Therefore, unlike the *Tank Truck* situation, the violator cannot accurately ascertain the amount of his potential liability. In most hard-core violations, he is unable to know how many competitors will be injured due to the antitrust violation, nor can he ascertain the amount of damages which any one party will incur. Furthermore, he cannot know whether or not the Government will institute proceedings, either in its official or proprietary capacity.[98] Even assuming that the only suit with which the violator will be faced is the private treble damage action (and this will not occur often, since in many cases the private plaintiff waits for the Government to sue, and then uses the Government conviction for prima facie evidence), he still can do no more than predict that the final treble damage sum assessed against him will be halved by the deduction. And this fact standing alone has little meaning to the prospective violator since he does not know the principal sum on which the reduction of one-half will be taken. Therefore, it would seem that the allowance of the deduction does little to improve the "risk ratio" of a potential antitrust violator, and thus it is questionable whether the public policies behind the antitrust laws would be "severely and immediately" frustrated by allowing the treble damage payment to be deducted.

However, this discourse on the applicability of the *Tank Truck* doctrine to treble damage payments probably will be rendered academic should any of the proposed legislation be enacted.

IV. Proposed Legislation

The various legislative proposals regarding the tax treatment of treble damage payments, while similar in attempting to change Revenue Ruling 64-224, have proceeded along two distinctly separate paths. The first type, represented by the bill of Congressman Celler,[99] calls for the amendment of section 4 of the Clayton Act. Congressman Celler's bill, H.R. 2514, calls for the addition of the following subsection:

> (b) In any action pending or instituted under subsection (a) of this section on or after the date of enactment of this subsection, the amount recovered in excess of the damages sustained shall not be treated as income for purposes of any law of the United States imposing a tax on income. In any action pending or instituted under subsection (a) of this section or under section 4A of this Act on or after the date of enactment of this subsection, no payment made by any defendant pursuant to any judgment or settlement of such action shall be deductible as ordinary and necessary expense under any law of the United States imposing a tax on income.[100]

98. A successful Government suit in either instance may be used by a private plaintiff as prima facie evidence against the same defendant "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." Clayton Act § 5 (a), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964).

99. H.R. 2514, 90th Cong., 1st Sess. (1967).

100. Ibid.

It should be noted at the outset that this bill takes a two-pronged approach to the problem. The purpose of the first sentence of subsection (b) is to insure that the needed incentive for the bringing of private antitrust actions will not be lessened by the imposition of an income tax on the "punitive" portion of the recovery. The enactment of this portion of the Celler bill would directly contradict the Supreme Court holding in *Glenshaw Glass*.[101]

The second sentence of subsection (b) represents a strict, and perhaps inaccurate, appraisal of the possible frustration of antitrust policy caused by the allowance of the treble damage payment deduction. Were this portion of the Celler bill to be enacted, the entire amount of any judgment or settlement of any private antitrust action would be non-deductible to the wrongdoing taxpayer. There are several arguments that can be raised in opposition to this portion of H.R. 2514. Perhaps the most obvious objection is that, assuming the two-thirds portion of the damages to be punitive rather than compensatory, the payment of the actual damages is not allowed to be deducted. Even those authorities who strongly advocated labeling two-thirds of the treble damage recovery as "punitive" generally agreed that the first third of the recovery was compensatory for actual damages suffered.[102] And although it has been stated that "the same provision may be penal as to the offender and remedial as to the sufferer,"[103] few authorities have interpreted this statement as dictating that the entire amount of a treble damage payment be deemed penal and therefore non-deductible.[104]

A second possible objection to the "absolute" approach of the Celler bill is that it treats all treble damage payments alike; that is, the inadvertent violator is treated no better than the purposeful conspirator.[105] There is language in *Tank Truck* which might be said to support the Celler view. In that case, the Court stated that since the maximum weight statute involved made no distinction between willful and inadvertent violations, "state policy is as much thwarted in the one instance as in the other."[106] In the case of the majority of antitrust

101. See text accompanying note 75 supra. At least one writer has suggested that such a measure is necessary if we are to restore the historic purpose of the antitrust treble damage section. Wright, A Tax Formula to Restore the Historical Effects of the Antitrust Treble Damage Provisions, 65 Mich. L. Rev. 245, 249 (1966). Actually, this author realized that to allow the two-thirds portion of the recovery to be treated as non-taxable income would more than restore the pre-Glenshaw stimulant, since prior to Glenshaw, it was not certain that the two-thirds could be excluded from ordinary income. See id. at 256.

102. See, e.g., William Goldman Theaters, Inc., 19 T.C. 637, 640 (1953), aff'd sub nom. Commissioner v. Glenshaw Glass Co., 211 F.2d 928 (1954), rev'd, 348 U.S. 426 (1955).

103. Cox v. Lykes, 237 N.Y. 376, 380, 143 N.E. 226, 227 (1924). (Citations omitted.)

104. But see 113 U. Pa. L. Rev. 954, 958 (1965).

105. H.R. 2514 encompasses all § 4 suits, which could include inadvertent as well as purposeful violations of the antitrust laws. There is language in the Jerry Rossman case to indicate a difference in treatment for inadvertent and purposeful violators of the Emergency Price Control Act of 1942, and, the Tank Truck Court pointed out that the OPA Administrator had differentiated between willful and innocent violators. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30, 37 (1958).

106. Id. at 36; accord, Hoover Motor Express Co. v. United States, 356 U.S. 38, 40 (1958).

statutes, as with the maximum weight statute, it is a proscribed act which is punished,[107] and the statutes make little if any distinction between a willful and inadvertent violation. However, there are also great differences in the nature of the two types of statutes. In the case of the maximum weight statute, the proscribed action is clearly ascertainable, and where the taxpayer commits an infraction, albeit inadvertent, he should not be heard to complain, since it was fully within his power to comply with such statute. The situation in regard to the antitrust laws is much different. Unlike the maximum weight statute, the acts proscribed by the antitrust laws are complex, vague and often remain unclear even after lengthy litigation.[108] Whereas the inadvertent violator of a maximum weight statute could almost certainly have avoided the violation had he exercised a greater degree of care, this cannot accurately be said of the inadvertent violator of an antitrust statute. Therefore, the inadvertent antitrust violator will not be made to act with a greater degree of care by disallowing him a deduction of his treble damage payments.[108a] Still uncertain as to the acts proscribed by the antitrust laws, he is certainly capable of committing another inadvertent violation at a later date.

Another aspect of the Celler proposal which might create some controversy is the non-deductibility of payments made in settlement of pending treble dam-

107. Examples of such proscribed acts are price discrimination, discrimination in services, conspiracies in restraint of trade, mergers which tend to lessen competition in any line of commerce, etc.

108. Nowhere is this uncertainty greater than in the field of asset acquisitions. Section 7 of the Clayton Act, the anti-merger provision of the antitrust laws, states that: "No corporation [engaged in commerce] . . . shall acquire . . . the whole or any part of . . . the assets of one or more corporations . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964). One of the key factors in determining whether there has been a lessening of competition is the showing of a trend toward concentration in the particular industry involved. See Brown Shoe Co. v. United States, 370 U.S. 294 (1962). However, in the most recent Supreme Court decision, the Court applied a different criteria for measuring this trend than it had applied in the previous cases. In the previous cases, as typified by Brown Shoe, concentration was found to exist where a large portion of an industry was controlled by only a few companies —i.e., where the top four companies controlled 25% of the market in that product. However, in United States v. Von's Grocery Co., 384 U.S. 270 (1966), this factor was not present, as the grocery market was completely fragmentized. However, the Court found a trend toward concentration from the fact that the number of small competitors had decreased over a period of time. Certainly the defendants in Von's could not have known, at least from the prior judicial decisions, that their actions would violate the anti-merger clause of the Clayton Act. This is clear from the dissenting opinion which asserts that it is possible that there will be no lessening of competition even though the number of competitors has decreased. Id. at 282-83 (Stewart, J., dissenting).

108a. Of course, by realizing that the penalties for violating a law are severe, the taxpayer will usually exercise a greater degree of care in ascertaining the legality of his prospective acts. But as already stated, there are certainly enough other sanctions involved in antitrust violations to prevent the deductibility of treble damage payments from becoming pivotal.

age litigation. The Attorney General had suggested that a distinction could be made between money paid to satisfy judgments and payments made by way of settlement.[109] He reasoned that this would promote respect for the antitrust laws while at the same time encourage settlements. However, his suggestion was based purely on an antitrust viewpoint, and when the IRS informed him that such distinction could not be maintained as a matter of tax law, the Attorney General deferred to the IRS judgment.[110] The Celler and IRS view on this issue appears correct.[111]

One other objection raised to the Celler proposal is that the bill, in effect, would allow the injured party to receive five times his after-tax loss and the violator would pay six times his after-tax gain.[112] The bill would, thus, appear to impose sextuple rather than treble damages.[113] This approach could substantially weaken the competitive position of a company which inadvertently violated the antitrust laws.

A different legislative approach to the treble damage deductibility problem appears in Senator Long's proposed amendment to section 162 of the Internal Revenue Code. The bill,[114] insofar as it related to treble damage payments,[115] stated:

(g) . . . If in a criminal proceeding a taxpayer is convicted of a violation of the antitrust laws, no deduction shall be allowed under subsection (a) for two-thirds of any amount paid or incurred—

(1) on any judgment for damages entered against the taxpayer under section 4 of the [Clayton Act] . . . on account of such violation or any related violation of the antitrust laws which occurred prior to the date of the final judgment of such conviction, or

(2) in settlement of any action brought under section 4 on account of such violation or related violation.

109. Letter From Nicholas deB. Katzenbach to Laurence N. Woodworth, February 8, 1965, in Staff Study 60.

110. Id. at 61-62.

111. However advantageous a policy of encouraging settlements might be, if it is to be assumed that an important public policy embodied in the antitrust laws is frustrated whenever a deduction is allowed for payments made pursuant to a treble damage judgment, it would be difficult to imagine how the same public policy is not frustrated when a deduction is allowed for payments made in settlement of a law suit brought for the commission of the identical act.

112. "Assume that a corporate seller receives an extra $100 because of a price-fixing conspiracy. Its gain, and the other party's damage, after taxes is $50. If the seller has to pay $300 in treble damages, that is, three times the overcharge, without being able to take a deduction, it will be out of pocket six times its net gain or six times the other party's net injury." 112 Cong. Rec. 22220-21 (daily ed. Sept. 20, 1966) (remarks of Senator Hruska). Similarly if the injured party's loss was $100, its loss in effect would be $50. It would receive $300 in treble damage payments. Under the Celler bill only amount representing actual damages would be taxable or $100. In effect, the injured party would receive $250 or five times its after-tax damages.

113. 112 Cong. Rec. 22221 (daily ed. Sept. 20, 1966) (remarks of Senator Hruska).

114. S. 3650, 89th Cong., 2d Sess. (1966).

115. S. 3650 also deals with fines and penalties, and bribes and illegal kickbacks.

Unlike the Celler bill, S. 3650 dealt solely with the deductibility aspect of the treble damage payments, taking no position on the tax treatment of a treble damage recovery. Under the Long bill, the non-deductibility applies only to two-thirds of the payments, the initial one-third being fully deductible as a remedial payment.[116] Payments made in satisfaction of judgments are given the same treatment as settlements. Treble damages paid out due to inadvertent violations of the antitrust laws would appear to be deductible. It is only in cases where the taxpayer has been convicted of a criminal violation of the antitrust laws, and a treble damage judgment is entered against the taxpayer on account of such violation, that the deduction will be disallowed under the Long proposal. Thus, S. 3650 would operate in a small percentage of antitrust cases, since the large majority of antitrust suits are of a non-criminal nature.[117] In the case of inadvertent violations of the antitrust laws, the usual Governmental action is to seek an injunction or a cease and desist order against the alleged violator. The criminal proceeding is limited to willful, hard-core antitrust violations.[118]

There is some evidence to support an even more restrictive interpretation of S. 3650. Senator Long, in his statements before the Senate made immediately prior to his introduction of this bill, commented that:

> The denial of a deduction for treble damage payments in effect is limited to cases where there has been a "sharply defined" violation of the antitrust laws. The uncertainty of the application of the antitrust laws is such that a sense of fairplay would seem to require such a limitation. To limit the denial to sharply defined violations, the denial of the deduction is limited to those damage payments arising out of cases in which the courts have imposed *criminal sanctions against officers* of the companies.[119]

As stated above, criminal proceedings are relatively rare in antitrust actions, and the severe measure of imposing criminal sanctions against the officers of the violating companies is a step that the courts have been reluctant to take except in the case of a most flagrant criminal antitrust violation.[120] It can

116. See Staff Study 15; 112 Cong. Rec. 16184 (daily ed. July 25, 1966) (remarks of Senator Long).

117. In 1958, of the 325 antitrust suits which were commenced by the Government, only 22 were criminal cases. In 1960, the ratio was 27 out of 315; in 1964, 24 out of 446. 1964 Reports of the Proceedings of the Judicial Conference of the United States 151.

118. "The two most common forms of legal action brought by the Government under the antitrust laws are criminal suits and civil actions seeking to enjoin illegal conduct of the kind that has been engaged in. An antitrust criminal action is normally brought when it appears from the evidence that there has been a 'per se violation,' such as price-fixing, the allocation of territories or customers, boycotts, pools, or tying agreements, or when it appears that there has been a willful violation of the law. In other situations, the Department [of Justice] will normally institute a civil suit." Van Cise, Understanding the Antitrust Laws 248 (rev. ed. 1966).

119. 112 Cong. Rec. 16183 (daily ed. July 25, 1966) (remarks of Senator Long). (Emphasis added.)

120. The electrical conspiracy cases were examples of such flagrant antitrust violations.

easily be seen, therefore, that if the legislative intent behind S. 3650, as evidenced by the statements of Senator Long, is read to limit the denial of the deduction to those few cases where criminal sanctions have been imposed on the officers of the violating corporation, the effect of the proposed bill on the deductibility of treble damage payments will be minimal.[121] There is authority to support such a reading of the Long bill, since S. 3650 is merely a codification of the recommendations of the Staff of the Joint Committee on Internal Revenue Taxation,[122] and one such recommendation was to limit the non-deductibility to cases where such criminal sanctions had been imposed on the officers.[123] However, there is a stronger possibility that the bill would be interpreted literally by the courts, so as to extend its coverage to all cases where the taxpayer, both individual and corporate, has been criminally convicted of an antitrust violation.[124]

V. Conclusion

In allowing all treble damage payments to be deductible to the taxpayer as an ordinary and necessary business expense, the IRS should not have placed its sole reliance on the categorization of treble damages as remedial. Although the weight of authority supports the proposition that the primary purpose of the treble damage action was to encourage the bringing of private suits, there is a large body of authority which considers the trebling of damages to be a penalty imposed on the wrongdoer, acting as a deterrent to future violations. The study undertaken by the Staff of the Joint Committee on Internal Revenue Taxation found both elements present in the treble damage statute.[125]

Seven corporate officers were actually imprisoned, while 23 others were given suspended sentences and put on probation. Staff Study 2.

121. There were only 24 criminal antitrust actions litigated in 1964. Of the 143 convictions arising out of those actions, 3 resulted in imprisonments, 5 in probations, and 135 in fines. Although the statistics are unclear as to the breakdown of the fines, it can be safely assumed that a large percentage were levied against the defendant-corporations, rather than their officers. 1964 Reports of the Proceedings of the Judicial Conference of the United States 151, 260.

122. Compare S. 3650, 89th Cong., 2d Sess. (1966), with the bill suggested in Staff Study 16-17.

123. Staff Study 13.

124. There is evidence that this is the proper reading of the statute's real purpose, since both Senator Long and the Staff of the Joint Committee stated that "if the taxpayer had been convicted in a criminal proceeding, he was protected by the requirement that the prosecutor must prove him guilty beyond a reasonable doubt. In such a case it is clear that the taxpayer's payment was in violation of the public policy involved. Denial of the deduction of the payment can then be justified on the ground that the deduction would clearly frustrate a sharply defined public policy." Staff Study 14; accord, 112 Cong. Rec. 16183 (daily ed. July 25, 1966) (remarks of Senator Long). This indicates that any criminal violation forming the basis for a treble damage suit would be sufficient grounds for disallowing the deduction, regardless of the fact that sanctions were not imposed on the officers of the violators.

125. See Staff Study 2-6; accord, Letter From Nicholas deB. Katzenbach to Laurence N. Woodworth, February 8, 1965, in Staff Study 61.

The crucial issue is that of public policy. In Revenue Ruling 64-224, the IRS limited its policy discussions to the remedial, as opposed to penal, nature of the treble damage provision. However, the relevant public policy considerations go far beyond the penal-remedial dichotomy. Even if it were true that the primary purpose of the treble damage provision is to punish the antitrust violator, it would not automatically follow that the allowance of a deduction for such payments would frustrate the public policies embodied in the antitrust laws.[126] By the same token, the mere fact that the purpose behind a statute is primarily compensatory does not free payments made under such statute from public policy considerations.

Representative Celler has stated that to allow the deduction of treble damage payments would lessen the "sting" of the statute's punitive effect, and has at least implied that where the sting is lessened, there will be a frustration of the relevant policies involved.[127] However, although the *Tank Truck* Court did speak of the dangers of "reducing the sting" in relation to frustrations of public policy,[128] the doctrine, as set forth in that case, and as further explained in *Sullivan* and *Tellier*, envisions a frustration that is both "immediate" and "severe"; that is, a situation where a prospective wrongdoer, after considering that he will be allowed to deduct certain payments, violates a statute because the lessened consequences have made the risk involved worthwhile. It is submitted that a prospective antitrust violator would not fall within that category.

One argument has been submitted in favor of the IRS withdrawing Revenue Ruling 64-224. Since no taxpayer will challenge a rule allowing complete deductibility, and since the Government cannot bring a suit to challenge its own ruling,[129] the IRS position, if allowed to remain in its present form, will be beyond judicial determination.[130] It is argued that had the IRS taken a contrary position, or at the least remained neutral in the matter, the final determination as to whether any antitrust public policies had been frustrated in allowing a treble damage deduction would have been left to the courts. However, while perhaps it would have been wiser for the IRS to have deferred to the judiciary in this matter, the fact remains that the IRS chose to take a position in favor of complete deductibility and, due to the fact that so many companies have entered into settlements in reliance on the ruling,[131] it is highly unlikely that the IRS will now reverse its stand.[132] Therefore, any changes in the present tax treatment of treble damage payments must originate with Congress.

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126. Jerry Rossman Corp. v. Commissioner, 175 F.2d 711, 713-14 (2d Cir. 1949).

127. See Statement of Hon. Emanuel Celler Submitted to the Joint Committee on Internal Revenue Taxation, in Staff Study 46.

128. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30, 35-36 (1958).

129. Staff Study 59.

130. See Comment, 60 Nw. U.L. Rev. 233, 240-41 (1965).

131. General Electric, the largest of the violating companies, has entered into settlements with respect to 95% of the sales involved in the suits brought against them. Staff Study 2. See also note 87 supra.

132. The possibility that the IRS will issue a new ruling, having only a prospective effect, although unlikely, should not be precluded.