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ANTITRUST POLICY AND TAXATION

GARY PINNELL

The goal both of the antitrust statutes and of the tax laws is economic regulation and stabilization. Antitrust laws work toward this goal by promoting competition, while tax laws, besides their function of raising revenue, encourage private investment and stimulate productivity. By working in harmony, the maximum effect of antitrust policy and tax policy can be achieved. But several recent developments have brought antitrust policy and taxation into conflict, the result being a lessening of the efficiency of both.

These conflicts have arisen because of the tendency to equate antitrust damages with other types of injuries. Although antitrust violations are tortious in nature,[1] they are not sufficiently analogous to conventional torts to allow accurate parallels to be drawn or to permit similar treatment for tax purposes. Antitrust actions arise only where there is a statutory violation; most conventional tort actions arise under common law principles. When the antitrust violation is proved, the damages sustained must be automatically tripled;[2] in conventional tort situations, the amount of the damages awarded is left solely to the trier of fact. These two fundamental differences indicate the need for change in the tax consequences of antitrust proceedings for both the antitrust plaintiff and defendant.

THE ANTITRUST PLAINTIFF

Tax policy determines the treatment of a plaintiff's antitrust recovery and the deductibility of its litigation expenses. This treatment will directly affect the most important decision to be made by the plaintiff — whether or not to prosecute the claim.

Legal Expenses

Counsel fees, court costs, and other litigation expenses incurred by a taxpayer in connection with or proximately resulting from the taxpayer's trade or business are deductible as ordinary and necessary business expenses.[3] For

1. *E.g.*, Simpson v. Union Oil Co., 311 F.2d 764, 768 (9th Cir. 1963), *rev'd on other grounds*, 377 U.S. 13 (1964).
2. Clayton Act § 4, 15 U.S.C. § 15 (1970).
3. INT. REV. CODE OF 1954, § 162(a); *see* Kornhauser v. United States, 276 U.S. 145, 151-53 (1928). *See generally* McDonald, *Deduction of Attorney's Fees for Federal Income Tax Purposes*, 103 U. PA. L. REV. 168 (1954).

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tax purposes the legal expenditures made by a successful antitrust plaintiff are offset against his recovery.[4] Where the recovery is that it will be fully included in gross income, the net result is that the legal expenses are fully deductible. In those cases where the recovery is capital in nature, such as damages for the ruin of the business, the legal expenses would be capitalized and therefore deductible only to the extent of the capital gain recognized.[5] Presumably, the entire cost of an unsuccessful litigation would be deductible on the grounds that they proximately result from the taxpayer's trade or business.

Character of the Recovery

In an antitrust action the successful plaintiff may recover damages for the loss of profits, overpayments made on the purchase of price-fixed equipment or inventory, treble damages, damages for the ruin of the business or injury to its goodwill, or a combination of these.[6] Each of these types of damages gives rise to varying tax consequences. It may be stated that damages received for the loss of profits[7] and the punitive portion of treble damages[8] generally are ordinary income, but damages for injury to goodwill are a capital recovery and therefore non-taxable.[9]

Had the profits, lost due to the defendant's anticompetitive conduct, been received through the ordinary course of business, they would have been taxed as ordinary income.[10] The mere fact that they were finally received as a

4. *See* Estate of Meade v. Commissioner, 489 F.2d 161, 165 (5th Cir. 1974); Peter K. Pappas, 31 P-H Tax Ct. Mem. 1209 (1962).

5. INT. REV. CODE OF 1954, §§ 263, 265; *cf.* Rev. Rul. 67-125, 1967-1 CUM. BULL. 31. *See generally* Estate of Meade v. Commissioner, 489 F.2d 161, 165 (5th Cir. 1974), *rev'g* 41 P-H Tax Ct. Mem. 977 (1972).

6. *See generally* Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955) (treble damages); Thomson v. Commissioner, 406 F.2d 1006, 1009 (9th Cir. 1969) (lost profits and injury to business); Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944) (ruin of business); Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912, 913 (6th Cir. 1932) (loss of business goodwill); Rev. Rul. 68-378, 1968-2 CUM. BULL. 335 (overcharge on electrical equipment).

7. *See, e.g.*, Sager Glove Corp. v. Commissioner, 311 F.2d 210 (7th Cir. 1962), *cert. denied*, 373 U.S. 910 (1963); Commercial Elec. Supply Co., 8 B.T.A. 986, 992 (1927). *See also* INT. REV. CODE OF 1954, § 186(a).

8. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), *rev'g* 211 F.2d 928 (3d Cir. 1954); Commissioner v. Obear-Nester Glass Co., 217 F.2d 56 (7th Cir. 1954), *cert. denied*, 348 U.S. 982 (1955); William Basle, 26 P-H Tax Ct. Mem. 635 (1957), *aff'd per curiam*, 256 F.2d 581 (3d Cir. 1958); John E. Bloom, 25 P-H Tax Ct. Mem. 184 (1956); *see* Treas. Reg. § 1.61-14(a) (1965). *See generally* Koenig, *Federal Taxation of Private Antitrust Recovery*, 13 STAN. L. REV. 264, 278-81 (1961); Note, *Taxation of Damage Recoveries from Litigation*, 40 CORNELL L.Q. 345 (1955).

9. Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944); Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912, 913 (6th Cir. 1932).

10. Although used here in the singular, there may be more than one defendant. The usual antitrust action involves a "conspiracy" to harm the plaintiff through anti-

result of legal action should not change their character. The logic for this treatment is perhaps the most clearly understood precept in the entire area of tax treatment of antitrust damages.

The rationale becomes more obscure, however, when considering other types of recoveries. The test to be applied in determining the tax treatment of the recovery is "[i]n lieu of what were the damages awarded?"[11] If the recovery is for damage to the goodwill of the business, then the proceeds are a non-taxable return of capital to the extent of the plaintiff's basis in its goodwill.[12] Amounts received in excess of the value of the goodwill[13] constitute taxable income.[14]

There will ordinarily be two situations where the taxpayer claims damage to goodwill—where the business is totally destroyed due to the defendant's anticompetitive conduct, and where the business is partially destroyed, or a particular product line is injured. A good example of the first situation was considered in *Raytheon Production Corp. v. Commissioner*,[15] where a manufacturer of radio rectifying tubes charged that RCA had entered into a conspiracy to monopolize the business of selling such tubes with the result that Raytheon's business had rapidly diminished.[16] Although Raytheon

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competitive practices, price fixing or price discrimination. It is relatively rare that a single offender will have the requisite economic power to injure the plaintiff. Therefore textual references to a single defendant should be understood to include one or more defendants.

11. Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944). *See also* Rev. Proc. 67-33, § 3.02, 1967-2 CUM. BULL. 659, 660.

12. Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912 (6th Cir. 1932). *See also* Michael Berbiglia, 20 P-H Tax Ct. Mem. 400, 404 (1951).

13. Goodwill has been defined as the capitalized earning power of the business less the value of the tangible assets. *See* George W. Staab, 20 T.C. 834, 840 (1953). *See also* Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944).

In determining the possible capital gain to be recognized by the antitrust plaintiff, it is entirely possible that the goodwill has a basis of zero or is nonexistent. In the first instance, the recovery would be taxable as a long-term capital gain in its entirety. *See* R.J. Durkee, 18 P-H Tax Ct. Mem. 610, 612 (1949), *aff'd mem.*, 181 F.2d 189 (6th Cir. 1950) (on remand). If there is no goodwill, the recovery will be ordinary income because of the lack of a capital injury. In Abraham Moulton, 31 P-H Tax Ct. Mem. 624 (1962), a liquor dealer was found to have no goodwill. The settlement received to compromise a price discrimination suit was held to represent the nuisance value of the suit since there was no damage to the business as a going concern. *Id.* at 627.

14. In non-antitrust actions, the treatment of the excess will be capital gain. *See* INT. REV. CODE OF 1954, § 1231(a); R.J. Durkee, 18 P-H Tax Ct. Mem. 610 (1949), *aff'd*, 181 F.2d 189 (6th Cir. 1950); *cf.* Paul v. United States, 30 Am. Fed. Tax R.2d 5724 (S.D. Ill. 1972).

15. 144 F.2d 110 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944).

16. *Id.* at 113-14. In 1926, Raytheon was doing 80 percent of the rectifying tube business in the United States, and showed profits that year of more than $450,000. By 1927, RCA, which owned or controlled the patents on almost all the practical radio circuits entered into licensing agreements with other radio manufacturers requiring the use of RCA tubes in the radio sets. This tying practice, coupled with RCA's monopoly

alleged both loss of its goodwill and loss of profits, the latter allegation was found to be merely evidentiary.[17]

Raytheon held the taxpayer's recovery in excess of its basis in its goodwill was taxable as ordinary income.[18] It is important to note that when *Raytheon* was decided, capital gains were taxed at ordinary rates;[19] under present law, the excess would be taxed as any other capital gain.[20]

The few cases which have allowed the taxpayer to treat his recovery as a return of capital have been strongly criticized.[21] The gravamen of the criticism seems to be that the partial destruction of the business is really a loss of present and future profits. Because the plaintiff's business has only been weakened, and the weakening may not be permanent, the damages recovered should be treated as lost profits rather than as a capitalization of profits. While it is true that the defendant's anticompetitive practice causes the injured plaintiff to lose profits, this argument overlooks the fact that lost market share is not so easily regained. Had Raytheon's business been only damaged, rather than collapsed by RCA's monopolistic tying arrangement, the critics would declare that Raytheon's recovery should have been treated as lost profits. But Raytheon, as a result of its "superior skill, industry and foresight,"[22] had served 80 percent of the market before RCA tied radio tubes to patent licenses. RCA, however, would still have had a commanding share of the market, even after it was ordered to stop its anticompetitive practices.[23] RCA's market share would thus be attributable to the continuing effects of its antitrust violations which had since stopped, rather than to its

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power, so cornered the market on rectifying tubes that Raytheon's profits fell to $150,000 in 1927. By 1928, they were a scant $10,000.

17. The court found that:

> This was not the sort of antitrust suit where the plaintiff's business still exists and where the injury was merely for loss of profits. The allegations and evidence as to the amount of profits were necessary in order to establish the value of the goodwill and the business since that is derived by a capitalization of profits.

Id. at 113; *accord,* Durkee v. Commissioner, 162 F.2d 184, 186 (6th Cir. 1947).

18. Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir. 1944), *cert. denied,* 323 U.S. 779 (1944).

19. Capital gains were included in gross income to the extent that they exceeded capital losses. Revenue Act of 1938, § 117, 52 Stat. 502.

20. *See* R.J. Durkee, 18 P-H Tax Ct. Mem. 610, 614 (1949), *aff'd,* 181 F.2d 189 (6th Cir. 1950).

21. Noall & Troxell, *Tax Aspects of Antitrust Proceedings,* 18 TAX L. REV. 213, 240-42 (1963) (advocating return of capital treatment only where the taxpayer's business is totally destroyed). *But see* Koenig, *Federal Taxation of Private Antitrust Recovery,* 13 STAN. L. REV. 264, 265-69 (1961).

22. United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

23. Vacuum tubes are a product in which there is no real product differentiation. The same type of tube is interchangeable with any other brand, and the circuit will function as well with Brand X as Brand Y. The competition, then, must be based on price and customer prejudice toward a certain manufacturer. Further, all other factors being equal, customer buying patterns are often based on habit. Therefore consumers accustomed to buying RCA rectifying tubes would probably continue to buy from RCA even after Raytheon's ability to compete was restored.

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skill, foresight and industry. This would undoubtedly result in lower profits to Raytheon; this loss of profits, however, would be for an indefinite period of time. Return on capital investment would also be lowered. It may be said that this is an injury to capital which could adequately be compensated only as a return of capital, and that a loss of profits was implicit in the capital injury and not the injury itself.[24] Even so, the requirement to be met before return of capital will be allowed seems to rest primarily on two factors—the nature of the damages received (the "in lieu of what" test) and the destruction of the taxpayer's business.

Treatment of damages as return of capital is also allowed where the injury was caused by an overcharge on a capital asset due to a price-fixing conspiracy.[25] The compensatory portion of the recovery represents the amount of the overcharge, so the basis of the asset is reduced by the amount of the award. If the asset is subject to depreciation or amortization, and the award is greater than the adjusted basis of the asset, the recovery is first applied to the adjusted basis, reducing it to zero.[26] The excess is ordinary income because it represents a recapture of the depreciation or amortization taken.

The Punitive Portion of Treble Damages

A suit to recover damages for violation of the antitrust laws is brought under Section 4 of the Clayton Act which provides that the damages awarded are to be automatically trebled.[27] Trebling of the damages is not elective with either the court or the plaintiff, nor is it an additional amount to be awarded in the case of an especially flagrant violation; it is manda-

24. A second analysis is possible: Had Raytheon decided to sell its business, the price would have been the value of the net assets (the value of tangible assets and certain intangibles such as patents less liabilities) plus some amount to represent the capitalized earning power of the business. Where these future earnings were lessened through a loss of market share, the value of the business accordingly decreased. This would be an injury to capital caused by a loss of profits; attributing the recovery to a loss of profits would leave the true injury uncompensated.

A similar analysis was used by the court in Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912 (6th Cir. 1932):

> [T]he true measure of damages was compensation to be determined by ascertaining how much less valuable its business was by reason of the wrongful acts of [the defendant] . . . . Injury to its business of course means injury to its financial standing, credit, reputation, good will, capital, and other possible elements. Profits were one of the chief indications of the worth of the business; but the usual earnings before the injury, as compared with those afterward, were only an evidential factor in determining actual loss and not an independent basis for recovery.

Id. at 913.

25. Rev. Proc. 67-33, 1967-2 CUM. BULL. 659.

26. *Id.* §§ 4.02, 4.03; Rev. Rul. 68-378, 1968-2 CUM. BULL. 335. The inclusion of the excess over adjusted basis in gross income is only to the extent that the recovery represents an earlier tax benefit. *See* Rev. Proc. 67-33, § 4.03, 1967-2 CUM. BULL. 659, 661; INT. REV. CODE OF 1954, § 111; Treas. Reg. § 1.111-1 (1960).

27. 15 U.S.C. § 15 (1970).

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tory.[28] The punitive two-thirds of the treble damages was tax exempt until 1955 when the Supreme Court, in *Commissioner v. Glenshaw Glass Co.*,[29] analogized the damages received in an antitrust action to those received for a personal injury: "Damages for personal injury are by definition compensatory only," but "[p]unitive damages . . . cannot be considered a restoration of capital for taxation purposes."[30]

When the character of treble damages is considered, a problem with treating treble damage recoveries as ordinary income arises. Numerous antitrust cases have held that the provision for trebling damages is not punitive, but rather remedial and compensatory.[31] In *Maltz v. Sax*,[32] the Court of Appeals for the Seventh Circuit said that "[t]his grant to persons damaged—a cause of action for treble damages—was for the purpose of multiplying the agencies which would help enforce the [Sherman Act] and therefore make it more effective."[33] The use of treble damages to encourage private antitrust suits and to encourage private plaintiffs to "bear a considerable amount

28. Clayton Act § 4, 15 U.S.C. § 15 (1970) reads,

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

29. 348 U.S. 426 (1955).

30. *Id.* at 432 n.8. Although *Glenshaw Glass* arose from damages received as a result of an antitrust action, its results are not so limited. The non-taxable status of all punitive awards was changed.

The post-*Glenshaw Glass* cases have steadfastly followed this approach. *E.g.*, Thomson v. Commissioner, 406 F.2d 1006, 1008 (9th Cir. 1969), *aff'g* 34 P-H Tax Ct. Mem. 1317 (1965); William Basle, 26 P-H Tax Ct. Mem. 635 (1957), *aff'd per curiam*, 256 F.2d 581 (3d Cir. 1958); John E. Bloom, 25 P-H Tax Ct. Mem. 184 (1956). *See also* Commissioner v. Obear-Nester Glass Co., 217 F.2d 56 (7th Cir. 1954), *cert. denied*, 348 U.S. 982 (1955) (foreshadowing the result in *Glenshaw Glass*).

31. An action under Section 7 of the Sherman Act, which was replaced by Section 4 of the Clayton Act, is not an action for a penalty or forfeiture, but is one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect. City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23, 28-29 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). The following cases reached a similar result under Section 4 of the Clayton Act: Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747, 756 (S.D.N.Y. 1953); Electric Theater Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937, 942 (W.D. Mo. 1953); Momand v. Twentieth Century-Fox Film Corp., 37 F. Supp. 649, 657 (W.D. Okla. 1941). *Contra*, Acme Precision Prods., Inc. v. American Alloys Corp., 347 F. Supp. 376, 380 (W.D. Mo. 1972); Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176, 182 (E.D. Tenn. 1940), *aff'd*, 123 F.2d 1016 (6th Cir. 1941). *See also* Herald Co. v. Harper, 410 F.2d 125, 130-31 (8th Cir. 1969), holding that even if the treble damage provision was punitive in nature that would not be sufficient to label it a criminal statute and make available constitutional safeguards as in criminal prosecutions.

Whereas recent cases have been quick to find the treble damage provisions a penalty, great weight should be given to the older cases which were decided in the same social, economic and political melieu out of which the Sherman and Clayton Acts arose.

32. 134 F.2d 2 (7th Cir. 1943).

33. *Id.* at 4.

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of the burden and expense of enforcement and thus save the Government time and money"[34] seems to be reinforced by the fact that the remedy of treble damages is not available to the government.[35]

The view that treble damages are remedial in nature is supported by the fact that the antitrust plaintiff usually recovers far less than his claimed damages, even after the jury award has been increased threefold.[36] Private antitrust actions are almost certain to be as protracted as they are expensive. Even where the government has previously obtained a conviction or judgment against the violator,[37] the private claimant must still establish the extent of its damages. In the usual situation, the extent of the damage incurred and its effect of the plaintiff's future business are extremely difficult either to discern or to prove.[38] In short, the recovery is likely to be far less than the actual damage sustained, even after consideration of trebled damages.[39]

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34. S. REP. No. 619, 84th Cong., 1st Sess. 2-3 (1955), *cited in* Noall & Troxell, *Tax Aspects of Antitrust Proceedings*, 18 TAX L. REV. 213, 234 (1963).

35. Clayton Act, § 4A, 15 U.S.C. § 15(a) (1970). The Government may only recover its actual damages.

36. Lee Loevinger, who later became the Assistant Attorney General in charge of the Antitrust Division, summarized the plaintiff's risks and hardships that lead to the inadequate recovery:

> As a practical matter, a business victim of antitrust violation cannot undertake any action for vindication of his rights unless he is willing and able to wait at least two or three years—and often longer—for the decision of his case, is able to advance at least several thousand dollars in probable costs of preparing and presenting his case, and is prepared to withstand the social and economic pressures and the threat of reprisal and retaliation that not infrequently are the lot of the antitrust plaintiff.

Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 170 (1958).

37. Under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1970), a final judgment or decree in a civil or criminal action brought by the government is prima facie evidence against the defendant in subsequent litigation brought by private plaintiffs who are injured as a result of the defendant's anticompetitive conduct. This provision does not apply to consent decrees entered into by the government and the defendant prior to trial. Under this latter practice, the defendant who realizes it will lose its battle with the government can take a consent decree, thereby leaving private claimants with the burden of proving antitrust law violations. The prima facie proof aspects are illustrated in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

38. "[E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). The defendant may try to show that the plaintiff passed on any overcharges to its customers. *See* Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59 (S.D.N.Y. 1964); Note, *The Defense of "Passing On" in Treble Damage Suits Under the Antitrust Laws*, 70 YALE L.J. 469 (1961). *See generally* Donovan & Irvine, *Proof of Damages Under the Anti-Trust Laws*, 88 U. PA. L. REV. 511 (1940); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231 (1961).

39. In Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 173 (1958), the following observation was made:

> The treble damage recovery is sometimes referred to as something of a windfall for plaintiffs. In actual practice this is not the case. It is virtually never possible for a plaintiff to show by tangible evidence of the kind demanded by courts the full

Labeling treble damages as punitive is at variance with the traditional concepts of punitive damages.[40] Punitive damages are awarded to punish the tortfeasor for his wrongdoing and vary according to the outrageousness of his conduct.[41] The jury might not award punitive damages if it feels the tort was inadvertent or non-malicious, but since antitrust treble damages are automatic, inadvertence is immaterial. In some jurisdictions punitive damages may be awarded to compensate for wounded feelings or for litigation expenses.[42] All these features of punitive damages are in stark contrast to the "punitive" two-thirds of treble damages.[43] In apparent agreement, Revenue Ruling 64-224 provides:

> Actions brought under Section 4 of the Clayton Act are remedial in nature since the purpose behind this section of the statute is to provide the victim with a means of recovering damages inflicted, and not to punish the wrongdoer, in the sense of a punishment . . . .[44]

In this ruling it was held that treble damage payments made to private antitrust claimants are deductible as ordinary and necessary business expenses.[45] Since these same deductible damages are income to the recipient under the theory that they represent a penalty windfall, and since in this revenue ruling they were held not to be a penalty, this aspect of antitrust damage taxation is a classic exercise in *non sequitur*. In the ordinary scheme of things, transactions which give rise to deductions by one taxpayer create income for another,[46] but here the risk and expense of antitrust litigation is shifted to the

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amount of his damages. Further, the deprivation of business and profits over a long period of time always involves a business handicap that is never taken into account or compensated. The depreciated value of money is not taken into account. The unrecoverable expenses of litigation are always very substantial. The time and trouble of the plaintiff in pursuing his lawsuit are never considered. Finally, it is almost always necessary for a plaintiff to pay a substantial part of any recovery for legal expenses and attorneys' fees which are not fully compensated by any court award. When all of these factors are taken into account, it would be a rare and fortunate plaintiff who came out of an antitrust suit with a net recovery amounting to full compensation for his actual damages.

40. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-14 (1971); 22 AM. JUR. 2d *Damages* §§ 236-42 (1965).

41. *See, e.g.*, Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953).

42. *See, e.g.*, Wright Titus, Inc. v. Swafford, 133 S.W.2d 287, 294-95 (Tex. Civ. App.—Austin 1939, writ dism'd jdgmt cor.).

43. Treble damage claims are also assignable. Momand v. Twentieth Century-Fox Film Corp., 37 F. Supp. 649, 651-52 (W.D. Okla. 1941); *see* Paul v. United States, 30 Am. Fed. Tax. R.2d 5724 (S.D. Ill. 1972).

44. 1964-2 CUM. BULL. 52, 54. Payments made to the government under Section 4A of the Clayton Act, however, are punitive damages, not restitution. *Id.* at 54.

45. *Id.* *But see* INT. REV. CODE OF 1954, § 162(g) (disallowing the deductibility of two-thirds of treble damages where defendant has been convicted of a criminal violation of the antitrust laws).

46. Depreciation deductions, for example, do not give rise to income because there is no second party receiving anything. But the converse does not always hold true. Amounts expended that represent income to the recipient may not be deductible by the party making the payment, such as some legal expenses. An expense that may not be deducted by the client is nonetheless income to the lawyer.

injured party by the very logic used to aid the violator. It would indeed be relevant to ask who is being penalized.

The provisions of Revenue Ruling 64-224 have been suggested as the basis for an argument that treble damages should not be taxed to the recipient, at least where the compensatory portion represents a return of capital.[47] This view is supportable if *Glenshaw Glass* is read narrowly: where the recovery was for lost profits, the entire recovery should be ordinary income, but where the injury inflicted resulted in a return of capital, the trebled recovery should be tax-free.[48] The Tax Court has not agreed with this narrow reading of *Glenshaw Glass*.[49] The treatment of treble damages as punitive and their taxation as ordinary income will probably continue until the harsh rule of *Glenshaw Glass* is overruled by the courts or abrogated by Congress.

Section 186

Section 186 was added to the Code as part of the Tax Reform Act of 1969[50] to provide some relief to antitrust plaintiffs.[51] Under this provision, a deduction is available to offset the unrecovered net operating losses occasioned by the defendant's wrongful conduct.[52] In the tax disposition of the treble damages, however, only one-third of the recovery is considered to be compensatory and therefore eligible for deduction under section 186.[53] The other two-thirds, the so-called punitive portion, is ordinary income and fully taxable,[54] notwithstanding the possibility that the compensable portion is less than the unrecovered losses.

There are two most critical parts of section 186. First is the necessity that there be an unrecovered net operating loss, because injuries inflicted on the taxpayer which cause merely a loss of profits are inadequate unless a net operating loss results.[55] The other is the requirement that the recovery be pursuant to a civil action filed against the violator making the payment.[56]

47. Boland, *Income Tax Treatment of Antitrust Damages*, 22 TAX L. REV. 47, 66 (1965).

48. Koenig, *Federal Taxation of Private Antitrust Recovery*, 13 STAN. L. REV. 264, 279 (1961).

49. Ralph Freeman, 33 T.C. 323 (1959); Chalmers Cullins, 24 T.C. 322 (1955); *cf.* Rev. Rul. 58-418, 1958-2 CUM. BULL. 18.

50. Act of Dec. 30, 1969, Pub. L. No. 91-172, § 904, 83 Stat. 711.

51. INT. REV. CODE OF 1954, § 186. *See generally* 34 AM. JUR. 2d *Federal Taxation* ¶¶ 5263-64, at 216-17 (1974); Taggart, *Fines, Penalties, Bribes and Damage Payments and Recoveries*, 25 TAX L. REV. 611, 628-37 (1970). The Taggart article was published before the regulations for section 186 were promulgated.

52. The wrongful conduct is not limited to antitrust actions, but includes patent infringement, breach of contract and breach of fiduciary duty. INT. REV. CODE OF 1954, § 186(b).

53. Treas. Reg. § 1.186-1(c)(1) (1972).

54. Treas. Reg. § 1.61-14(a) (1965).

55. INT. REV. CODE OF 1954, § 186(a).

56. *Id.* § 186(b)(3). In Treas. Reg. § 1.186-1(c)(3)(i) (1972), an "action" for

This latter criterion seems out of place because it precludes settlements made before the institution of an action. Consequently, the antitrust plaintiff must go through the motions and expense of a possibly needless lawsuit. Public policy, which favors settlements in order to avoid increasing the burdens of a crowded court docket, is thus thwarted by this requirement.

The expenses of recovery, which necessarily include legal expenses, must be allocated between the punitive and compensatory portions of the recovery.[57] The recovery expenses attributable to the deductible compensable injury are offset against the section 186 deduction chiefly because any other treatment would result in a double deduction.

Allocation of Damages in Settlements

When an out of court settlement is made between the parties to an antitrust action, the settlement usually recites an allocation of the damages between an injury to the plaintiff's goodwill, loss of profits, and punitive damages.[58] Neither the Commissioner nor the courts is bound by the allocation in the settlement.[59] Similarly, if the settlement fails to make an allocation, one will be made by the court,[60] and it will be overturned on appeal only where it is shown that the allocation made by the lower court was "clearly erroneous."[61]

In determining the reasonableness of the allocation and in making an initial allocation if none was made by the parties, the court will look both to the pleadings filed in the antitrust suit[62] and to the record of the trial itself.[63]

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the purposes of triggering section 186 is "considered as instituted upon completion of service of process . . . upon all defendants who pay or incur an obligation to pay a compensatory amount."

57. Treas. Reg. § 1.186-1(c)(4) (1972). In a treble damage action, one-third of the recovery will be considered to be the compensatory amount. *Id.* § 1.186-1(c)(1). Thus one-third of the expenses of recovery will be allocated to the compensatory amount.

58. *See, e.g.*, William Basle, 26 P-H Tax Ct. Mem. 635 (1957), *aff'd per curiam*, 256 F.2d 581 (3d Cir. 1958).

59. William Basle, 26 P-H Tax Ct. Mem. 635, 639 (1957), *aff'd per curiam*, 256 F.2d 581 (3d Cir. 1958). But if the settlement provisions are such that the tax effects will be materially different for the parties where the allocations are changed, the Commissioner will be hard pressed to challenge the allocation. *See* Ullman v. Commissioner, 264 F.2d 305, 308 (2d Cir. 1959) ("[t]ax avoidance desires . . . are ordinarily antithetical, forcing them, in most cases, to agree upon a treatment which reflects the parties' true intent . . . .").

60. Glenshaw Glass Co., 18 T.C. 860, 871 (1952), *aff'd*, 211 F.2d 928 (3d Cir. 1954), *rev'd on other grounds*, 348 U.S. 426 (1955).

61. Thomson v. Commissioner, 406 F.2d 1006, 1010 (9th Cir. 1969), *aff'g* 34 P-H Tax Ct. Mem. 1317 (1965). The allocation is arbitrary and erroneous if there is a clear demonstration of capital injury, coupled with damages received for lost profits, and the Tax Court treated the full recovery as ordinary income because there was no allocation in the settlement. Durkee v. Commissioner, 162 F.2d 184, 187 (6th Cir. 1947).

62. Paul v. United States, 30 Am. Fed. Tax R.2d 5724, 5725 (S.D. Ill. 1972); Chalmers Cullins, 24 T.C. 322, 328 (1955); Glenshaw Glass Co., 18 T.C. 860, 868

A complaint alleging only lost profits will not support a stipulation in the settlement that all or part of the payment is made to compensate the plaintiff for an injury to goodwill.[64] Neither will the mere allegation that the plaintiff has sustained an injury to its goodwill uphold a settlement based at least partly on that claim.[65] In short, the taxpayer must be prepared to show that the injury to goodwill was actually inflicted and that the settlement includes a sum to recompense that injury.

The Tax Court had formerly attributed two-thirds of the recovery to taxable punitive damages if there was no allocation in the settlement; the balance was allocated between lost profits and capital recovery.[66] But in *Ione Thomson*,[67] where a claim was made in the antitrust complaint for both lost profits and injury to the business, the Tax Court, apparently convinced that there was a valid claim for the injury to the business, found half of the compensatory portion of the recovery to be lost profits and half to be a nontaxable return of capital.[68] The result has been changed by Revenue Procedure 67-33.[69] The taxpayer is now aided by a presumption that no portion of the settlement is for punitive damages where the settlement amount is less than the compensatory damages alleged in the antitrust suit.[70]

(1952), *aff'd*, 211 F.2d 928 (3d Cir. 1954), *rev'd on other grounds*, 348 U.S. 426 (1955). *See also* Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912, 913 (6th Cir. 1932); *cf.* Rev. Rul. 58-418, 1958-2 CUM. BULL. 18.

In Abraham Moulton, 31 P-H Tax Ct. Mem. 624, 628 (1962), the Tax Court held:

> [W]here an unallocated amount is received . . . in settlement of a legal action, the determination as to the purpose of the payment received is controlled in the absence of proof to the contrary by the nature of the claim made by the taxpayer which was settled by the payment and the actual basis of recovery.

63. Sager Glove Corp. v. Commissioner, 311 F.2d 210, 211 (7th Cir. 1962), *cert. denied*, 373 U.S. 910 (1963) (settlement was within $10 of amount corporation's president testified was loss in profits); *cf.* Abraham Moulton, 31 P-H Tax Ct. Mem. 624, 627 (1962) (limitations had run and barred the action; settlement held to be nuisance value of the suit).

64. *Cf.* Nicholas W. Mathey, 10 T.C. 1099, 1104-05 (1948) (recovery for patent infringement where theory of complaint was lost profits; taxpayer argued unsuccessfully to Tax Court that recovery was a return of capital). *But cf.* Peter Kucera, 20 P-H Tax Ct. Mem. 262, 265 (1951) (settlement in patent infringement suit held to be additional payments for sale of patents taxable as capital gain despite claim for treble damages in suit).

65. Sager Glove Corp. v. Commissioner, 311 F.2d 210, 211 (7th Cir. 1962), *cert. denied*, 373 U.S. 910 (1963); Peter K. Pappas, 31 P-H Tax Ct. Mem. 1209, 1211 (1962). *See also* Estate of Carter, 298 F.2d 192 (8th Cir.), *cert. denied*, 370 U.S. 910 (1962).

66. *See* Ione Thomson, 34 P-H Tax Ct. Mem. 1317, 1322 (1965), *aff'd*, 406 F.2d 1006 (9th Cir. 1969). *But see* Abraham Moulton, 31 P-H Tax Ct. Mem. 624, 628 (1962); Peter Kucera, 20 P-H Tax Ct. Mem. 262, 265 (1951).

67. 34 P-H Tax Ct. Mem. 1317 (1965), *aff'd*, 406 F.2d 1006 (9th Cir. 1969).

68. *Id.* at 1322.

69. 1967-2 CUM. BULL. 659.

70. Rev. Proc. 67-33, § 4.01, 1967-2 CUM. BULL. 659, 661. *See* Thomson v. Commissioner, 406 F.2d 1006, 1009 (9th Cir. 1969). This presumption is only overcome by clear evidence to the contrary.

This indicates the importance of good planning in the complaint and settlement. The pleadings should emphasize the capital injury, and the settlement should stipulate that capital is sought to be recovered first, before attributing anything to lost profits or overcharges.[71] Negotiation records, conferences and correspondence which refer to and emphasize the capital injury can be valuable evidence to prove the reasonableness of the allocation.[72] For example, an entry on the company's books labeling the recovery as "injury to company's business" has proved helpful although not determinative.[73] A stipulation of some culpability on the part of the defendant might also aid the taxpayer in demonstrating capital recovery.[74] The taxpayer should take care, however, not to make the settlement allocations appear contrived.[75]

THE ANTITRUST DEFENDANT

Federal income taxes also have an impact on the defendant in an antitrust action, and, as with the plaintiff, tax and antitrust policy sometimes come into conflict.

Legal Expenses

The deductibility of the defendant's legal expenses has been in a state of considerable confusion. The Internal Revenue Service had originally ruled

71. The various causes of action against the same defendant should be clearly segregated. In one case, the complaint alleged both breach of contract and violation of state antitrust laws. The Tax Court found the action to be based on contract and not antitrust, holding the settlement to be damages for breach of contract and taxable as ordinary income. Martin Bros. Box Co., 12 P-H Tax Ct. Mem. 586, 591 (1943), *aff'd mem.*, 142 F.2d 457 (6th Cir. 1944). In such cases, separate suits might be advisable where they are not contrary to procedural rules of the forum.

72. *See* Martin Bros. Box Co., 12 P-H Tax Ct. Mem. 586, 589-90 (1943), *aff'd mem.*, 142 F.2d 457 (6th Cir. 1944). *See also* Abraham Moulton, 31 P-H Tax Ct. Mem. 624, 627 (1962), where negotiations centered primarily on treble damage aspects and consequently the recovery was held ordinary income.

The Commissioner is aided by a presumption of the correctness of his determinations. Welch v. Helvering, 290 U.S. 111, 115 (1933). This presumption carries with it the additional presumption that the receipt in issue is ordinary income. H. Liebes & Co. v. Commissioner, 90 F.2d 932, 935 (9th Cir. 1937). The Commissioner's presumptions must be overcome by legally sufficient evidence to the contrary. *See* J.M. Perry & Co. v. Commissioner, 120 F.2d 123, 124 (9th Cir. 1941). For a discussion of these presumptions and their corresponding burdens of proof in a different but analogous context see Comment, *Reasonable Needs of the Business: The Section 537 Question*, 6 ST. MARY'S L.J. 444, 466 (1974).

73. Telefilm, Inc., 21 T.C. 688, 692 (1954).

74. *See* Abraham Moulton, 31 P-H Tax Ct. Mem. 624, 627 (1962) (settlement held ordinary income; recovery was found to be "nuisance value" of suit).

75. Overcaution seems to be at least one of the reasons the taxpayer's settlement allocation was not sustained in William Basle, 26 P-H Tax Ct. Mem. 635 (1957), *aff'd per curiam*, 256 F.2d 581 (3d Cir. 1958). The taxpayer had not filed suit, and would not settle except on the condition that three-fourths of the recovery was allocated to goodwill. *Id.* at 636-37.

that the legal fees paid by the antitrust violator in the unsuccessful defense of a criminal action were deductible as ordinary and necessary business expenses.[76] The Service subsequently reversed itself,[77] however, holding that counsel fees paid to defend a criminal antitrust prosecution were not deductible on the grounds of public policy. This was later amplified by a holding that the deductibility of legal expenses incurred in the unsuccessful defense of civil claims brought by the government under Section 4A of the Clayton Act or under the Federal False Claims Act would frustrate public policy.[78]

The theory on which these rulings were based—that the allowance of the deduction would be against public policy—was abruptly upset in *Commissioner v. Tellier.*[79] There the Supreme Court allowed the deduction of legal expenses incurred by a securities underwriter in the unsuccessful defense of a prosecution for criminal violation of the securities and mail fraud laws. Mr. Justice Stewart, writing for a unanimous Court, said,

> No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense. That is not "proscribed conduct." It is his constitutional right. . . . [I]t is a basic of our public policy that a defendant in a criminal case have counsel to represent him.[80]

In acquiescence to the *Tellier* case, the Internal Revenue Service adopted the position that all legal expenses incurred in the defense either of a criminal prosecution for violation of the antitrust laws or of a civil claim by the United States would be deductible.[81]

Deductibility of Damages Paid

The deductibility of damages paid by the antitrust defendant, like the deductibility of legal expenses, has had a vacillating history. Early cases indi-

76. G.C.M. 24377, 1944 CUM. BULL. 93. G.C.M. 24377, and the cases upon which it relied, is discussed in depth in Noall & Troxell, *Tax Aspects of Antitrust Proceedings,* 18 TAX L. REV. 213, 213-25 (1963).

77. Rev. Rul. 62-175, 1962-2 CUM. BULL. 50. G.C.M. 24377 was held to have misread the cases upon which it relied. 1962-2 CUM. BULL. at 51. Since these underlying cases involved the unsuccessful defense of civil actions, it is implicit in Rev. Rul. 62-175 that legal expenses incurred in defending civil actions are deductible. It is also implicit in Rev. Rul. 62-175 that the expenses of a successful defense of either a criminal or civil action are deductible.

78. Rev. Rul. 64-224, 1964-2 CUM. BULL. 52.

79. 383 U.S. 687 (1966).

80. *Id.* at 694.

81. Rev. Rul. 66-330, 1966-2 CUM. BULL. 44. In Central Coat, Apron & Linen Serv., Inc. v. United States, 298 F. Supp. 1201, 1206 (S.D.N.Y. 1969), a defense of criminal action under Section 1 of the Sherman Act, the expenses incurred by a corporation defending a corporate officer were also deductible. Had the legal expenses been deducted by the corporate officer himself, they would still have been deductible under the *Tellier* doctrine. If the legal expenses had been paid by the corporation on behalf of its officer, and the corporation itself was not a party to the proceedings, it is possible this would be considered a constructive dividend. The corporation would receive no de-

cated that damages paid to private claimants were properly deductible,[82] whereas damages paid to the United States were not.[83] Similarly, recoveries made by states pursuant to civil actions under state antitrust statues are nondeductible.[84] The Internal Revenue Service subsequently changed its position, however, in Revenue Ruling 64-224.[85] On the theory that such payments are remedial in nature, the damages paid to private claimants were held deductible by the defendant.[86]

Congressional liberals were outraged by what they termed a "tax giveaway," primarily on the grounds that the allowance of such deductions violated public policy.[87] The public policy objection was somewhat blunted by the Supreme Court's decision in *Commissioner v. Tellier*.[88] Although the issue there was the deductibility of legal expenses resulting from a criminal conviction for securities fraud, a broad reading of the opinion seems to indicate the correctness of Revenue Ruling 64-224. The following language is particularly significant:

> Only where the allowance of a deduction would 'frustrate sharply defined national or state policies proscribing particular types of conduct' have we upheld its disallowance. . . . Further, the 'policies frustrated must be national or state policies evidenced by some *governmental* declaration of them.'[89]

The Court indicated that this "governmental declaration" might be evidenced by a specific disallowance of the deduction by an appropriate Code provision.[90] This statement was tied to a discussion of the proposed legislation

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duction, but the officer would have income and a deduction in the same amount. *See* G.C.M. 24377, 1944 CUM. BULL. 93, "To the extent that such expenses represent a payment on behalf of the individual defendants, they do not constitute ordinary and necessary business expenses."

82. *See, e.g.*, International Shoe Co., 38 B.T.A. 81 (1938); *cf.* I.T. 3627, 1943 CUM. BULL. 111 (treble damages paid to buyer under Emergency Price Control Act are deductible).

83. *Cf.* Standard Oil Co. v. Commissioner, 129 F.2d 363 (7th Cir.), *cert. denied*, 317 U.S. 688 (1942) where the court remarked, "[W]e think it tolerably safe to say that torts which are committed against the government and which are also violative of the criminal statutes may not furnish the basis of deduction." *Id.* at 371.

84. Universal Atlas Cement Co., 9 T.C. 971 (1947), *aff'd*, 171 F.2d 294 (2d Cir. 1948), *cert. denied*, 336 U.S. 936 (1949) (Texas antitrust statute).

85. 1964-2 CUM. BULL. 52. Amounts paid to the United States are not deductible. *Id.* at 54.

86. *Id.* at 54.

87. *See* discussion in Boland, *Income Tax Treatment of Antitrust Damages*, 22 TAX L. REV. 47, 52-54 (1966). Two of the most outraged were Senator Philip A. Hart, Chairman of the Senate Antitrust and Monopoly Subcommittee, and Representative Emanuel Celler, Chairman of the House Committee on the Judiciary and its antitrust subcommittee.

88. 383 U.S. 687 (1966).

89. *Id.* at 694 (Court's emphasis).

90. *Id.* at 693. "[D]eduction of expenses falling within the general definition of § 162(a) may, to be sure, be disallowed by specific legislation, since deductions 'are a matter of grace and Congress can, of course, disallow them as it chooses.'"

to limit the deduction of treble damage payments under the antitrust laws,[91] and the combined interpretation of these statements leads to the inference that antitrust damage payments do not offend "sharply defined public policy."

The debate was resolved somewhat by the Tax Reform Act of 1969, which added the new section 162 (g) to the Code.[92] The purpose of the section is to deny a deduction of two-thirds of the treble damages for "hard-core violations."[93] Such hard-core violations are those in which the defendant has pled guilty or nolo contendere, or is found guilty of criminal violations of the antitrust laws.[94]

There are five critical points in section 162(g). The first is the requirement of a criminal conviction, without which the statute does not consider the violation to be "hard-core." The conviction need not be final, but if the prosecution is discontinued or the defendant is ultimately acquitted, then a deduction for damages paid is allowed.[95] Nor does the conviction have to be previous in time to the damage payments sought to be deducted,[96] and the defendant gains no tax advantage by paying off private claimants before the government begins criminal action. The Justice Department, which determines whether or not criminal proceedings are to be instituted, can thus effectively control the percentage of antitrust damage settlements that will be deductible.[97]

The second important point is the inclusion of nolo contendere pleas in the statute. The main advantage of a plea of no contest is that it limits the finding of defendant's guilt to that prosecution only and does not constitute an admission for subsequent litigation.[98] It is also not prima facie evidence

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91. *Id.* at 693 n.10.

92. Tax Reform Act of 1969, Pub. L. No. 91-172, § 902, 83 Stat. 711. The forerunner of section 162(g) was introduced by Senator Philip A. Hart in 1965 as a reaction to Rev. Rul. 64-224. See discussion of Senator Hart's proposal in Boland, *Income Tax Treatment of Antitrust Damages*, 22 TAX L. REV. 47, 52-62 (1970). *See also* Wright, *A Tax Formula to Restore the Historical Effects of the Antitrust Treble Damage Provisions*, 65 MICH. L. REV. 245 (1966).

93. S. REP. No. 91-552, 91st Cong., 1st Sess. 274, 1969-3 CUM. BULL. 597.

94. INT. REV. CODE OF 1954, § 162(g); Treas. Reg. § 1.162-22(a) (1972).

95. Treas. Reg. § 1.162-22(b) (1972).

96. *Id.* § 1.162-22(a)(2).

97. It has been pointed out that it is unlikely that the tax consequences to the violator would influence the Justice Department one way or the other in determining whether or not criminal indictments are to be sought. *See* Taggart, *Fines, Penalties, Bribes and Damage Payments and Recoveries*, 25 TAX L. REV. 611, 622 (1970).

98. *See, e.g.*, Dalweld Co. v. Westinghouse Elec. Corp., 252 F. Supp. 939, 941 (S.D.N.Y. 1966). In A.B. Dick Co. v. Marr, 95 F. Supp. 83, 101 (S.D.N.Y. 1950), the court said,

> The general rule is that a plea of nolo contendere is no more than an implied admission solely for the purpose of the case in which the plea is made, and is not admissible as an admission in a subsequent civil suit based on the same conduct.

See generally Annot., 18 A.L.R.2d 1287 (1951).

to be used by a private claimant.[99] Thus the nolo contendere plea is popular because it saves both the government and the defendant time and expense in conducting a criminal prosecution and does not have the additional consequences of a guilty plea or conviction. Whether or not the tax consequences now raised by a plea of nolo contendere will be determinative of its future remains to be seen.

The new Code section also covers damage payments made to settle violations related to those for which the defendant was convicted.[100] The exact perimeters of this area of "related violations" are vague. The regulations seem to require not only a criminal conviction but also an injunction ordering the defendant to stop its anticompetitive practice.[101] If the anticompetitive practice said to have injured a private claimant would fall within the scope of the injunction, then the violation is a related violation within the meaning of section 162(g).[102]

The fourth vital point of section 162(g) is that the disallowance of the deduction applies to settlements as well as judgments.[103] This treatment will apply even though the antitrust cause of action was "dismissed or otherwise disposed of."[104] Section 162(g) has been criticized because the cost of a settlement will be increased by the tax effect, so the incentive to settle the suit will be lessened.[105] Further, since two-thirds of the settlement will be allocated to treble damages by the statute even though the settlement will often be less than the compensatory damages claimed, the wisdom of this mandatory allocation must be questioned.[106]

The final essential element of the new Code provision is the requirement of filing an action.[107] The critical factor on which the allowance or disallow-

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99. Clayton Act § 5(a), 15 U.S.C. § 16(a) (1970).

100. INT. REV. CODE OF 1954, § 162(g)(1), (2).

101. Treas. Reg. § 1.162-22(c)(1) (1972).

102. *Id.* § 1.162-22(c)(2). Apparently the determination of related violations will have to be made on a case-by-case basis. *See* Taggart, *Fines, Penalties, Bribes and Damage Payments and Recoveries*, 25 TAX L. REV. 611, 627 (1970).

103. INT. REV. CODE OF 1954, § 162(g)(1), (2).

104. Treas. Reg. § 1.162-22(d) (1972). A related violation may even occur in a period barred by limitations. *See id.* § 1.162-22 Ex. 2.

105. *See* Boland, *Income Tax Treatment of Antitrust Damages*, 22 TAX L. REV. 47, 61-62 (1966). *But see* Taggart, *Fines, Penalties, Bribes and Damage Payments and Recoveries*, 25 TAX L. REV. 611, 625-26 (1970); Wilberding, *New Tax Considerations Injected into Antitrust Treble Damage Proceedings*, 19 U. KAN. L. REV. 441, 454 (1971).

106. If the antitrust defendant were allowed to deduct only one-third of its settlement as the compensatory portion, the courts might consider this to mean that only one-third of the plaintiff's recovery represents restitution and the remainder is taxable punitive damages, even where the total award was less than the plaintiff's provable damages. The net result of such a rule would be to penalize the plaintiff for the defendant's criminal conduct. No cases have been discovered which involve section 162(g), and its effect on the plaintiff remains to be seen.

107. "[N]o deduction shall be allowed . . . of any amount paid . . . in settlement of *any action* brought under [the Clayton Act] . . . ." INT. REV. CODE OF 1954, § 162(g)(2) (emphasis added). Presumably, the requirements of an action would be the

ance of the deduction depends is the filing of a suit by the plaintiff. If the plaintiff sues, the deduction is lost. This provision, then, encourages prompt settlement of both the claimant's injury and unmeritorious claims brought by unscrupulous claimants.[108]

The legislative history gives no clue to the reason for the action requirement,[109] and the logic of this requirement is obscure when viewed in conjunction with section 186, enacted as a companion to section 162(g). If the plaintiff is to be benefited by the section 186 deduction, it must file suit or lose the deduction. If this suit will cause the defendant to forfeit its deduction by operation of section 162(g), then the parties have reached a deadlock that can properly be resolved only if the defendant offers to settle for an amount great enough to offset the plaintiff's loss of its section 186 deduction in exchange for the plaintiff's agreement not to file suit. To this extent, sections 162(g) and 186 are in conflict.

Consequences of Criminal Proceedings

A criminal conviction leads to tax consequences in addition to those of section 162(g). Since the decision in *Tank Truck Rentals, Inc. v. Commissioner*,[110] it has been clear that deductions for fines paid for violation of criminal statutes, even if inadvertent, will be disallowed on public policy grounds. Thus, fines paid by corporations for antitrust violations are nondeductible, as are those paid by individual defendants.[111] Payments by the corporation of its officers' fines are not deductible by the corporation as additional compensation, but constitute a constructive dividend.[112]

State Antitrust Laws and Actions Thereunder

As an outgrowth of the trust busting era which saw the passage of the Sherman, Clayton and Federal Trade Commission Acts, many states enacted their

same as those of the companion section, section 186. *See* Treas. Reg. § 1.186-1(c)(3)(i) (1972).

108. This potential aspect of section 162(g) has been characterized as blackmail:

> While it may encourage early settlements, it could also lead to blackmail of sorts, as potential defendants would be most anxious to prevent the filing of complaints, even at the sacrifice of judicial supervision and the development of a formal record on which to negotiate an equitable settlement.

Boland, *Income Tax Treatment of Antitrust Damages*, 22 TAX L. REV. 47, 60 (1966). *See also* Taggart, *Fines, Penalties, Bribes and Damage Payments and Recoveries*, 25 TAX L. REV. 611, 621 (1970).

109. *See* S. REP. No. 91-552, 91st Cong., 1st Sess. 273-74, 1969-3 CUM. BULL. 596-97.

110. 356 U.S. 30 (1958).

111. Central Coat, Apron & Linen Serv., Inc. v. United States, 298 F. Supp. 1201, 1207 (S.D.N.Y. 1969) (fine imposed under Sherman Act, section 1); Columbus Bread Co., 4 B.T.A. 1126 (1926) (fine imposed under state antitrust laws).

112. Central Coat, Apron & Linen Serv., Inc. v. United States, 298 F. Supp. 1201, 1202 (S.D.N.Y. 1969). This would be the result even if the corporation were unindicted.

own antitrust laws.[113] Most are modeled after their federal counterparts, so fines paid to the state by the defendant had been held nondeductible even before the *Tank Truck Rentals* decision.[114]

Similarly, civil penalties paid to the states are also disallowed on public policy grounds. In *Universal Atlas Cement Co.*,[115] the State of Texas brought a civil suit alleging violation of its antitrust provisions. The defendant denied its guilt but entered into a compromise agreement to settle the action in order to conserve time and expense and to avoid negative publicity. The settlement and the subsequent judgment specifically recited that they were not to be construed as an admission of guilt.[116] Despite these stipulations, the Tax Court disallowed the claimed deduction.[117]

A broad reading of Revenue Ruling 64-224[118] would seem to reinforce the decision in *Universal Atlas Cement.* Payments made to the United States for violation of federal antitrust laws were held non-deductible in that revenue ruling on the grounds that they are "in effect punishment for injury to the public occasioned by the violation of law."[119] Payments made to a state pursuant to its antitrust statutes are clearly punishment; hence the language of Revenue Ruling 64-224 would seem to include them.

There is also a question concerning the deductibility of legal expenses incurred as a result of actions by the states under their antitrust laws. These expenses were held deductible in *Longhorn Portland Cement Co.*,[120] but the Internal Revenue Service has since announced it will no longer follow that case.[121] The Commissioner's nonacquiescence would now seem to be im-

113. *E.g.*, TEX. BUS. & COMM. CODE ANN. §§ 15.01-15.34 (1968).

114. Columbus Bread Co., 4 B.T.A. 1126 (1926) (fines, penalties and court costs incurred in violation of Ohio antitrust statute).

115. 9 T.C. 971 (1947), *aff'd*, 171 F.2d 294 (2d Cir. 1948), *cert. denied*, 336 U.S. 936 (1949).

116. Section VII of the settlement provided:

> This agreement is made by the parties hereto solely and only for the purpose of compromising and settling the matters involved in this suit, by and between the State of Texas, as plaintiff, and the defendants herein named, and it is expressly understood and agreed as a condition hereof, that neither this agreement nor the judgment to be entered thereon, nor any clause or provision of said agreement or judgment, shall constitute or be construed to be an admission or estoppel as against the various defendants herein as evidencing or indicating in any degree an admission of truth or correctness of the allegations in plaintiff's petitions contained in whole or in part.

Id. at 973.

117. *Id.* at 976; *accord*, Commissioner v. Longhorn Portland Cement Co., 148 F.2d 276 (5th Cir)., *cert. denied*, 326 U.S. 728 (1945); Robert S. LeSage, 16 P-H Tax Ct. Mem. 1079, 1083 (1947), *rev'd on other grounds*, 173 F.2d 826 (5th Cir. 1949) (guilt denied in both answer and settlement; Texas antitrust laws).

118. 1964-2 CUM. BULL. 52.

119. *Id.* at 54.

120. 3 T.C. 310 (1944), *rev'd on other grounds*, 148 F.2d 276 (5th Cir.), *cert. denied*, 326 U.S. 728 (1945). *See generally* Noall & Troxell, *Tax Aspects of Antitrust Proceedings*, 18 TAX L. REV. 213, 217-19 (1963).

121. The Commissioner initially acquiesced on the deductibility of the legal expenses,

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material, however, in light of the *Tellier* decision.[122] Further, Revenue Ruling 66-330, which held that legal expenses resulting from criminal prosecutions by the United States are deductible, may be read to include state prosecutions.[123]

DIVESTITURES PURSUANT TO ANTITRUST ORDERS

In order that the anticompetitive practice complained of may be more effectively abated, courts have the power to order the defendant to divest itself of certain assets or subsidiaries.[124] Examples of such orders include requiring the defendant to sell products it formerly only leased[125] and forcing the defendant to divest itself of stock in another corporation.[126]

The repeated contention that such court ordered divestitures are involuntary conversions has been rejected.[127] Such a court order lacks the element of a taking for public use without consent on payment of a just compensation.[128] If an involuntary conversion were to result from the forced sale, the gain would be a capital gain and taxable at a lower rate.[129]

Divestiture of stock by the defendant can have a devastating effect. The defendant cannot ordinarily sell a block of stock it holds in another corporation without depressing the market for that security. The alternative, therefore, is to distribute the stock to its shareholders as a dividend in kind. The fair market value of the stock on the date of distribution must be included in gross income by the recipient.[130] By way of illustration, assume X

1944 CUM. BULL. 18, but has since withdrawn his acquiescence and now nonacquiesces. 1964-2 CUM. BULL. 8.

122. Commissioner v. Tellier, 383 U.S. 687 (1966).

123. 1966-2 CUM. BULL. 44.

124. *See* Clayton Act §§ 15, 16, 15 U.S.C. §§ 25, 26 (1970).

125. *See, e.g.*, United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 352 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

126. *See, e.g.*, United States v. E.I. duPont de Nemours & Co., 366 U.S. 316 (1961).

127. Norton Co. v. United States, 196 F. Supp. 129, 133 (D. Mass. 1961); Rev. Rul. 58-11, 1958-1 CUM. BULL. 273 (divestiture of stock pursuant to antitrust order); Rev. Rul. 55-717, 1955-2 CUM. BULL. 298 (divestiture of stock pursuant to state antitrust laws).

Legislation was introduced in 1962 which would have included court-ordered divestitures in the definition of involuntary conversions as that term is used in section 1033. Congress adjourned before the Sentate could act on the bill. However, the bill, as introduced, would have been of limited assistance to the violator because of the requirement that the antitrust violation be inadvertent; further, it was required that the proceeds of the forced sale be reinvested in similar property. This bill and its provisions is discussed in Noall & Troxell, *Tax Aspects of Antitrust Proceedings*, 18 TAX L. REV. 213, 250 (1963).

128. *See* Rev. Rul. 58-11, 1958-1 CUM. BULL. 273. *See also* INT. REV. CODE OF 1954, §§ 1033, 1231.

129. INT. REV. CODE OF 1954, § 1231(a). The depreciation taken on the asset, if any, would be subject to the recapture provisions of section 1245.

130. *Id.* §§ 301(c), 316.

Corporation has purchased 15 percent of the outstanding stock of Y Corporation, and that both are large, publicly traded corporations. At the time the Y stock was acquired, its market price was $60 per share. Some time later the United States brings an antitrust action against X Corporation, alleging that competition has been restrained by the acquisition of Y stock, and in a consent decree X Corporation agrees to distribute its Y stock to X shareholders. When the distribution is made, the Y stock has appreciated in value to $90. The shareholders of X Corporation must include in their gross income $90 for each share of Y received. In order to afford the additional taxes X shareholders must pay because of their unsolicited receipt of Y shares, they may have to sell some or all of the Y stock. If a large amount of stock is involved, the market price of both X and Y issues may be substantially depressed. The burden of the antitrust laws may thereby be shifted from X Corporation to Y Corporation and their respective stockholders. This situation occurred in 1961 when duPont was ordered to sell all of its General Motors stock.[131] Because of the possible consequences to the nation's economy, Congress enacted special legislation to allow the dividend to be treated as a return of capital rather than as a taxable dividend.[132] Although not specifically so limited, in practice that provision applies only to the duPont-General Motors transaction, and subsequent stock divestiture orders will not have the benefit of this Code section.[133]

There are also important tax consequences when the defendant is ordered to sell property it previously only leased. In *Continental Can Co. v. United States*,[134] the Court of Claims held the gain on the sale of canning equipment pursuant to a court order was taxable as ordinary income rather than as capital gain. In a vigorous dissent the minority felt that since the property was not held for sale in the ordinary course of business, capital gains treatment

131. United States v. E.I. duPont de Nemours & Co., 366 U.S. 316 (1961).

132. INT. REV. CODE OF 1954, § 1111.

133. Section 1111 applies only in those situations where an action was instituted by the government prior to 1959 and a decree entered after 1960. *Id.* § 1111(d).

134. 422 F.2d 405 (Ct. Cl.), *cert. denied*, 400 U.S. 819 (1970). The same result was reached on similar facts in American Can Co. v. Commissioner, 317 F.2d 604 (2d Cir. 1963), *cert. denied*, 375 U.S. 993 (1964). The dissenters in *Continental Can* distinguished *American Can* because in the latter all machines formerly leased were repossessed and returned to inventory before being sold and it reported all profits from machines sold as capital gains. Continental Can Company, however, allowed lessees to retain possession and never transferred such equipment to inventory. Continental Can Co. v. United States, 422 F.2d 405, 421 (Ct. Cl. 1970). Continental Can Company also reported as capital gain only the profits made on those machines sold to lessees in possession before the changeover date of the consent decree. *Id.* at 408.

There was also a considerable question raised as to whether or not *American Can* had been overruled by the decision in Malat v. Riddell, 383 U.S. 569 (1966). The majority felt *American Can* had only been criticized but reached the proper result. Continental Can Co. v. United States, 422 F.2d 405, 413-14 (Ct. Cl. 1970). The dissenters, however, felt it had been overruled. *Id.* at 421.

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should have been allowed.[135] The critical points in controversy were whether or not the canning machines were property held primarily for sale to customers, and whether or not such sales were made in the ordinary course of business. If both criteria had been met, the equipment would not have constituted a capital asset; thus the gain would have been ordinary income.[136] In *Malat v. Riddell*[137] it had been held that "primarily," as used in the statute, "means 'of first importance' or 'principally'."[138] Continental Can did not hold the canning machines "principally" for sale to its customers; it only leased its machines.[139] Moreover, it would not have sold the machines had it not been ordered to do so. Because of this fact, the dissenters felt this disposition was not made in the ordinary course of business.[140] The result today might be somewhat different due to the provisions of section 1245, which treats the gain realized in excess of the adjusted basis as ordinary income to the extent of depreciation taken.[141] To the extent that the sales price exceeds the recomputed basis, however, the gain is a capital gain.[142]

PROPOSED REFORMS

It is apparent that the tax laws have contributed to the inadequacies and inequities in antitrust enforcement. The dichotomies of treatment afforded the antitrust plaintiff and defendant are based more often than not on illogical or imagined differences rather than on factual distinctions. The use of the tax laws for punishment is inconsistent with their intended function of raising revenue and redistributing wealth; indeed, this position has been adopted by the Section on Taxation of the American Bar Association.[143] If the penalties for antitrust violations are too small, then Congress should exercise its power and raise them. So that the basic thrust of the antitrust laws may be restored, Congress should reform the present tax consequences for violations.

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135. Continental Can Co. v. United States, 422 F.2d 405, 420 (Ct. Cl. 1970).

136. INT. REV. CODE OF 1954, § 1221(1).

137. 383 U.S. 569 (1966).

138. *Id.* at 572.

139. Continental Can Co. v. United States, 422 F.2d 405, 407 (Ct. Cl. 1970).

140. "[W]hen the taxpayer was forced to convey the equipment to its lessees by court decree, this was not done in the ordinary course of business but in a most extraordinary way." *Id.* at 420.

141. Although *Continental Can* was decided in 1970, it dealt with taxable year 1951, so the provisions of the Internal Revenue Code of 1939 applied.

Section 1245 property is defined as that subject to an allowance for depreciation. INT. REV. CODE OF 1954, § 1245(a)(3). Further, section 1245 cuts across and takes precedence over all other provisions of the Code. *Id.* § 1245(d). This section was not enacted until 1962, so it was of no assistance in deciding the *Continental Can* case.

142. The recomputed basis is calculated by adding all depreciation taken or other adjustments to basis made since June 30, 1963, to the adjusted basis of the asset. INT. REV. CODE OF 1954, § 1245(a)(2)(B).

143. *See* Wright, *A Tax Formula to Restore the Historical Effects of the Antitrust Treble Damage Provisions*, 65 MICH. L. REV. 245, 254 (1966).

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The Result of Glenshaw Glass Should be Reversed

Pre-*Glenshaw Glass*[144] law held that punitive damages received as the result of litigation were tax-free.[145] Since treble damages are meant to be remedial rather than punitive,[146] and were originally included in the Sherman Act to encourage private actions, it would be consistent with the basic purposes of both the antitrust and the tax laws to exempt these additional damages from taxation. Although it is not possible to estimate the revenue loss that would be associated with such an exemption, it would doubtlessly be small. Since the trebled portion of the damages do much to restore the former competitive prowess of the plaintiff, the eventual increased profits of the plaintiff will more than make up for that revenue loss.

In addition to the attacks that may be made on the reasoning in *Glenshaw Glass* and its faulty premise that treble damages are sufficiently analogous to tort punitive damages to warrant taxation as income, there is a possibly more cogent argument that *Glenshaw Glass* reached the wrong result. It is apparent that the treble damages provision of the Clayton Act was meant to encourage private litigation and make the resulting effort, expense and gamble more worthwhile. But a tax which reduces the recovery increases the effort, expense and risk factors in proportion to the plaintiff's tax bracket. If the government wants to encourage private actions, it should provide that the trebled portion of the recovery be tax free. Private actions have been called "the most important pillar of antitrust enforcement;"[147] an appropriate tax policy would strengthen that pillar.

Detractors might point to the availability of the government's previous judgment which makes a prima facie case against the violator in a private action; this might be considered incentive enough for the plaintiff to undertake to vindicate its injuries without the added tax encouragement. This argument overlooks the fact that even if the plaintiff should be fortunate enough to be aided by a prior government action, the prima facie case may still be rebutted in the private suit.[148] Moreover, the plaintiff must exhibit

144. 348 U.S. 426 (1955).

145. *See* Central R.R. v. Commissioner, 79 F.2d 697, 699 (3d Cir. 1935) (punitive damages for breach of trust were non-taxable). *But see* Obear-Nester Glass Co. v. Commissioner, 217 F.2d 56 (7th Cir. 1954).

146. Authorities cited note 29 *supra.*

147. Loevinger, *Private Action—The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL. 167, 172 (1958). *See also* Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement,* 40 A.B.A.J. 1061 (1954).

148. *See* Theater Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 542-43 (1954).

The resources of the Antitrust Division are not so vast that all antitrust violators are brought to court. Further, on those that are, a substantial number will take a consent decree or plead nolo contendere to avoid the expense and time involved in fighting the antitrust action. Neither convictions based on nolo pleas nor consent decrees may be used as prima facie evidence of a violation in subsequent private suits. Clayton Act, competent evidence to show not only that it sustained an injury as the result of this violation, but also the extent of the injury.[149] For example, the result of *United States v. Socony-Vacuum Oil Co.*[150] showed that the private plaintiff may be unsuccessful even though the government was victorious. Forty private suits were filed, but most of them were unsuccessful.[151] The same was true of the suits filed subsequent to the government's criminal convictions against both General Motors and its financing subsidiary.[152] Thus, the advantage of the successful government action may turn out to be largely illusory.[153]

This is not to say that the compensatory portion of the recovery should not receive a just tax treatment. Lost profits and other recoveries that would have been ordinary income to the plaintiff should still be treated as such. Any other treatment would unjustifiably allow the plaintiff to convert ordinary income into something else. In keeping with the notion of properly taxing the compensatory third of the treble damage award, the Commissioner and the courts must not be so ready to find that the taxpayer has received ordinary income. Capital injuries do occur; where the taxpayer has made its claim for an injury to goodwill and there is a valid indication of such, the compensatory portion of the award should be allocated first to capital recovery.

Similarly, the amount received by the taxpayer in a settlement should be allocated first to capital recovery, then to lost profits, and finally to trebled damages. This order of priority is suggested because the emphasis in antitrust policy, as it should be in tax policy, is to make the plaintiff whole again and to restore its competitive position. Anything which cannot be justified as being properly attributable to capital injury is next to be allocated to lost profits. There should be an allocation to treble damages only if there is an excess over the provable capital injury and the claimed lost profits. This is based on the sound principle that the plaintiff will be most interested in recouping its actual damages occasioned by the antitrust violation before profiting from it.

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§ 5(a), 15 U.S.C. § 16(a) (1970); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

149. *See* Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 170 (1958).

150. 310 U.S. 150 (1940).

151. *See* Comment, *Antitrust Enforcement by Private Parties: Analysis of Development in the Treble Damage Suit*, 61 YALE L.J. 1010, 1046-47 (1952).

152. United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941). The subsequent private actions are discussed in Comment, *Antitrust Enforcement by Private Parties: Analysis of Development in the Treble Damage Suit*, 61 YALE L.J. 1010, 1048 (1952).

153. Admittedly, many defendants faced with the threat of private suits following a successful government action will compromise with the private plaintiffs. Even so, the plaintiff will in all likelihood still walk away with a settlement that represents less than the damages actually sustained.

Section 162(g) Should be Changed

Section 162(g) provides that a deduction for two-thirds of a settlement or judgment will be disallowed to defendants who have previously been found guilty of criminally violating the antitrust laws.[154] The biggest problem with this section is that it rests on a faulty premise. Its purpose is to punish hard-core violators by disallowing a deduction for two-thirds of the damages paid. Necessarily implicit in this premise are the assumptions not only that all hard-core violators are prosecuted criminally, but also that only hard-core violators are so prosecuted. This logical flaw could be in a large measure corrected by taking the nolo contendere pleas out of the statute. Violators who have inadvertently transgressed the antitrust laws, or who for other reasons do not deserve the additional punishment from the tax laws, should be allowed to plead no contest and still avoid the further tax penalty. The trial judge may in his discretion accept or reject the plea, and his option may be properly exercised by weighing the seriousness of the violation against the impact of the tax laws.[155]

Another situation where the nolo contendere plea should be allowed is where the subsequent treble damage actions, made an even more serious threat because of the disallowance of the deduction, could result in the bankruptcy of the defendant.[156] In such extreme cases the real burden of the violation would be borne by the innocent shareholders.[157]

Present law allows the Justice Department to control the deductibility of damages through its choice of civil or criminal prosecutions.[158] Armed with this power the Antitrust Division could conceivably use the threat of criminal action and the subsequent disallowance of deductions to force the defendant to take a consent decree, even though the defendant feels it has a valid defense. If the business of the Justice Department is obtaining consent decrees, then this use of the tax laws is valid; if the business of the Justice Department is to enforce the law, then this is fundamentally wrong and should be changed.

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154. INT. REV. CODE OF 1954, § 162(g).

155. A defendant may plead nolo contendere only with the permission of the court. FED. R. CRIM. P. 11.

156. *See* Boland, *Income Tax Treatment of Antitrust Damages*, 22 TAX L. REV. 47, 60 (1966).

157. Strictly speaking, only the officers and employees of a corporation, not the corporation itself, can commit a crime or a tort. Stockholders may bring derivative actions against those officers and directors who brought about the antitrust violations to recover the fines and damages paid by the corporation on account of the illegal activities. *See* Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963). But if the violation results in very large expenses incurred by the corporation, such as in *Allis-Chalmers*, it is likely that the stockholders will be able to recover relatively little of the damages before exhausting the personal fortunes of the culpable directors and officers.

158. *See* Boland, *Income Tax Treatment of Antitrust Damages*, 22 TAX L. REV. 47, 60 (1966); Taggart, *Fines, Penalties, Bribes and Damage Payments and Recoveries*, 25 TAX L. REV. 611, 622 (1970).

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Even if the violator is criminally convicted, it may nonetheless circumvent the statute and be entitled to the deduction if it settles with the claimant before a civil action is filed. Although this provision would seem to reach a desirable policy goal, encouraging the violator to settle before subjecting the claimant to the expense and trouble of a lawsuit, there is no logical justification for treating settlements before suit is filed differently from those settled after the institution of an action. The allowance or disallowance of a deduction should not be based on such an artificial distinction any more than it should be in section 186.

The reasoning of the statute is also faulty when it assumes that two-thirds of an out of court settlement represents punitive damages. It has already been noted that the plaintiff will emphasize its actual damages, and probably few, if any, antitrust settlements include an amount intended to represent treble damages. This allocation rule becomes even harsher when the combined tax effects on both the plaintiff and the defendant are considered. Assuming that the plaintiff gets a judgment for three times its actual damages, and the plaintiff is aided in its case by a prior criminal conviction of the defendant, present law woud make plaintiff include two-thirds of the award in gross income and would deny defendant a deduction. In effect, the same money would be taxed twice.

At the very least, section 162(g) should be amended to cure its deficiencies in logic. It was originally introduced in objection to Revenue Ruling 64-224,[159] and the tax law is no place for statutes founded on outrage.

CONCLUSION

No matter what changes are made in the income tax laws to bring them more fully into harmony with antitrust policy, the plaintiff will still incur hardships which cannot be corrected through tax policy. These hardships, in themselves an effective deterrent to private litigation, must not be coupled with a tax policy that compounds the palintiff's burden. It would therefore be a proper exercise of legislative power to enact a program which would encourage private parties to aid the government in antitrust enforcement. The purpose of the antitrust laws is to encourage competition and thereby stimulate the economy to greater productivity; since one of the purposes of the revenue laws is economic stimulation and regulation, a sound tax policy would be an appropriate way for Congress to encourage private enforcement.

The antitrust violator should also be given the benefit of an equitable tax policy. Appropriate deductions should be allowed to clearly reflect income rather than distort it because of politically inspired fictions. These proposed reforms will be fair to victim and violator alike and encourage private enforcement of the antitrust laws.

159. 1964-2 CUM. BULL. 52.

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