

Case No. 25-10773

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

FAULK COMPANY, INCORPORATED,

Plaintiff – Appellee,

v.

ROBERT F. KENNEDY, JR., SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, in his official capacity as Secretary of Health and Human Services; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES and its sub-agency DEFENDANT CENTERS FOR MEDICARE AND MEDICAID SERVICES; MEHMET OZ, ADMINISTRATOR OF THE CENTERS FOR MEDICARE AND MEDICAID SERVICES, in his official capacity as Administrator of Centers for Medicare and Medicaid Services,

Defendants – Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 5th Cir. R. 28.2.1, Appellee Faulk Company, Incorporated offers this Certificate of Interested Persons.

(1) Number and Style of the Case: No. 25-10773; *Faulk Company, Incorporated v. Robert F. Kennedy, Jr. in his official capacity as Secretary, Department of Health and Human Services; United States Department of Health and Human Services and its sub-agency Centers for Medicare and Medicaid Services; Mehmet Oz in his official capacity as Administrator, Centers for Medicare and Medicaid Services; United States of America.*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Appellants:

Robert F. Kennedy, Jr., Secretary, U.S. Department of Health and Human Services, In his official capacity as Secretary of Health and Human Services; United States of America; United States Department of Health and Human Services, And its sub-agency Defendant Centers for Medicare and Medicaid Services; Mehmet Oz, Administrator of the Centers for Medicare and Medicaid Services, In His Official Capacity as Administrator of Centers for Medicare and Medicaid Services

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STATEMENT REGARDING ORAL ARGUMENT

Because this case entails review of matters of first impression, Plaintiff – Appellee Faulk Company, Inc. respectfully requests that the Court permit the parties an opportunity to present oral argument.

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STATEMENT OF ISSUES

1. Whether the district court correctly held that the federal tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), does *not* deprive the court of subject matter jurisdiction over an Administrative Procedure Act (“APA”) challenge to a Department of Health and Human Services (“HHS”) regulation that is keyed to a public health statute rather than the determination of federal taxes.

2. Whether the district court correctly held that HHS regulation 45 C.F.R. § 155.310(i) must be set aside and vacated as an *ultra vires* act in excess of statutory authority because it purports to delegate to the Internal Revenue Service (“IRS”) the authority to issue employer certifications under ACA § 1411—an authority Congress exclusively assigned to HHS and the state and federally-facilitated health insurance exchanges (collectively, the “Exchange”).

3. Whether the district court correctly held that the IRS lacks the statutory authority to issue the “certifi[cation] to the employer under section 1411” that is required by I.R.C. § 4980H(a)(2), thereby rendering the assessment against Faulk Company, Inc. (“Faulk”) invalid and entitling it to a refund under 26 U.S.C. § 7422.

INTRODUCTION

This appeal presents a fundamental question of administrative law: Can federal agencies rewrite a complex statutory scheme to suit their own administrative convenience? In enacting the Affordable Care Act (“ACA”), Congress created a specific, bifurcated administrative structure for processing federally-funded advance premium tax credits and cost-sharing reductions (collectively, “subsidies”) available on the Exchange and the resulting Employer Shared Responsibility Payment (“ESRP”) excise taxes. Congress assigned the role of determining subsidy eligibility, notifying employers, and adjudicating appeals to HHS and state Exchanges. It assigned to HHS the role of directing Treasury when and where to provide payment for subsidies and, importantly, notifying Treasury of each employer triggering ESRP excise tax liability. Congress assigned the role of assessing and collecting the ESRP excise tax to the IRS—but *only* after HHS had completed its work first—hence the reference in I.R.C. § 4980H to ACA § 1411 (42 U.S.C. § 18081) as a condition precedent to the imposition of ESRP excise taxes.

HHS ignored this structure. Instead of establishing the robust notice-and-appeal program mandated by ACA § 1411, HHS promulgated a regulation, 45 C.F.R. § 155.310(i), unlawfully delegating its certification duties to the IRS. IRS then attempted to certify Faulk’s liability itself, years after the fact, without Faulk ever receiving the statutory notice or due process appeal rights Congress guaranteed.

The district court properly recognized that agencies have no power to rearrange the pieces of the chess board laid out by Congress. Because the IRS’s assessment was based on a certification issued without statutory authority, and because the regulation purporting to authorize that delegation was void *ab initio*, the judgment below should be affirmed.

STATEMENT OF THE CASE

I. Statutory Framework

The ACA imposes an ESRP excise tax on employers with 50 or more full-time equivalent employees (“applicable large employers”) that fail to offer affordable, minimum value health coverage to their full-time employees. 26 U.S.C. § 4980H. However, liability is not automatic. It is triggered only after an employee receives a premium tax credit and, crucially, that fact “has been certified to the employer under section 1411 of the [ACA].” *Id.* § 4980H(a)(2).

ACA Section 1411 establishes the “program for determining eligibility” for these credits. 42 U.S.C. § 18081(a). Under this section, the Exchange must notify the employer if an employee is determined eligible for a subsidy and must provide the employer an opportunity to appeal that determination. *Id.* § 18081(e)(4), (f)(2). This process is administered by HHS. *Id.* Only after this process concludes does the statute contemplate the assessment of the excise tax.

II. Factual Background

Appellee Faulk Company, Inc. (“Faulk”) is a Texas corporation providing janitorial services to schools. ROA.9. In 2019, Faulk employed fewer than 500 individuals and ceased offering group health insurance coverage after no employee enrolled in it. ROA.12, 212.

At no point in 2019, 2020, or 2021 did HHS or any Exchange notify Faulk that any of its employees had received a premium tax credit, nor was Faulk informed of its potential liability or its right to appeal any such determination through the HHS administrative process required by ACA § 1411. ROA.12, 212.

Instead, in December 2021—three years after the relevant tax year—the IRS sent Faulk Letter 226-J. ROA.12. This letter purported to “certify” that Faulk was liable for an ESRP of approximately \$200,000, citing HHS regulation 45 C.F.R. § 155.310(i) for the assertion that the letter constituted certification under ACA § 1411. ROA.10, 12-13. This was the first and only notice Faulk received with respect to 2019. ROA.12, 17.

III. Procedural History

Faulk paid the assessment in full under protest and timely filed a claim for refund. ROA.10. After six months passed without IRS action, Faulk filed suit in the U.S. District Court for the Northern District of Texas. ROA.10. Faulk challenged

the validity of HHS Regulation 45 C.F.R. § 155.310(i) under the APA (Count III) and sought a refund of the tax (Count I). ROA.17-19, 20.

On summary judgment, the district court ruled in Faulk’s favor. ROA.628. It held that the IRS lacked authority to issue the certification required by I.R.C. § 4980H because that authority belongs exclusively to HHS under the plain text of the ACA. ROA.634-35. Consequently, the court set aside 45 C.F.R. § 155.310(i) as an unlawful delegation of statutory authority and ordered a full refund of the ESRP. ROA.644. HHS and the United States now appeal.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court’s judgment on all grounds.

First, the court had subject matter jurisdiction to hear Faulk’s APA challenge to the HHS regulation. In the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (“DJA”), Congress bestowed on federal courts the power to grant declaratory relief, but not in “cases ... with respect to Federal taxes.” 28 U.S.C. § 2201(a). Faulk’s challenge in Count III is against HHS, its sub-agency CMS and two of their officers in their official capacities, not Treasury or IRS or the United States, and it is directed at a public health regulation issued by HHS under Title 42, not a tax assessment under Title 26. The relief sought—vacatur of an unlawful agency rule—does not restrain the assessment or collection of a tax but merely restores the administrative

structure Congress enacted for administration of the Exchanges. The DJA federal tax exception does not apply.

Second, HHS Regulation 45 C.F.R. § 155.310(i) exceeds HHS’s statutory authority and is thus *ultra vires*. Agencies are creatures of statute and may not delegate their duties to other agencies without express congressional authorization. The ACA specifically assigns the duty of certifying employer liability and managing appeals to HHS and the Exchanges. It contains no provision authorizing HHS to delegate this adjudicatory function to the IRS. By attempting to wash its hands of this due process duty via regulation, HHS exceeded its statutory authority.

Third, the IRS’s assessment was invalid because the statutory precondition for liability was never met. I.R.C. § 4980H(a)(2) requires that liability be “certified to the employer under section 1411 of the [ACA].” The phrase “under section 1411” modifies the specific action “certified to the employer,” and it means “by reason of the authority of section 1411.” Because ACA § 1411 grants authority exclusively to HHS, a certification issued by the IRS is legally ineffectual. The United States’ argument that the IRS may “self-certify” ignores the text, violates the basic canons of statutory construction, and renders the specific notice-and-appeal protections of ACA § 1411 a nullity. Because the tax was assessed without the required statutory certification, the district court correctly ordered a refund.

ARGUMENT

I. THE DJA FEDERAL TAX EXCEPTION DOES NOT APPLY TO FAULK’S APA CHALLENGE TO HHS REGULATION 45 C.F.R. § 155.310(i) (COUNT III).

Both before the district court and here, HHS argued that the DJA federal tax exception bars Faulk’s APA challenge to HHS regulation 45 C.F.R. § 155.310(i). ROA.104-06; ECF No. 46, pp. 73-81. This issue must be addressed at the outset.

While the Supreme Court described the DJA as “procedural only,” it is a remedial statute that grants federal courts the judicial power to issue declaratory judgments. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-44 (1937). Through the federal tax exception found in the first sentence of 28 U.S.C. § 2201(a), Congress declined to give federal courts the power to grant the remedy of declaratory judgment “with respect to Federal taxes.” Without the requisite statutory power to grant the requested remedy, a court thus lacks subject matter jurisdiction. *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 84-103 (1998). Because subject matter jurisdiction concerns a court’s power to resolve a case, it is a gateway, first order question; a court cannot reach the merits without it. *United States v. Cotton*, 535 U.S. 625, 630 (2002). As will be shown, the DJA federal tax exception does not apply, and this Court retains subject matter jurisdiction.

A. *Rivero* is not controlling on the issue of scope of the DJA federal tax exception.

HHS relies heavily, if not exclusively, upon *Rivero v. Fidelity Investments, Inc.*, 1 F.4th 340 (5th Cir. 2021), for two propositions: (1) the DJA federal tax exception is broader than the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a) (“AIA”), and (2) the DJA federal tax exception is so broad as to act as a jurisdictional bar to an Administrative Procedure Act (“APA”) challenge to a regulation issued by the U.S. Department of Health and Human Services (“HHS”). HHS’s reliance is misplaced.

1. The scope of the DJA federal tax exception was neither briefed by the parties nor meaningfully analyzed in *Rivero*.

The vast majority of the *Rivero* court’s analysis is devoted to whether Congress intended the DJA federal tax exception to be a non-jurisdictional claims-processing rule, like an element of a cause of action, or jurisdictional condition. *Rivero*, 1 F.4th at 344-45. The district court in *Rivero* dismissed the case *sua sponte*, and the Fifth Circuit’s primary focus was the propriety of that dismissal, given that the parties had not raised the DJA federal tax exception issue. The Court’s substantive analysis of the *scope* of the DJA federal tax exception is relegated to a mere two paragraphs, the first of which is a recitation of the Treasury regulation at issue and an overview of the parties’ arguments about it. *Id.* at 345-46. The opinion includes no analysis of the DJA federal tax exception or citation to any authority for

its conclusion that a court cannot hear a private party dispute that turns on the interpretation of a Treasury regulation. The entirety of the discussion is this:

The district court found that, under either scenario proffered by Rivero, to declare that no transfer certificate is necessary would require the court “to construe various tax code provisions and treasury regulations to value Medrano's gross estate” and make a “determination ‘with respect to Federal taxes’ that is precluded by the plain language of the Declaratory Judgment Act.” We discern no error, much less clear error, with regard to this finding. Indeed, we agree with the district court that deciding the merits of Rivero's request for declaratory relief would inevitably involve sifting through the applicable Treasury regulations discussed above in order, ultimately, to make a determination “with respect to Federal taxes,” beyond the power granted to federal courts by the DJA.

Id. at 345-46. Given the lack of discussion, the question of whether the DJA federal tax exception is broader than the AIA was not at issue in the case—nor would it have been because the parties in *Rivero* did not brief it. *See* Brief of Appellant, *Rivero v. Fid. Invs., Inc.*, No. 20-40371 (5th Cir. Sept. 21, 2020); Response Brief of Appellee, *Rivero v. Fid. Invs., Inc.*, No. 20-40371 (5th Cir. Oct. 21, 2020); Reply Brief of Appellant, *Rivero v. Fid. Invs., Inc.*, No. 20-40371 (5th Cir. Nov. 12, 2020).

2. The authorities relied upon by the *Rivero* district court do not support an expanded scope.

While *Rivero* cites no authorities in its discussion of the scope of the DJA federal tax exception, the district court decision it affirmed does. However, a review of those authorities further reveals that *Rivero* is not precedential for either of HHS’s

propositions. *See Rivero v. Fid. Invs., Inc.*, Civ. Action No. 4:18-CV-909-SDJ2020, WL 2541963, at *2-3 (E.D. Tex. May 19, 2020). For its operative language regarding the scope of the DJA federal tax exception, the district court cited to *Ray v. El Paso Community Foundation*, No. EP-09-CV-00249-KC, 2009 WL 2413488, at *2 (W.D. Tex. Aug. 4, 2009), a sister district court opinion similarly involving a private party dispute in which there is but a single paragraph of discussion and no substantive analysis. Regarding the scope of the DJA federal tax exception, the *Ray* court cited to only two cases: *Warren v. United States*, 874 F.2d 280 (5th Cir. 1989), and *Smith v. Booth*, 823 F.2d 94 (5th Cir. 1987).

In *Warren*, a *pro se* plaintiff brought a tax protestor suit seeking to declare null and void a frivolous return penalty the IRS had assessed under I.R.C. § 6702, and this Court held that the DJA federal tax exception barred such suit because the requested remedy was a declaration that plaintiff owed no such tax penalty. *Warren*, 874 F.2d at 281-82. This Court in *Smith* held that the DJA and AIA barred the suit because the plaintiff sought a declaration that they were eligible for installment payment of estate taxes under I.R.C. § 6166, overruling the decision of the IRS on the matter—i.e., a legally binding declaration of their tax liability. *Smith*, 823 F.2d at 95-97. Neither *Warren* nor *Smith* addressed whether the DJA federal tax exception is broader than the AIA. Both cases involved direct requests for declarations of tax

liability before payment, suits for which federal courts clearly do not have jurisdiction under either the DJA or AIA.

None of these opinions speak in any meaningful way to a court's jurisdiction over an APA challenge to HHS's authority to issue a public health regulation or otherwise expand the scope of the DJA federal tax exception.

3. The *Rivero* Court did not have the benefit of *CIC Services*.

Crucially, the Fifth Circuit issued its *Rivero* decision on June 22, 2021—a mere 36 days after the Supreme Court handed down its landmark decision in *CIC Services, LLC v. IRS*, 593 U.S. 209 (2021). The *Rivero* briefing completed in late 2020 before *CIC Services* was decided, so the Court did not have the opportunity to consider the Supreme Court's upstream/downstream analysis or its explicit instructions for lower courts to narrow their reading of *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), and *Bob Jones University v. Simon*, 416 U.S. 725 (1974)—particularly where the requested relief concerns a regulatory mandate rather than a tax itself. *CIC Servs.*, 593 U.S. at 227-28 (J. Kavanaugh, concurring); *id.* at 217. As a result, *Rivero* cannot be relied upon as precedent regarding APA challenges to non-Treasury regulations.

B. The statute, and the intent of Congress expressed in it, is controlling.

What, then, is the scope of the DJA federal tax exception? The remedy of declaratory judgment is a creature of statute. Accordingly, determining the scope of

the federal tax exception in that statute is a matter of legislative intent, discerned through the process of statutory construction.

That analysis begins with the text of the statute to determine its plain meaning. *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023); *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020); *Van Loon v. U.S. Dep’t of the Treasury*, 122 F.4th 549, 563 (5th Cir. 2024). In determining a statute’s plain meaning, words are given their “ordinary meaning” judged from the time Congress enacted the statute, considering their dictionary definitions and both their specific context in a sentence or provision and the broader context of the statute as a whole, using the canons of interpretation. *Fischer v. United States*, 603 U.S. 480, 486 (2024); *Garland v. Cargill*, 602 U.S. 406, 415-16 (2024); *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277-78 (2018); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

The inquiry ends if from this analysis the text of the statute is clear and unambiguous. *Bassel v. Durand-Day (In re Durand-Day)*, 134 F.4th 846, 851 (5th Cir. 2025) (citing *Carpenters Dist. Council v. Dillard Dep’t Stores*, 15 F.3d 1275, 1282-83 (5th Cir. 1994)). The court must “presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

However, if there is some ambiguity, other sources, such as pre-enactment legislative record should be consulted. *See Yates v. United States*, 574 U.S. 528, 540-543 (2015).

The DJA federal tax exception is but a single prepositional phrase, “except with respect to Federal taxes.” 28 U.S.C. § 2201(a). An 8-member majority of the Supreme Court recently observed that “with respect to” is highly context-dependent, capable of at least two interpretations ranging from broad and expansive to narrow and specific. *See United States v. Miller*, 604 U.S. 518, 526-29 (2025). The range of possible meanings was no less wide in 1935 when the phrase was added than in 2025. *See United States v. Butler*, 297 U.S. 1, 56, 64-66, 70-75 (1936) (construing a statute to establish “a purchasing power with respect to articles that farmers buy” by pegging agricultural prices “with respect to” consumer goods, and considering the government’s argument that the phrase was a general policy aspiration for general welfare, but ultimately finding it to be a specific operative ratio that rendered the “tax” a regulatory penalty). In the DJA, did Congress mean that the federal tax exception applies to “a case *specifically concerning* Federal taxes,” which would suggest something like a cause of action seeking a legally-binding declaration of federal tax liability or the propriety of collection efforts—i.e., a tax case? Or did Congress mean it applies to “a case *generally referencing* Federal taxes,” which would suggest a broad application, encompassing any cause of action in which either

the legal theory requires that a federal tax statute or regulation be interpreted or referenced as a logical step, or a process upstream from the determination, assessment and collection of taxes—i.e., a tax question? As discussed below, the answer is clearly the former.

1. The remedial focus of the statute demands a remedial focus of the DJA tax exception.

The best textual evidence of legislative intent is its context—both the wider context how it fits within the overall framework of the DJA and the narrow context of the clause’s role in the sentence in which it appears. As for the wider context, the singular function of the three short subparagraphs that comprise the DJA, as enacted in 1934, was to grant courts the power to provide litigants a federal remedy of declaratory judgment, plus a few details about due process. This is plain from its text:

Sec. 274D. (1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

Declaratory Judgment Act of 1934, Pub. L. 73-343, 48 Stat. 955, 955-56 (Jun. 14, 1934).

The remedial focus of the statute is confirmed in the legislative history:

The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. The House Committee Report stated, “The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief, a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.” H.R.Rep. No. 1264, 73d Cong., 2d Sess., 2 (1934).

Perez v. Ledesma, 401 U.S. 82, 111-112 (1971) (J. Brennan, concurring in part and dissenting in part); *see also id.* at 112-15 (detailing the legislative history of the act).

A year later in 1935, Congress added as a parenthetical the phrase now referred to as federal tax exception. Revenue Act of 1935, Pub. L. 74-407, 49 Stat. 1014, 1027 (Aug. 30, 1935). As amended, subsection (1) would have read like this:

In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

The phrase, “(except with respect to Federal taxes),” appears in the subsection of the DJA providing the grant of remedial power, just after the opening phrase, “In cases of actual controversy,” which the Supreme Court interpreted just two years later to simply mean a matter otherwise justiciable under Article III. *Aetna Life Ins. Co.*, 300 U.S. at 229-30.

When Congress enacted the 1935 amendment, it did so against the backdrop of well-settled Supreme Court precedent requiring that provisos be narrowly construed so they do not swallow the grant of power to which the proviso is attached. *United States v. Morrow*, 266 U.S. 531, 534-35 (1925). Under this established canon,

[t]he general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation. Its grammatical and logical scope is confined to the subject-matter of the principal clause. ... This is emphasized when the proviso is examined in the light of prior legislation, the condition it was evidently intended to correct, and its legislative history.

Id.

Here, the “enacting clause” or “principal clause” is the grant of remedial power to federal courts. According to Supreme Court precedents of the time, Congress would have expected the federal tax exception proviso to be applied as a narrow exception to the subject matter of the clause—i.e., the grant of remedial power, not a broad jurisdictional bar against any legal question involving a tax. Viewing the phrase in its proper statutory context, it means that in cases otherwise justiciable, Congress intended to give courts the power to issue declaratory

judgments, but not where the declaration operates on federal taxes—i.e., tax cases. Even applying the nearest-reasonable-referent canon, the exception modifies “cases of actual controversy”—a Constitutional term of art referring to justiciable disputes—thereby stripping the Court of remedial power only over *tax controversies* (i.e., disputes with the government over tax liability), not over *administrative controversies* or *private party controversies* that merely touch upon tax regulations.

What’s more, because the federal tax exception is tied to the grant of judicial power, it is the remedy—the thing sought to be declared—to which a court should look and not the subjective motive of the plaintiff or the downstream consequences of the declaratory relief requested, just as the Supreme Court has held with respect to the AIA. *See CIC Servs.*, 593 U.S. at 217.

The structure and context of the DJA federal tax exception indicate that Congress did not intend to bar federal courts from considering tax questions, particularly when they are a mere logical step in ultimately reaching the legal conclusion that declaratory relief should be granted, and as a proviso it is to be construed narrowly. But just how narrowly? When does a plaintiff’s requested declaratory relief become a tax case that Congress did not intend for federal courts to touch? Where the statutory language itself lacks clarity in this regard, the legislative history provides it aplenty.

2. The legislative history confirms the scope of the DJA tax exception is limited to the determination, assessment and collection of taxes.

Another precedent of which the 74th Congress would have been acutely aware is the canon of statutory construction requiring courts to interpret text in light of the specific legal defect it was enacted to fix. Just one year before the 1935 amendment, the Supreme Court held that in construing a statute, the court must read the text “in the light of the mischief to be corrected and the end to be attained.” *Warner v. Goltra*, 293 U.S. 155, 158 (1934). This “mischief rule” directs courts not to abstract legislative purposes, but to specific evidence of the problem Congress sought to remedy. Here, the Senate Report leaves no doubt as to that specific mischief: the amendment was designed solely to stop taxpayers from using the newly enacted Declaratory Judgment Act to circumvent an existing prohibition against restraining the assessment and collection of taxes.

Very soon after Congress passed the DJA in 1934, taxpayers figured out they could use declaratory judgment actions to get around the 1867 Tax Anti-Injunction Act and its prohibition against “suit[s] for the purpose of restraining the assessment or collection of any tax,” and there ensued a flood of litigation seeking to declare two New Deal taxes unconstitutional—the Agricultural Adjustment Act processing tax and the Kerr-Smith Tobacco Restriction Act penalty tax—challenges the Roosevelt administration wanted to avoid. Edwin Borchard, *Declaratory Judgments*

pp. 850-54 (2d ed. 1941). That is not, however, what was presented to Congress. *Id.* Instead, Congress was told that declaratory judgment actions were interfering with the collection of income taxes and the administrative procedure adopted to adjudicate errors in tax assessments. *Id.*

As the Supreme Court explained:

The Federal Declaratory Judgment Act of 1934 was amended by § 405 of the Revenue Act of 1935 expressly to except disputes “with respect to Federal taxes.” The Senate Report explained the purpose of the amendment as follows:

Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long continued policy of Congress (as expressed in Rev.Stat. 3224 [the Tax Anti-Injunction Act] and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

S.Rep. No. 1240, 74th Cong., 1st Sess. 11. It is clear enough that one “radical departure” which was averted by the amendment was the potential circumvention of the “pay first and litigate later” rule by way of suits for declaratory judgments in tax cases.

Flora v. United States, 362 U.S. 145, 165 (1960); see also Borchard, *supra*, at 850-51. By adding the federal tax exception to the DJA, Congress did not intend to create

a broad, sweeping jurisdictional prohibition against courts considering tax questions; rather, its intent was to plug a specific loophole Congress believed it had inadvertently created affecting the determination, assessment and collection of taxes.

Taken together, the text of the statute, its context as being remedial in nature, and its legislative history demonstrate that by “In cases of actual controversy (except with respect to Federal taxes)” Congress’s intent was that courts not have the remedial power to issue declarations “keyed to the acts of” determining, assessing or collecting federal taxes, just as the Supreme Court has said with respect to the AIA. *See CIC Servs.*, 593 U.S. at 217 (quoting *Direct Mktg. Ass’n v. Brohl*, 575 U.S. 1, 12 (2015)).

C. The relief Faulk requests is not “with respect to Federal taxes” within the meaning of the DJA.

Count III is a civil action under the APA to set aside an *HHS* regulation on the basis that it is contrary to a *public health* statute. ROA.20. The regulation complained of, 45 C.F.R. § 155.310(i), was issued by HHS (not Treasury or IRS) under its own authority pursuant to ACA § 1411, which was codified at 42 U.S.C. § 18081, a public health statute (not the Internal Revenue Code). 78 Fed Reg. 4594, 4636 (Jan. 22, 2013). “[P]ursuant to the Secretary [of HHS]’s program for determining [individuals’ Exchange subsidy] eligibility”—i.e., not pursuant to a tax assessment or collection procedure—HHS delegated responsibility for issuing “certifi[cation] to an employer that one or more employees has enrolled [in

subsidized Exchange coverage],” and Faulk’s argument is that HHS did not have the authority to make that delegation. *Id.*; 45 C.F.R. § 155.310(i); ROA.20. It is the act of HHS making an improper delegation of authority through an HHS regulation to which the relief requested in Count III is keyed, not IRS’s failure to receive that authority or its unlawful exercise of it.

The effect of the relief requested—setting aside and vacating the offending HHS regulation—will not bind the hands of IRS with respect to its assessment or collection of ESRP excise taxes; it just won’t be able to self-certify one of the elements, requiring that it wait for HHS to first follow the required statutory machinery. Or not. If 45 C.F.R. § 155.310(i) is not the IRS’s sole source of authority to issue “certifi[cation] to the employer under section 1411 of the [ACA],” then vacating that HHS regulation has no effect on IRS whatsoever. Either way, the relief Faulk requested and that the district court granted with respect to Count III is not a tax case for which federal courts lack declaratory relief power.

Neither is the relief sought in Count III dependent upon other, prohibited declaratory relief. The Court’s power to rule on the validity of 45 C.F.R. § 155.310(i) is not predicated on Faulk obtaining a declaration with respect to its tax refund case. They are independent causes of action with independent grants of relief against separate defendants. Each cause of action could have been brought in a separate lawsuit. Either HHS had authority to delegate employer certifications under ACA §

1411, or it didn't. Either HHS had authority to create a program separate from the processes required by ACA § 1411, or it didn't. The Court does not first need to order that Faulk be given a refund in Count I to grant the APA relief it requests in Count III. (This contrasts with the matter before the court in *Novartis Pharmaceuticals Corp. v. Secretary of United States Department of Health and Human Services*, 155 F.4th 223 (3d Cir. 2025), in which the declaratory relief the plaintiff requested against CMS (to “[d]eclare void any agreement that Novartis may be unconstitutionally coerced into entering”) necessarily required that other, prohibited relief first be granted (to “[d]eclare that the Program’s ‘excise tax’ violates the Excessive Fines Clause” and is therefore unconstitutional).)

To construe the public health statute 42 U.S.C. § 18081 (that is, ACA § 1411), this Court may find it helpful or even necessary to examine its broader context. Given the largesse of the ACA, that would include reading—perhaps even construing—I.R.C. § 4980H as a means of discerning Congressional intent in ACA § 1411. But the text of the DJA statute, its legislative history and applicable Supreme Court precedents simply do not evidence or support a conclusion that Congress intended for the DJA federal tax exception to be so broad as to prohibit courts from examining tax questions posed by requests for non-tax relief. *See, e.g., Ryan, LLC v. IRS*, Civ. Action No. 3:25-CV-0078-B, 2025 WL 3089415, at *8-9 (N.D. Tex. Nov. 5, 2025) (acknowledging the AIA-plus view of *Rivero* but declining to apply

it to an APA challenge to the Treasury regulation that resulted from a district court setting aside the IRS Notice that was the subject of *CIC Services*, and finding it perfectly acceptable to “constru[e] provisions of the APA and congressional [Internal Revenue Code] statutes that formed the basis for the Treasury’s authority to pass the Final Rule”).

The focus of inquiry is whether the relief sought declares tax liability or interferes with the assessment or collection of taxes. The relief sought in Count III does not ask for or require that. Faulk’s APA challenge to HHS regulation 155.310(i) is not a “case ... with respect to Federal taxes” within the meaning of the DJA.

II. HHS REGULATION 45 C.F.R. 155.310(i) DELEGATED EMPLOYER CERTIFICATION AUTHORITY TO THE IRS; BECAUSE IT IS CONTRARY TO STATUTE, THE DISTRICT COURT RIGHTLY VACATED IT.

A. HHS regulation 45 C.F.R. § 155.310(i) is a delegation.

As it did in the district court, the HHS asserts that, notwithstanding the fact that HHS went through the formal notice-and-comment rulemaking process and issued a regulation that has the force of law, HHS was not actually delegating anything to IRS but rather “simply set[ting] out [its] interpretation of the relevant statutory provisions.” ECF No. 46, p. 49. That is an interesting (re)characterization.

The regulation providing for the HHS-to-Treasury handoff says, “the Internal Revenue Service will adopt methods to certify to an employer that one or more employees has enrolled [in subsidized Exchange coverage].” 45 C.F.R. § 155.310(i).

While HHS uses the word, “will,” as opposed to the more emphatic “shall,” it used “will” to command a range of other directives in regulations issued at the same time, including delegations to states. *See* 78 Fed. Reg. 4594, 4596-98 (Jan. 22, 2013) (proposing 42 C.F.R. § 457.350(g)(3) (“The State will determine the written format and timing of the information regarding Medicaid”)); *id.* (proposing 42 C.F.R. § 440.345 (“States will adhere to future guidance for updating benefits”)); *id.* (proposing 45 C.F.R. § 155.510(a) (“The appeals entity or the Exchange must enter into agreements with the agencies ... Such agreements must include a clear delineation of the responsibilities”)); *id.* (proposing 45 C.F.R. § 155.535(f) (“The appeals entity will review the appeal de novo....”)).

What’s more, in the preamble to the proposed regulation, HHS was very clear that this was not a mere “interpretation of the relevant statutory provisions”:

We [HHS and CMS] propose to add new paragraph (i) regarding a *certification program pursuant to* the Secretary [of HHS]’s program for determining eligibility for advance payments of the premium tax credit and cost-sharing reductions in accordance with *section 1411(a)* of the Affordable Care Act. This certification program is distinct from the [employer] notification specified in *section 1411(e)(4)(B)(iii)* and paragraph (h).

In new § 155.310(i), we propose that the certification to the employer will consist of methods adopted by the Secretary of Treasury as part of the determination of potential employer liability under *section 4980H* of the Code. In this manner, the certification program will address not only individuals on whose behalf advance payments of the premium tax credit and cost-sharing reductions are provided, but also individuals claiming the premium tax credit only on their tax returns.

78 Fed Reg. at 4636 (emphasis supplied).

HHS added 45 C.F.R. § 155.310(i) “pursuant to ... section 1411(a) of the Affordable Care Act”—that is, “by reason of the authority of” or “under” ACA § 1411. Through 45 C.F.R. § 155.310(i), HHS created the employer certification program referred to in I.R.C. § 4980H, and then it gave that program to Treasury. That is a delegation.

The suggestion that HHS did not delegate authority to the IRS because the IRS was exercising its own independent authority is further belied by the fact that the IRS accepted and acted upon the delegation from HHS. During administrative proceedings with the IRS, Faulk raised the issue of its lack of authority, to which the IRS responded, “The [HHS] regulations at 45 C.F.R. § 155.310(i) provide that ... the Internal Revenue Service will adopt methods certify to an employer....” ROA.429-31; ROA.188. If HHS did not need to delegate authority to the IRS and instead the IRS had independent authority under I.R.C. § 4980H to issue “certifi[cation] to the employer under section 1411 of the [ACA],” the IRS would not have felt the need to reference the HHS regulation when its authority was questioned. To the extent an agency’s interpretation matters, both agencies interpreted the statutes such that the IRS would only have authority to issue “certifi[cation] to the employer under section 1411 of the [ACA]” if HHS delegated it.

B. HHS has no authority to delegate employer certification to Treasury or IRS.

A reviewing court shall “hold unlawful and set aside agency action ... found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(a)(2)(C). “[A]n administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). “Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022). As delegates of Congress, agencies must operate within the administrative structures Congress created; they are not permitted to further delegate or reorganize themselves unless given that authority by Congress. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988); *Gonzales v. Oregon*, 546 U.S. 243, 262-65 (2008). The Court’s task, then, is to discern the intent of Congress in this regard, using traditional tools of statutory construction. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 295-96 (2013).

1. The overarching structure and general context of the ACA’s Exchange subsidy provisions demonstrate Congress intended for HHS to be in charge.

The text of the relevant statutes make clear that Congress provided no express authorization for HHS to delegate employer certification to IRS. Furthermore, the

structure and context of the statutes as a whole strongly suggest that Congress intended for it to be that way. Given this, if Congress had intended to permit HHS to make an inter-agency sub-delegation, it would have said so expressly.

Rather than provide HHS one, broad, sweeping enabling statute for the ACA, Congress provided numerous narrow, discrete commands and authorizations that are remarkably specific. *See, e.g.*, 42 U.S.C. § 18001(a), (b)(1), (f), (g)(4) (temporary high risk pool program); *id.* § 18002(a)(1), (c)(2), (f) (temporary retiree medical reinsurance program); *id.* § 18003(a)(1), (c) (federal Exchange website); 18013 (annual report to Congress on self-insured health plans); *id.* § 18014(e) (authority to issue regulations implementing the Expatriate Health Coverage Clarification Act of 2014); *id.* § 18022(b), (d) (essential health benefits); *id.* § 18023(b)(3)(B) (abortion coverage notice); *id.* § 18031 (various Exchange operation rules and processes, with some responsibility-sharing among States, the Exchanges and insurance regulators); *id.* § 18032(e) (insurance broker qualification); *id.* § 18033 (Exchange oversight); *id.* § 18041 (standards for operating and providing health insurance on the Exchanges); *id.* § 18071 (subsidization of Exchange coverage through cost-sharing reductions); *id.* § 18081 (Exchange subsidy eligibility process for individual health coverage, employer notices and appeals, etc.); *id.* § 18082 (advance determinations by HHS to “allow” Exchange subsidies on the Exchanges and a mechanism for HHS to give orders to Treasury to make monthly “payment” of them); *id.* § 18083

(Medicaid and CHIP integration with the Exchanges). Taken together, these provisions of the ACA show that Congress intended not to give HHS broad discretionary powers but instead to confine it in a specific, directed and non-discretionary administrative structure.

In that very specific structure, Congress permitted HHS to delegate almost nothing to Treasury. In fact, when Treasury's help is needed, Congress took care to expressly state that the program belongs to HHS and that Treasury should simply do what it is told. *Id.* § 18082(a)(3) (“The Secretary [of HHS] shall establish a program under which ... the Secretary of the Treasury makes advance payments to the [Exchange insurance companies] in order to reduce the premiums payable by individuals eligible for such credit”); *id.* § 18082(c)(3) (“The Secretary [of HHS] shall also notify the Secretary of the Treasury ... if an advance payment of the cost-sharing reductions ... is to be made to the [Exchange insurance company] with respect to any individual enrolled in the plan. The Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary specifies in the notice”); *id.* § 18082(c)(2)(A) (“The Secretary of the Treasury shall make the advance payment under this section of any premium tax credit allowed under section 36B of title 26 to the issuer of a qualified health plan on a monthly basis (or such other periodic basis as the Secretary [of HHS] may provide)”); *see also id.* § 18081(c)(3) (“The Secretary [of HHS] shall submit the information

described ... to the Secretary of Treasury for verification of household income and family size”); *id.* § 18081(c)(4) (“The Secretary [of HHS] shall provide that verifications and determinations ... shall be done ... by determining the consistency of the information submitted with the information maintained in the records of the Secretary of the Treasury”); *id.* § 18081(e)(2)(A)(ii) (“the Secretary [of HHS] shall, if applicable, notify the Secretary of the Treasury under section 1412(c) of this title of the amount of any advance payment to be made”); *id.* § 18082(a)(2)(A) (“The Secretary [of HHS] shall establish a program under which ... the Secretary [of HHS] notifies ... the Secretary of the Treasury of the advance determinations”); *id.* § 18082(a)(2)(B) (“The Secretary [of HHS] shall establish a program under which ... the Secretary [of HHS] notifies ... the Secretary of the Treasury of the name and employer identification number of each employer with respect to whom 1 or more employee [sic] of the employer were determined to be eligible for the premium tax credit under section 36B of title 26 and the cost-sharing reductions under section 18071 of this title because (i) the employer did not provide minimum essential coverage; or (ii) the employer provided such minimum essential coverage but it was determined under section 36B(c)(2)(C) of title 26 to either be unaffordable to the employee or not provide the required minimum actuarial value”); *id.* § 18082(c)(1) (“The Secretary [of HHS] shall notify the Secretary of the Treasury ... of the advance determination under section 1411 of this title”).

Congress extended this HHS-first administrative scheme even into the IRS's fiefdom of Title 26. The ACA's Exchange subsidies are means-tested, and I.R.C. § 36B creates the premium tax credit that is reconciled on an individual's tax return with what is advanced under ACA §§ 1411 and 1412 to health insurance carriers providing Exchange coverage. Notwithstanding that this is an income tax statute, in three separate places Congress gave HHS rulemaking authority. 26 U.S.C. § 36B(b)(3)(D)(ii) (allocation of the value of benefits provided in excess of essential health benefits to the tax credit calculation); § 36B(c)(3)(A)(iii) (determination of permissible mid-year enrollment events and low-income thresholds); § 36B(e)(3) (calculation methodologies for determining household size and income for individuals not lawfully present). IRS's only commands are to calculate the inflation index for the premium affordability threshold, determine the documentation needed for unemployment income, waive collection of any overpaid subsidy advances from 2020 and issue regulations for allocation of the value of pediatric dental. *Id.* § 36B(b)(3)(E), (c)(2)(C)(iv), (c)(4)(F), (f)(2)(B)(iii), (g)(3).

The remainder of that statute is comprised of word problems, definitions serving as variables for those word problems, arithmetic equations and methodologies for determining the dollar amount of the premium tax credit, all of which are in the passive voice. *See, e.g., id.* § 36B(a) (“there shall be allowed as a credit”); § 36B(b)(2) (“The premium assistance amount determined under this

subsection”); § 36B(b)(3)(B) (“no credit is allowed under this section”). If Congress had not specified which agency allows or determines things under this statute, one would think Congress is referring exclusively to the IRS because the statute is referring to itself, and it is an Internal Revenue Code statute. But Congress did specify another agency: HHS. “*The Secretary [of HHS]* shall establish a program meeting the requirements of this section for determining ... in the case of an individual claiming a premium tax credit or reduced cost-sharing under section 36B of title 26 or section 18071 of this title (A) whether the individual meets the income and coverage requirements of such sections; and (B) the amount of the tax credit or reduced cost-sharing; [and] whether an individual’s coverage under an employer-sponsored health benefits plan is treated as unaffordable under sections 36B(c)(2)(C) and 5000A(e)(2) of title 26.” 42 U.S.C. § 18081(a)(2), (a)(3) (emphasis supplied). The ACA is HHS’s world; Treasury just lives in it.

2. Congress did not give HHS authority to further delegate to IRS.

In ACA § 1411 Congress made provision for HHS to delegate certain things to Exchanges. *See id.* § 18081(d) (“the Secretary [of HHS] shall verify the accuracy of such information in such manner as the Secretary determines appropriate, including delegating responsibility for verification to the Exchange”). But Congress made no provision for HHS to delegate anything to IRS, except that an appeal of an individual’s eligibility for Exchange subsidies could be heard by HHS “or one of

such other Federal officers,” which would include the Treasury Secretary. *See id.* § 18081(f)(1).

C. The regulation exceeds statutory authority, and the district court rightly vacated it.

In ACA §§ 1411 and 1412 (42 U.S.C. §§ 18081, 18082), Congress created a very specific and strict administrative scheme that does not permit HHS to delegate anything to IRS with respect to an employer. HHS regulation 45 C.F.R. § 155.310(i) is contrary to the statute; the district court rightly vacated it, thereby legally dissolving the rule and returning the law to what it was prior to the regulation’s issuance—and not just for Faulk, but for everyone. *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022) (explaining that vacatur is a “distinct” and “complete” remedy that “legally dissolve[s]” the rule); *Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 885 F.3d 360, 388 (5th Cir. 2018) (ordering vacatur of a rule found inconsistent with its governing statute to return the law “to what it was prior” to the rule’s enactment); *United States v. Texas*, 599 U.S. 670, 703 (2023) (Gorsuch, J., concurring) (citing *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (noting that when a regulation is set aside, “the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”)).

III. IRS LACKS AUTHORITY TO ISSUE “CERTIFI[CATION] TO THE EMPLOYER UNDER SECTION 1411 OF THE [ACA]”.

Faulk’s refund claim against the United States turns on the proper construction of I.R.C. § 4980H(a)(2), one of the two required preconditions for the imposition of an excise tax. The statute imposes excise tax liability only after:

at least one full-time employee of the applicable large employer *has been certified to the employer under section 1411* of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee[.]

I.R.C. § 4980H(a)(2) (emphasis supplied).

To determine if the IRS’s self-generated “certification” satisfies this statutory command, the Court must apply “traditional tools of statutory construction” to discern the “best reading” of the text. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400-01 (2024). This requires more than isolating a single phrase; it demands a construction that gives effect to every word, clause, and sentence, ensuring that no statutory language is rendered superfluous or void. *Fischer*, 603 U.S. at 493. This is particularly true for the ACA, the provisions of which the Supreme Court has instructed must be “read in their context and with a view to their place in the overall statutory scheme.” *King v. Burwell*, 576 U.S. 473, 492 (2015). Consequently, this Court should reject any interpretation of Section 4980H that would do harm to the substantive protections Congress enacted in the neighboring provisions of ACA

§ 1411. *See Maracich v. Spears*, 570 U.S. 48, 59-60 (2013) (rejecting a statutory interpretation that would undermine certain privacy interests the statute was designed to protect).

The United States argues that the phrase, “has been certified to the employer under section 1411,” allows the IRS to issue the certification itself, provided it does so “consistent with” the standards of the ACA. ECF No. 46, pp. 39-40. This is, at most, a permissible reading; it is certainly not the best one. The *best* reading—compelled by the plain text, the rules of grammar, and the structure of the Affordable Care Act as a whole—is that the certification must be issued *by reason of the authority* of Section 1411. Because Section 1411 grants authority exclusively to HHS and the Exchanges, the IRS has no authority to issue “certifi[cation] to the employer under section 1411 of the [ACA],” and its attempt to self-certify liability via Letter 226-J was ineffectual.

A. The best reading of “under Section 1411” is “by reason of the authority of Section 1411.”

The dispositive phrase in Section 4980H(a)(2) is the adverbial modifier “under section 1411.” To determine the scope of the IRS’s power, the Court must determine what it means to do something “under” a statute.

The Supreme Court and this Court have repeatedly held that the most natural meaning of “under” in a statutory context is “subject to,” “governed by,” or “by reason of the authority of.” *See Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 583 U.S. 109,

124 (2018) (holding that agency action is “under” a statute when it is taken “pursuant to” or “by reason of the authority of” that statute); *Bassel*, 134 F.4th at 852 (confirming that “under” typically means “subject or pursuant to” or “by reason of the authority of”); *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (“‘[U]nder’ means ‘subject [or pursuant] to’ or ‘by reason of the authority of’”).

Applying this definition to Section 4980H(a)(2) clarifies the statutory scheme immediately. The statute requires that the employee be “certified to the employer *by reason of the authority of* section 1411.” Nothing in the context of I.R.C. § 4980H suggests Congress intended anything other than the usual definition of “under” when used in a statute.

Accordingly, Section 1411 (42 U.S.C. § 18081) is the source of authority for the certification. It is the “program” Congress established for determining eligibility and notifying employers, explicitly administered by the Secretary of HHS. By contrast, Section 1411 grants no authority to the IRS to certify anything to an employer, and so it cannot be issued by the IRS “under section 1411.” Any certification provided by IRS is issued *under* the IRS’s general tax administration powers, which Section 4980H(a)(2) expressly disclaims as the basis for this specific procedural step because it specifies the basis must come from Section 1411.

The United States’ preferred definition—that “under” merely means “consistent with” or “in accordance with” Section 1411—renders the phrase weak and redundant, violating the canon against surplusage. *See Bruckner Truck Sales, Inc. v. Guzman*, 148 F.4th 341, 344-45 (5th Cir. 2025). If Congress merely intended to cross-reference the standards for eligibility, the statute would simply read: “certified ... as having enrolled in a qualified health plan [as provided in section 1411].” Instead, Congress attached the modifier “under section 1411” to the transmission itself (“certified to the employer”). By doing so, Congress invoked the specific administrative machinery of Section 1411—the notice and appeals process administered by HHS. *See* 42 U.S.C. § 18081(f)(2).

Moreover, in the statutes to which the United State points as examples, the context makes it clear that Congress intended the “consistent with” connotation of “under” rather than its ordinary “by reason of the authority of” usage. In most of the United States’ examples, the object of the preposition or adverbial phrase “under” is something other than an action (e.g., a “rule,” “definition,” “ground” or “eligibility”), providing precisely the cue needed. Even in statutes where “under” is used to modify “determined” or “allowed” or similar, a casual glance at the cross-referenced statute makes it clear that the object of “under” is a standard. Such is the case with ACA §§ 1411 and 1412 and their cross-references to I.R.C. § 36B. *See, e.g.,* 42 U.S.C. § 18082(a)(2)(B)(ii) (“but it was determined under section

36B(c)(2)(C) of title 26 to either be unaffordable to the employee or not provide the required minimum actuarial value”); 26 U.S.C. § 36B(c)(2)(C) (solely containing the standards for affordability and minimum value and no actions to be taken).

B. Grammatically, “under Section 1411” modifies the act of certification, not just the eligibility standards.

The United States attempts to detach the “under section 1411” modifier from the act of certifying, arguing that it only relates to the content of the eligibility determination (i.e., whether the employee was eligible for a subsidy). This violates the nearest-reasonable-referent canon and ignores the unitary nature of the verb phrase.

The statute says the employee “has been certified to the employer under section 1411.” The phrase “under section 1411” appears immediately after the phrase “certified to the employer.” Grammatically, it functions as an adverbial modifier governing the entire preceding phrase. It restricts the act of certification, not merely the factual basis of the employee’s eligibility.

By placing “under section 1411” immediately after “to the employer,” Congress indicated that the transmission to the employer must itself be authorized by, and consistent with, Section 1411. This is critical because Section 1411 is not just a definitions section; it is a privacy and due process statute. It contains strict rules about notice, appeals, and information sharing. *See* 42 U.S.C. § 18081(e)–(f). If the United States’ reading were correct, the IRS could “certify” liability using

Section 1411’s eligibility math while ignoring Section 1411’s privacy and notice safeguards. That would cleave the substantive tax liability from the procedural protections Congress attached to it and is inconsistent with the detailed administrative scheme Congress created.

C. The statutory structure confirms HHS must issue the certification.

The United States’s argument that the IRS *must* issue the certification because it is the only agency with the data to do so is factually incorrect and legally irrelevant. It is factually incorrect because Congress explicitly built a statutory pipeline for HHS to tell Treasury exactly which employers owe the penalty.

In ACA § 1412 (42 U.S.C. § 18082), Congress established the “Advance determination and payment” program. Subsection (a)(2)(B) specifically commands the Secretary of HHS to:

establish a program under which the Secretary [of HHS] notifies ... the Secretary of the Treasury of the name and employer identification number of each employer with respect to whom 1 or more employee [sic] of the employer were determined to be eligible for the premium tax credit under section 36B of title 26 and the cost-sharing reductions under section 18087 of this title because (i) the employer did not provide minimum essential coverage; or (ii) the employer provided such minimum essential coverage but it was determined under section 36B(c)(2)(C) of title 26 to either be unaffordable to the employee or not provide the required minimum actuarial value;

42 U.S.C. § 18082(a)(2)(B).

This provision mirrors I.R.C. § 4980H(a)(2) nearly word-for-word, providing IRS the exact data points necessary to assess the ESRP tax. (IRS already has Form

1095 data to calculate the amount. ECF No. 46, at p.42. It just needs the trigger.) If Congress had intended for IRS to independently generate this information and certify it to the employer itself, 42 U.S.C. § 18082(a)(2)(B) would be superfluous. Why would Congress command HHS to send a specific list of liable employers to Treasury if it had impliedly intended to give authority to Treasury to run the certification process itself?

The only interpretation that harmonizes I.R.C. § 4980H, ACA § 1411, and ACA § 1412 is the one adopted by the district court:

1. **HHS** determines eligibility and notifies the employer of potential liability and appeal rights (the “Notice” under ACA § 1411).
2. **HHS** resolves any appeals or confirms the liability (the “Certification” under ACA § 1411 referenced in I.R.C. § 4980H).
3. **HHS** transmits the list of liable employers to Treasury (under ACA § 1412).
4. **Treasury** assesses and collects the tax (under I.R.C. § 4980H).
5. **Treasury** provides employers a second appeal opportunity under Subtitle F of Title 26—specifically I.R.C. § 6330 (as stated in the last sentence of ACA § 1411(f)(2)(A)).

See ROA.635-38. This is a coherent, sequential administrative structure that is entirely consistent with the HHS-first approach Congress established for all other

aspects of Exchange subsidy administration. The only difference here is that instead of telling Treasury when and where to *cut* a check, HHS is telling Treasury where to *collect* one. The United States’s interpretation—that the IRS steps in at the beginning, ignores the HHS notice process, and issues its own certification—renders the HHS-to-Treasury notification mechanism in 42 U.S.C. § 18082(a)(2)(B) meaningless.

D. “Certification” is the culmination of the Section 1411 notice and appeals process.

The United States makes much of the fact that ACA § 1411 uses the term “notify” while I.R.C. § 4980H uses the term “certified.” It argues this semantic difference proves they are two completely distinct processes. This is a distinction without a difference.

“To certify” means: “[t]o attest as being true or as meeting certain criteria.” *Certify*, BLACKS’ LAW DICTIONARY (12th ed. 2024). In the context of the ACA, “certification” is best understood as the legal culmination of the ACA § 1411 notice and appeals process because once that process is complete, HHS will have determined, and HHS can attest as being true, that the individual meets or does not meet subsidy eligibility criteria. 42 U.S.C. § 18081(a)(1), (2). Section 1411 requires the Exchange to notify employers of potential liability and their right to appeal. *Id.* § 18081(e)(4). If the employer appeals, HHS adjudicates. *Id.* § 18081(f). The

outcome of that process—or the finalization of the determination if no appeal is taken—is the “certification” that the subsidy eligibility standards have been met.

This reading preserves the integrity of the statutory text. The IRS cannot collect the tax until the fact of liability “has been certified ... under section 1411.” That past-tense construction implies that the ACA § 1411 process (notice + opportunity to appeal) must be *completed* before the tax is assessed. A “Letter 226-J” from the IRS, issued years later and outside the ACA § 1411 framework, is not a certification “*under* Section 1411.” It is a tax demand letter masquerading as one.

E. The United States’ interpretation leads to absurd results.

Finally, the United States’ position requires the Court to accept that Congress created a robust due process protection for employers in ACA § 1411(f)—an appeals process specifically designed to challenge ESRP liability findings—but then wrote I.R.C. § 4980H in a way that allows the IRS to bypass it entirely.

If the IRS can “certify” liability itself, without waiting for the Section 1411 notice and appeals process to run its course, then the Section 1411 protections are a nullity. The IRS could (and in this case, did) simply assess the tax. The employer is deprived of the specific administrative remedy Congress created in the public health statute and is forced into the byzantine machinery of the IRS tax refund process.

Courts “must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.” *Loper Bright*, 603 U.S. at 412. The

Court should not defer to an agency interpretation that renders explicit statutory due process protections optional. The best reading of the statute—the one that gives effect to every clause and adheres to the administrative structure Congress enacted—is that the IRS lacks the authority to issue the certification required by I.R.C. § 4980H. Because it lacked that authority, the assessment against Faulk was invalid, and the district court rightly ordered a refund.

F. Congress explicitly mandated strict adherence to Section 1411 due process protections.

Any doubt about the ACA § 1411 employer due process being a prerequisite to liability under I.R.C. § 4980H is resolved by Congress’s explicit, repeated focus on protecting employer due process rights within this specific statutory scheme.

First, in the ACA itself, Congress demonstrated that it viewed the interaction between ACA Title I and the Internal Revenue Code not as separate spheres, but as an integrated system requiring specific procedural safeguards. Congress mandated that HHS (consulting with Treasury as needed) “conduct a study of the procedures that are necessary to ensure that in the administration of [Title I of the ACA] *and section 4980H of title 26* ... that the following rights are protected: ... *The rights of employers to adequate due process and access to information necessary to accurately determine any payment assessed on employers.*” 42 U.S.C. § 18081(i)(1), (1)(B), (2) (emphasis supplied).

Congress explicitly linked the “administration” of the I.R.C. § 4980H excise tax to the preservation of employer “due process.” If the United States’ interpretation were correct—that the IRS can “self-certify” liability using its own internal tax procedures, entirely bypassing the ACA § 1411 notice and appeal process—then most of the language of ACA § 1411(i) would be meaningless. Congress would not have mandated a single study by a single agency on preserving due process in the administration of both ACA § 1411 and I.R.C. § 4980H if it had intended to allow the IRS to bypass the very statute (ACA § 1411) that provides that due process.

Second, Congress re-emphasized the mandatory nature of ACA § 1411 in 2013, amidst the rollout of the Exchanges. In the Continuing Appropriations Act, 2014, Congress commanded that HHS “shall ensure that American Health Benefit Exchanges verify that individuals ... are eligible for such credits ... *consistent with the requirements of section 1411 of such Act.*” Pub. L. No. 113-46, § 1001(a), 127 Stat. 558, 566 (Oct. 17, 2013) (emphasis supplied). Crucially, Congress issued this directive “[n]otwithstanding any other provision of law,” removing any discretion HHS might claim to modify or delegate these duties under its general enabling statutes. *Id.*

Congress went further, conditioning HHS’s authority to direct Treasury to fund Exchange subsidies on HHS providing Congress with a certification that the Exchanges were properly verifying eligibility “consistent with the requirements of

section 1411”—all of it, not just the parts HHS found convenient. *Id.* By requiring strict adherence to “the requirements of section 1411”—without exception—Congress confirmed that the notice, appeal and certification procedures contained therein are not optional administrative suggestions. They are binding statutory preconditions to the expenditure of federal funds and the assessment of the resulting taxes. The IRS’s attempt to assess Faulk’s liability without a certification issued “consistent with the requirements of section 1411” violates not only the text of the ACA, but the clear and persistent intent of Congress to protect employers from precisely this type of opaque bureaucratic action.

CONCLUSION

Faulk respectfully requests that this Court affirm the district court’s opinion and order granting Faulk’s Motion for Summary Judgment and vacating HHS regulation 45 C.F.R. § 155.310(i), as void and unenforceable under the APA, thereby returning the law to what it was prior to the regulation’s issuance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2026, an electronic copy of the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system to all counsel of record.

/s/ David LeFèvre

David LeFèvre

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 10,672 words (exclusive of the certificate of interested persons, corporate disclosure statement, table of contents, statement regarding oral argument and certificates of counsel), as determined by the word-count function of Microsoft Word 365.

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/s/ David LeFèvre

David LeFèvre

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I hereby certify that, in the foregoing brief filed using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by the Fifth Circuit Rule 25.2.13 have been made, (2) the electronic submission is an exact copy of the paper document, and (3) the document has been scanned for viruses and is free of viruses.

/s/ David LeFèvre

David LeFèvre

Case No. 25-10773

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FAULK COMPANY, INCORPORATED,

Plaintiff – Appellee,

v.

ROBERT F. KENNEDY, JR., SECRETARY, U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES, in his official capacity as Secretary of Health and
Human Services; UNITED STATES OF AMERICA; UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES and its sub-agency
DEFENDANT CENTERS FOR MEDICARE AND MEDICAID SERVICES;
MEHMET OZ, ADMINISTRATOR OF THE CENTERS FOR MEDICARE AND
MEDICAID SERVICES, in his official capacity as Administrator of Centers for
Medicare and Medicaid Services,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

APPELLEE'S SUPPLEMENTAL RECORD EXCERPTS

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1. Edwin Borchard, *Declaratory Judgments* ch. VII (2d ed. 1941).¹

¹ Unavailable in most Westlaw and LexisNexis subscriptions; not available online generally.

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/s/ David LeFèvre

David LeFèvre

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CHAPTER XII

TAXATION

THE application of the declaratory judgment to questions of taxation is growing by leaps and bounds. Even in states which prohibit the grant of an injunction against the collection of taxes, the use of the declaratory action is not opposed. The reason is hardly doubtful; the speed, simplicity and inexpensiveness of the procedure have commended it to taxpayer and public official alike. Either one may initiate the suit; and it is interesting to observe how often public officials find it of advantage to obtain a clarifying adjudication on a statute or its application or administration against a contesting taxpayer or another public officer.

The principal questions that arise concern the constitutionality, construction and administrative application of taxing statutes and ordinances. Most of the issues are raised by the affected taxpayer, interested as a rule in claiming the invalidity of the tax or of his own exemption from its incidence. After dealing with the many phases of the subject from the point of view of state law, we shall then examine the deplorable but successful effort of the Department of Justice in 1935 to bring about an amendment to the Federal Declaratory Judgments Act to prevent its application to any federal tax questions, although the federal courts, as we shall see, have had much occasion to deal with matters of state taxation.

CONSTITUTIONALITY

Alternative to Injunction and Recovery Suits. The unconstitutionality or invalidity of a tax law subjecting the plaintiff to taxation has been challengeable in the United States by a suit for the recovery of a tax already paid, and in some states by injunction. Yet in some states it is not possible to enjoin the collection of a tax, because public policy opposes restraint upon the fiscal powers of the government, the alleged effect of which might be to cripple the exercise of public functions. The exceptions are carefully guarded.¹ Still it ought to be possible, without undue delay or hampering of the government, to challenge the validity of a tax law or tax assessment thereunder² without abusing the injunction for the purpose, and yet without going to the trouble and expense of paying the tax and then suing for its recovery. The delay and uncertainty as to the validity of the tax collection are not materially diminished by the fact that the

¹See Note, *Judicial Determination of the Validity of a Federal Tax before Payment*, 45 Harv. L. Rev. 1221 (1932).

²See *infra* p. 831.

Government has the tax money in its Treasury. What is needed is a speedy decision on the issue of legality, and this is afforded by the declaration.

In a leading case on the declaratory judgment before the United States Supreme Court,³ a Tennessee statute imposing an excise tax on the storers and distributors of gasoline was challenged by the plaintiff railroad, called upon to pay the tax, on the ground that it was neither a storer nor distributor but a consumer, and that the tax in its application to the plaintiff violated the commerce clause and the Fourteenth Amendment of the federal Constitution. The State defended on the ground that under Tennessee law, which prohibits suits to enjoin the collection of a tax,⁴ the only way to test the constitutionality of the law was to pay the tax and sue for its recovery. But as the validity of the tax had already been sustained in another type of case in an injunction proceeding,⁵ and as the plaintiff railroad probably feared that a federal court would deny it an injunction where the state law forbade, it determined to test the issue by declaratory action and was sustained in its effort to do so. Thus, the United States Supreme Court has approved a practice long prevailing in jurisdictions authorizing the declaratory judgment by permitting the legality of the tax to be tested by action for a declaration. This is not only simple, speedy, and inexpensive, but, while averting the inconveniences and impropriety of injunction, serves every practical purpose, for, in order to keep the government within the bounds of legality, it is not necessary to do more than declare the law.⁶ Coercive remedies against government officials are superfluous.

Other Remedies No Bar. Government officials challenged by declaratory action to correct an erroneous construction of a tax statute, to grant an exemption, or to refrain from enforcing an allegedly invalid or inapplicable tax upon the petitioner, frequently attempt to escape adjudication or to throw obstacles in the petitioner's path by asserting the impropriety of judicial recourse by declaration, on the ground (1) that an injunction is not permitted, (2) that payment and suit for recovery is the only remedy open to the protesting taxpayer, or (3) that the statutory procedure of administrative challenge, followed by certiorari, should be pursued. It is, however, interesting to note that in many states an injunction against a void or illegally assessed tax is readily obtainable.⁷ Even in the few states

³Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345 (1933).

⁴Tenn. Code (Shannon, 1932) §1138. See also Peterson et al. v. Central Arizona L. & P. Co., 107 P. (2d) 205 (Ariz. 1940), where Arizona law prohibited injunction.

⁵American Airways, Inc. v. Wallace, 57 F. (2d) 877 (D. C. Tenn. 1932).

⁶Somewhat the same development marks the experience of England, where suits against the Government to determine the legality of administrative action have been

permitted, notwithstanding the contention that this was possible only by petition of right. *Supra* p. 370 and *infra* p. 896.

⁷Union Pacific Ry. v. Cheyenne, 133 U. S. 516 (1885) (injunction, where collection would lead to multiplicity of suits and throw cloud on title);

Raymond v. Chicago Union Traction Co., 207 U. S. 20 (1907) (injunction, where collection would cause insolvency);

cf. Dept. of Treasury v. Ridgely, 211 Ind. 9, 4 N. E. (2d) 557, 560, 108 A. L. R.

which follow the federal Government and, in general, decline to enjoin the collection of taxes, the state courts have, nevertheless, granted declarations.⁸ And even when the tax is not paid, and where statutory administrative remedies to correct errors have been provided, the state courts seem to have considered them, certainly when only questions of law are involved, as alternative remedies and not to exclude resort to the declaratory judgment.

This has been especially evident in New York, where the corporation counsel of the city contested vigorously the effort of various concerns to invoke the declaratory judgment law to adjudicate their immunity from the application to their business or transactions of the city sales tax.⁹ The city contended that an administrative hearing before the comptroller, and certiorari from his determination to the courts, or a payment under protest, followed by application and if necessary suit for refund, are exclusive remedies and that the failure to exhaust the administrative remedy bars the declaratory action. But the Court of Appeals and with few exceptions¹⁰ the lower courts held the declaratory action proper, since it raised the legal issue promptly and required no administrative findings as a condition of adjudication.¹¹ The federal courts have also dispensed with the adminis-

1067 (1936), where provision for payment and suit for recovery was held not to exclude injunction;

Dept. of Treasury v. J. P. Michael Co., 105 Ind. App. 255, 11 N. E. (2d) 512 (1937) (declaration granted).

⁸Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249 (1933);

Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 (1937).

Peterson v. Central Arizona L. & P. Co., *supra* note 4.

⁹Socony-Vacuum Oil Co., Inc. v. City of New York, 247 App. Div. 163, 287 N. Y. S. 288 (1936), *aff'd* 272 N. Y. 668, 5 N. E. (2d) 385 (1936);

Dun & Bradstreet, Inc. v. City of New York, 276 N. Y. 198, 11 N. E. (2d) 728 (1937);

Y. M. C. A. v. City of New York, 251 App. Div. 821, 298 N. Y. S. 191 (1937), *aff'd* 276 N. Y. 619, 12 N. E. (2d) 605 (1938);

Empire City Subway Co., Ltd. v. City of New York, 168 Misc. 775, 6 N. Y. S. (2d) 55 (1938), especially useful opinion of Justice Black;

German Masonic Temple Ass'n. v. City of New York, 253 App. Div. 680, 3 N. Y. S. (2d) 596 (1938), *rev'd* 279 N. Y. 452, 18 N. E. (2d) 657 (1939).

¹⁰In German Masonic Temple Ass'n. v. City of New York, 253 App. Div. 680, 3 N. Y. S. (2d) 596 (1938), Justice Cohn was

persuaded to disallow the declaratory action on the theory that there was a "full and adequate remedy" provided by the administrative procedure—a ground since repudiated by the New York Court of Appeals in *Woollard v. Schaffer Stores Co.*, 272 N. Y. 304, 311, 5 N. E. (2d) 829 (1936)—and by the belief that in the other cases issues of fact had not been involved and were involved in the present case. The Court of Appeals thought issues of fact were not involved (279 N. Y. 452), but unless these were complicated and required administrative sifting and findings this should not have deterred judicial review at an early stage.

¹¹In *Manufacturers National Bank of Detroit v. City of Detroit*, 285 Mich. 273, 280 N. W. 760 (1938), the majority of the Michigan Supreme Court declined to pass on the legality of the city's refusal to deduct from a valuation for assessment of a tax on the shareholders of a bank the amount invested by the bank in certain securities. If this was invested from capital and not from deposits it should have been deducted. The majority could find no equitable principle involved, hence dismissed the bank's bill in equity for a declaratory judgment and injunction (in Michigan a declaration must lie in equity) and required the bank to pay the tax demanded from the shareholders and suggested that the shareholders sue for its recovery. This is unusual where a question of

trative proceedings as a condition of adjudication where the petitioner claimed for his business statutory exemption from taxation, which was denied by the Tax Collector on his construction of the law.¹²

The Johnson Act. Yet District Judge Clancy was probably correct in refusing under the Johnson Act to take jurisdiction of a federal suit for a declaratory judgment to hold invalid the 2% New York City sales tax as applied to a purchase of 12 cents or less.¹³ The Johnson Act prohibits any District Court to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state." Judge Clancy considered that there was a "plain, speedy and efficient remedy" in the administrative proceedings and review by certiorari, and by declaratory judgment in New York; and that whereas the Johnson Act prohibited him only "to enjoin, suspend or restrain," nevertheless adjudication in the form of a declaratory judgment amounted to the same thing. In so holding, the court was apparently correct, for the Johnson Act was designed to prevent federal assumption of jurisdiction to adjudicate and not merely the issuance of an injunction. On the other hand, there is believed to be a sharp difference between the injunction against the collection of federal taxes, provided by Section 3224 of the Revised Statutes, and adjudication of their legality by declaratory procedure.¹⁴

Constitutional Issues. State taxing statutes have been challenged by taxpayers under the declaratory procedure on the constitutional ground that they interfered with interstate commerce,¹⁵ impaired the obligation of contract,¹⁶ denied the equal protection of the

law or simple questions of fact are involved. The minority of the court, by Justice Sharpe, already distinguished for his prophetic dissent in the Anway case (*supra* p. 154), found equitable elements present in the avoidance of a multiplicity of suits, felt the bank could sue as the instrumentality of collection (see *Socony-Vacuum Oil Co. v. City of New York, supra* n. 9) and thought it useless to send the case back to trial for findings of fact which were admitted and where a complete decision could be rendered. The minority seems correct. The dismissal by the Alabama Supreme Court in *State Tax Commission v. Commercial Realty Co.*, 236 Ala. 358, 182 So. 31 (1938) on the ground that the suit to escape property taxes on property leased to the United States was a suit against the state on which immunity had not been waived seems unusual, and inconsistent with the many Alabama decisions to be noted hereafter.

¹²*Gully v. Interstate Natural Gas Co.*, 82 F. (2d) 145 (C. C. A. 5th, 1936), *cert. denied* 298 U. S. 688, 56 S. Ct. 958 (1936). Circuit Judge Hutcheson rejected the argument that

appeal should have been made to the judge of the Mississippi Circuit Court as a condition of invoking federal jurisdiction.

¹³*Collier Advertising Service v. City of New York*, 32 F. Supp. 870 (S. D. N. Y. 1940). *Contra, Morrison-Knudsen Co. v. State Board of Equalization*, 35 F. Supp. 553 (D. Wyo. 1940). *Cf. 50 Yale L. J. 927 (1941)* and *supra* p. 234.

¹⁴*Infra*, p. 831.

¹⁵*Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249, 53 S. Ct. 345 (1933) *supra* p. 195;

National Linen Service Corp. v. State Tax Comm., 237 Ala. 360, 186 So. 478 (1939) (sales tax; extra-state goods);

Durr Drug Co. v. Long, 237 Ala. 689, 188 So. 873 (1939) (sales tax; extra-state goods);

Storen et al. v. Adams Mfg. Co., 212 Ind. 343, 7 N. E. (2d) 941 (1937), 304 U. S. 307, 58 S. Ct. 913 (1938) (gross receipts tax).

¹⁶*Storen et al. v. Adams Mfg. Co.*, *supra* n. 15 (income from tax-exempt bonds included in gross receipts);

laws,¹⁷ violated due process of law or state's rights,¹⁸ violated the rule requiring uniformity,¹⁹ improperly delegated legislative power,²⁰ were discriminatory and unreasonable,²¹ were uncertain and

Oursler v. Tawes, 13 Atl. (2d) 763 (Md. 1940) (no income from ground rents shall be collected by lessor from lessee);

Kotch v. Middle Coal Field Poor Dist., 329 Pa. 390, 197 Atl. 334 (1938) (grant of power to levy taxes provides for payment of debts);

Town of Oneida v. Pearson Hardwood Flooring Co., 169 Tenn. 449, 88 S. W. (2d) 998 (1935) (statute changed boundaries, removing defendant from plaintiff town's jurisdiction, thus diminishing tax resources to meet service on its bonds).

¹⁷Sovereign Camp W. O. W. v. Murphy, 17 F. Supp. 650 (S. D. Iowa 1936) (foreign fraternal beneficial association claimed domestic associations exempted from tax);

Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 (1937);

Kentucky Tax Commission et al. v. Great Atlantic & Pacific Tea Co., 280 Ky. 606, 133 S. W. (2d) 947 (1939);

Oursler v. Tawes, 13 Atl. (2d) 763 (Md. 1940), *supra* n. 16;

Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102 (1934) (graduated income tax law, containing classifications and exemptions, held valid);

Cherokee State Bank of St. Paul v. Wallace, 202 Minn. 582, 279 N. W. 410 (1938).

¹⁸Curry, Tax Commissioner of Alabama v. McCanness, Comm'r of Finance of Tennessee, 307 U. S. 357, 59 S. Ct. 900 (1939);

Sancho v. Humacao Shipping Corp., 108 F. (2d) 157 (C. C. A. 1st, 1939) (Porto Rico denied power to tax sugar in New York);

cf. Penn v. Glenn, 10 F. Supp. 483 (W. D. Ky. 1935) *infra* p. 852.

Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 (1937) (*supra* n. 17);

National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. (2d) 283, 79 P. (2d) 381 (1938) (compelling buyer to pay seller's tax);

Mayor and City Council of Baltimore v. Perrin, 12 Atl. (2d) 261 (Md. 1940) (state constitution; required former owner to have paid taxes);

Williams v. Tawes, Comptroller, Circuit Court, Anne Arundel County, 17 Atl. (2d) 137 (Md. 1941) (foreign fiduciary income claimed exempt from Maryland tax); State *ex rel.* Froedtert Grain & Malting Co. v. Tax Commissioner, 221 Wis. 225, 265 N. W. 672,

221 Wis. 225, 267 N. W. 52 (1936) (tax on dividends earned in state).

¹⁹Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 (1937) (*supra* n. 17);

Rinn v. Bedford, 102 Colo. 475, 84 P. (2d) 827 (1938) (*infra* n. 22);

Price et al. v. Fox, Judge, et al., 220 Ky. 373, 295 S. W. 433 (1926) (Kentucky decedents and non-Kentucky decedents taxed differently; valid);

Oursler v. Tawes, 13 Atl. (2d) 763 (Md. 1940), *supra* n. 16;

Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102 (1934) (*supra* n. 17);

E. B. Ficklen Tobacco Co. v. Maxwell, 214 N. C. 367, 199 S. E. 405 (1938) (license fee of \$1,000 on sellers of "scrap tobacco");

Kotch v. Middle Coal Field Poor Dist., 329 Pa. 390, 197 Atl. 334 (1938), *supra* n. 16.

²⁰Davis v. Los Angeles County, 79 P. (2d) 1102 (Cal. 1938) and 12 Cal. (2d) 412, 84 P. (2d) 1034 (1938) (taxes for retirement of district school employees);

Smithberger v. Banning, Sec'y. of Dept. of Agriculture, 129 Neb. 651, 262 N. W. 492 (1935); 130 Neb. 354, 265 N. W. 10 (1936) (cooperation with federal agencies in using gasoline taxes for relief);

E. B. Ficklen Tobacco Co. v. Maxwell, 214 N. C. 367, 199 S. E. 405 (1938) (*supra* n. 19);

City of Portland v. Welch, 154 Ore. 286, 59 P. (2d) 228 (1936) (*infra* n. 32);

Kotch v. Middle Coal Field Poor Dist., 329 Pa. 390, 197 Atl. 334 (1938) (*supra* n. 16).

²¹Walsh et al. v. Bridgeport, 2 Conn. Supp. 88 (1935);

Dunlop Tire & Rubber Co. et al. v. J. M. Lee, Comptroller, 126 Fla. 369, 171 So. 331 (1936);

City of Jackson v. Riffle et al., 219 Ky. 689, 294 S. W. 142 (1927) (city sued to establish validity of its apparently discriminatory mode of special assessment);

Reynolds Metal Co. v. Martin, 269 Ky. 378, 107 S. W. (2d) 251 (1937) (state banks' income excluded from tax on "gross income," etc.);

Great Atlantic and Pacific Tea Co. v. Kentucky Tax Commission, 278 Ky. 367, 128 S. W. (2d) 581 (1939);

Martin, Commissioner v. Dixie Ice Cream Co., 280 Ky. 334, 133 S. W. (2d) 87 (1939) (unreasonable);

vague,²² imposed double taxation²³ or other improper burden,²⁴ dealt with more than one subject not clearly expressed in the title²⁵ or were for other reasons improperly adopted,²⁶ failed to allow certain deductions or exemptions,²⁷ allowed certain exemptions to others making them discriminatory,²⁸ or were *ultra vires* the local authorities undertaking to levy the tax.²⁹ They

Mayor and City Council of Baltimore v. Perrin, 12 Atl. (2d) 261 (Md. 1940);

Moeller, McPherrin & Judd v. Smith, Tax Commissioner, 127 Neb. 425, 255 N. W. 551 (1934) (change in system of taxation on personal property—plaintiff's stock affected); Keator v. Lackawanna County, 292 Pa. 269, 141 A. 37 (1928) (discriminatory);

Wiseman v. Smith, 170 Tenn. 293, 95 S. W. (2d) 42 (1936) (contested use of license tax—held discriminatory).

²²Rinn v. Bedford, 102 Colo. 475, 84 P. (2d) 827 (1938) (Public Revenue Service tax contested by lawyer, because he uses services of others and forced to collect from his clients);

E. B. Ficklen Tobacco Co. v. Maxwell, 214 N. C. 367, 199 S. E. 405 (1938) (*supra* n. 19).

²³Newlin v. Stuart, 273 Ky. 626, 117 S. W. (2d) 608 (1938) (tax on practice of law claimed additional to others);

Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102 (1934) (*supra* n. 17);

John Bardenheier Wine & Liquor Co. v. City of St. Louis, 345 Mo. 637, 135 S. W. (2d) 345 (1940) (city's power to impose gallonage tax, in view of state statutes).

²⁴Equi v. City and County of San Francisco, 13 Cal. App. (2d) 140, 56 P. (2d) 590 (1936) (tax for revenue not regulation);

Hill et al. v. City of Eureka, 35 Cal. App. (2d) 154, 94 P. (2d) 1025 (1939) (not revenue measure);

Lutz et al. v. Arnold, and Hamer v. Wise, 208 Ind. 480, 193 N. E. 840 (1935) (general intangible tax required stamps on promissory note, reduced to judgment, as condition of execution);

Vincent Realty Co. v. Brown, Sec'y of State, 344 Mo. 438, 126 S. W. (2d) 1162 (1939) (statute established lien on corporate assets for unpaid taxes—held, not justiciable until sale or gift ripens lien);

Rinn v. Bedford, *supra* n. 22, Smithberger v. Banning, *supra* n. 20, and Martin v. Dixie Ice Cream Co., *supra* n. 21 (compelled plaintiff distributor to act as tax collector);

Beach Tramways Subdivision Proprietary, Ltd. v. City of Sandringham, 52 C. L. R. 399 (1934-5).

²⁵Rinn v. Bedford, 102 Colo. 475, 84 P. (2d) 827 (1938) (*supra* n. 22);

Mayor and City Council of Baltimore v. Perrin, 12 Atl. (2d) 261 (Md. 1940);

Oursler v. Tawes, 13 Atl. (2d) 763 (Md. 1940), *supra* n. 16;

Moeller, McPherrin & Judd v. Smith, 127 Neb. 425, 255 N. W. 551 (1934);

Kotch v. Middle Coal Field Poor Dist., 329 Pa. 390, 197 Atl. 334 (1938), *supra* n. 16. See also *supra* p. 771 (constitutionality of statutes).

²⁶Davis v. Los Angeles County, 79 P. (2d) 1102 (Cal. 1938) (*supra* n. 20) (failed to satisfy requirement of urgency measure and election irregular);

Price et al. v. Fox, Judge, et al., 220 Ky. 373, 295 S. W. 433 (1926) (repeal of earlier statutes and republication);

Moore v. Lewis et al., County Commissioners, 10 D. & C. (Pa.) 466 (1928) (alleged defective heading).

²⁷Regents of University System of Georgia v. Page, 81 F. (2d) 577 (C. C. A. 5th, 1936) (exemption of state instrumentality, university, from tax on football game receipts);

United Pacific Ins. Co. v. Bakes, 57 Idaho 537, 67 P. (2d) 1024 (1937) (tax on gross premiums made no deduction for business on which no premium was paid);

cf. Moore v. Lewis et al., (*supra* n. 26) (plaintiff asserts constitutionality of statute exempting his horses and cattle).

²⁸Reynolds Metal Co. v. Martin, 269 Ky. 378, 107 S. W. (2d) 251 (1937) (*supra* n. 21) (banks and bank stockholders exempted);

Martin v. High Splint Coal Co., 268 Ky. 11, 103 S. W. (2d) 711 (1937) (improperly exempted real estate);

E. B. Ficklen Tobacco Co. v. Maxwell, 214 N. C. 367, 199 S. E. 405 (1938) (*supra* n. 19) (non-residents discriminated against);

State *ex rel.* Hamilton, Atty. Gen. v. Cohn, Collector, 1 Wash. (2d) 54, 95 P. (2d) 38 (1939) (distributors of gasoline refined in state exempt from excise tax).

²⁹McKinney v. Holt, Drainage Commissioner, 211 Ky. 512, 277 S. W. 851 (1925) (additional levy of special assessment);

Mason v. City of Victoria, 26 B. C. R. 418 (1917) (lack of jurisdiction);

may be attacked because they constitute special legislation or look to a special purpose,³⁰ or are in conflict with some superior law.³¹ Public bodies, including state, city, county, tax commission or collector, may sue each other or the taxpayer or collecting intermediary to establish that a tax law is or is not unconstitutional, depending upon their interest in the judgment sought.³² By virtue of the 1935 Amendment to the Federal Declaratory Judgments Act it is not even possible by declaration to challenge the constitutionality of a federal tax Act.^{32a}

CONSTRUCTION AND INTERPRETATION

Issues Adjudicated. Constitutionality or validity being conceded, we now come to the many cases which involve the applicability or administration of the tax, questions which may be raised either by the government or by an affected taxpayer. These issues usually involve questions of construction and interpretation. They arise in connection with the jurisdiction to tax, the liability of the property or the person to the particular tax, the necessity for and the right to make a levy, questions of classification, the inclusion or exclusion of the taxpayer from the terms of the class purported to be taxed, the immunity of the taxpayer by virtue of statute or contract, or by virtue of the particular use to which the property is put,

Spooner Oils, Ltd. v. Turner Valley Gas Conservation Board, [1932] 4 D. L. R. 729, 750 (Alberta) (conservation statute);

Unemployment Compensation Commission v. Savage, 140 S. W. (2d) 1073 (Ky. 1940), 54 Harv. L. Rev. 333 (1941) (state's disability to transfer to federal government taxes collected from railroad workers);

Cornell v. Deputy Federal Commissioner of Taxation (So. Am.), 29 C. L. R. 39 (1920) (validity of assessment).

³⁰Smithberger v. Banning, Sec'y of Dept. of Agriculture, 129 Neb. 651, 262 N. W. 492 (1935); 130 Neb. 354, 265 N. W. 10 (1936) (*supra* n. 20) (gasoline tax for relief not special purpose);

Tukey v. Douglas County, 133 Neb. 732, 277 N. W. 57 (1938) (power of legislature to remit penalties for tax delinquency);

City of Portland v. Welch, 154 Ore. 286, 59 P. (2d) 228 (1936) (*infra* n. 32);

Kotch v. Middle Coal Field Poor Dist., 329 Pa. 390, 197 Atl. 334 (1938) (*supra* n. 16) (held, not special legislation).

³¹John Bardenheier Wine & Liquor Co. v. City of St. Louis, 345 Mo. 637, 135 S. W. (2d) 345 (1940) (*supra* n. 23);

Wiseman v. Smith, 170 Tenn. 293, 95 S. W. (2d) 42 (1936) (*supra* n. 21) (distribution of tax funds under conflicting statutes).

³²City of Portland v. Welch, 154 Ore. 286, 59 P. (2d) 228 (1936) (city sued tax assessor, who had reduced budget on order of state tax commission);

Eugene School Dist. No. 4 v. Fisk, 159 Ore. 245, 79 P. (2d) 262 (1938) (validity of School Fund law, and tax thereunder; distribution between county and district contested);

State *ex rel.* Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P. (2d) 759 (1937) (county on behalf of property owners whose assessed valuation was increased by County Board of Equalization successfully challenged power of State Tax Commission to reconvene Board for the purpose);

State *ex rel.* Hamilton, Atty. Gen. v. Cohn, Tax Collector, 1 Wash. (2d) 54, 95 P. (2d) 38 (1939) (persons distributing petroleum products refined in state had been exempted from excise tax. Plaintiff insisted exemption unconstitutional). *Cf.* Colorado Nat'l Bank v. Bedford, Treasurer (plaintiff), 310 U. S. 41, 60 S. Ct. 800 (1940) (that bank not federal agency, hence subject to safe-deposit tax).

^{32a}William B. Scaife & Sons v. Driscoll, 94 F. (2d) 664 (C. C. A. 3rd, 1937) and *infra* p. 850.

such as religious, charitable or non-profit purposes, the correctness of the tax base, valuation, computation, rate, the amount due, especially in the light of conflicting statutes, the time of assessment, deductions allowable, the mode of assessment, especially its discriminatory or unreasonable administration, the incidence of the tax, and questions of administration in the collection or enforcement of the tax.

Jurisdiction to Tax. A question of primary importance is the jurisdiction of the taxing authority over the person or property of the taxpayer, a question which may be raised by the government, either against a competing taxing authority or against the individual to be taxed, or by the taxpayer against the government. A recent case in the United States Supreme Court deserves commendation as an illustration of the propriety of a declaratory suit among two or more competing tax authorities claiming exclusive jurisdiction over the person or estate of a decedent or living taxpayer by virtue of domicil or other distinguishing criterion of exclusive taxability. In the important case of *Texas v. Florida*³³ Texas brought an original bill in equity in the United States Supreme Court against the states of Florida, Massachusetts and New York, all of whom claimed to be the domicil of the late Edward H. R. Green, asking the Court to "determine, declare and adjudge whether, for purposes of taxation" the decedent was domiciled in Texas, Florida, Massachusetts or New York, the plaintiff claiming in particular that Texas was the domiciliary state and that therefore it "has exclusive right and jurisdiction to impose and collect succession, transfer or inheritance taxes upon the intangible personal property" of the decedent. It also appeared that if all four states could make their claim effective, the taxes would exceed the estate, notwithstanding its great size.

Although the suit was presented in purely declaratory form, and the determination of the court, confirming a master's report, found Massachusetts to be the domiciliary state, Mr. Justice Stone construed the bill as "in the nature of interpleader," a familiar form of equitable jurisdiction where a multiplicity of rival and mutually exclusive claims to the common fund was imminent or pending, and where the petitioner claimed an interest in the fund. The Supreme Court considered that the danger that the decedent's estate might be subject to loss through conflicting tax assessments in excess of the total value of the estate—the executor and next of kin having been served—and that the right of Texas to collect its tax might thus be defeated, made the issue clearly justiciable. Again the Supreme Court pointed out that equitable relief may be found not exclusively in the injunction but that irreparable injury, where in issue, may often be prevented "by a mere adjudication of rights," as in the case of boundary disputes between states.³⁴ This is the usual function of bills of peace, bills of interpleader and bills in the nature of interpleader. They are all declar-

³³306 U. S. 398, 59 S. Ct. 563 (1939).

³⁴*Supra* p. 142.

atory in form and effect³⁵ and are designed to avoid risk and jeopardy by adjudicating in one suit multiple claims to a single obligation. This case, like other litigations among competing governmental authorities to exclusive jurisdiction over a *res* or person or, in the obverse case, to immunity from a burden like poor relief, presents a cogent argument for the efficacy of declaratory procedure in cases of this type.³⁶

On the other hand, where the claims of two or more taxing jurisdictions are not mutually exclusive but may be independent and cumulative, resulting merely in double taxation of the same asset, there is no basis for invoking the original jurisdiction of the Supreme Court to determine which state has the better claim. This was pointed out by the Supreme Court, in a decision distinguishing *Texas v. Florida*, in the case of *Massachusetts v. Missouri*,³⁷ where Massachusetts claimed the privilege of taxing a revocable trust at the death of the trustor, domiciled in Massachusetts, although the securities and the trustee were in Missouri. Although the bill of Massachusetts did say that "both states are claiming the exclusive right to impose inheritance taxes upon the trust estate" and that Missouri "intends to exercise its jurisdiction over the trustees and property to the exclusion of Massachusetts," the Supreme Court found that the claims of the two states were not mutually exclusive, that Massachusetts was not asserting a claim susceptible of judicial enforcement in the Supreme Court, since the property in Missouri was amply sufficient to satisfy the claims of both states, should they be valid. The alleged reciprocal immunity which Missouri was supposed to grant to the estate of a Massachusetts citizen could not be enforced by the state of Massachusetts, but only by the individual affected, either in Missouri or in the lower federal courts, and as a bill to recover Massachusetts taxes from the Missouri trustees, it was not within the original jurisdiction of the Supreme Court.

Yet another recent case in the Supreme Court does support the view that conflicting claims of power to tax are justiciable in the lower courts either at the instance of the taxpayer or of the government. In *Curry v. McCanless*,³⁸ a decedent was domiciled in Tennessee. She left a trust estate in Alabama, which passed under the will. Inasmuch as Tennessee claimed the right to tax all the intangibles of a Tennessee decedent and Alabama, as the situs of the trustee and the securities in question, claimed the right to tax the trust estate, the two executors in Tennessee and Alabama sought a declaratory judgment in Tennessee against the tax collector of that state determining which state could tax and, if both, what portions of the estate fell to each. The Supreme Court of Tennessee held the estate "taxable in Tennessee and, [under the Fourteenth Amendment] not taxable in Ala-

³⁵*Supra* p. 137. Cf. *Cary Mfg. Co. v. Acme Brass & Metal Co.*, 215 Wis. 585, 254 N. W. 513 (1934) (conflicting title to insurance received after loss).

³⁶*Supra* p. 777.

³⁷308 U. S. 1, 60 S. Ct. 39 (1939).

³⁸307 U. S. 357, 59 S. Ct. 900 (1939) (two executors, plaintiffs against Tennessee).

bama, for purposes of death succession or transfer taxes."³⁹ On the appeal to the United States Supreme Court the two Tax Commissioners appeared as parties to the action. Still proceeding on the assumption that the intangibles had a "situs," each state claimed exclusive taxing jurisdiction of the trust estate in Alabama. Distinguishing previous conceptions of "situs," the Supreme Court held that the intangibles really had none but that they represent a relationship to the estate which warranted an exertion by each state of its authority and hence of its taxing power as a condition of passing title to the Alabama trust estate from the decedent to living beneficiaries.⁴⁰

Bases of Jurisdictional Immunity. Other cases in which by declaratory action taxing jurisdiction in violation of constitutional limitations was successfully challenged involve a tax by Porto Rico on a parcel of sugar purchased in Porto Rico but physically in New York on the day of assessment,⁴¹ and the important decision of District Judge Dawson in *Penn v. Glenn*⁴² holding unconstitutional as a regulation of production within a state the Kerr-Smith Tobacco Control Act.⁴³

Closely analogous are the numerous cases in which the petitioner claims immunity from the taxing jurisdiction of the state over his business or a particular transaction on the ground that its situs or effect or character is interstate or extra-state and therefore that the taxing government is without authority to levy a tax. These cases require a construction of the statute and an analysis and interpretation of the business or transaction. Thus, state sales, income, license or excise taxes have been contested on the ground that the transaction, while having ultimate effect in the state, was in reality so closely identified with interstate commerce as to place it outside the jurisdiction or power of the state to tax.⁴⁴ Similarly, with

³⁹*Long v. Stokes*, 174 Tenn. 1, 118 S. W. (2d) 228 (1937).

⁴⁰Butler, Hughes, McReynolds and Roberts, J. J. dissented, holding that Alabama was the situs of the trust estate and could alone tax its succession.

⁴¹*Sancho v. Humacao Shipping Corp.*, 108 F. (2d) 157 (C. C. A. 1st, 1939).

⁴²10 F. Supp. 483 (W. D. Ky. 1935). See also *infra* p. 852.

Cf. Los Angeles Soap Co. v. Rogan, 14 F. Supp. 112 (S. D. Cal. 1936) in which Judge Yankwich declined to grant a declaratory judgment, even before the Federal Amendment of 1935 excluding federal taxes from declaratory adjudication, in a case in which he held constitutional a tax or penalty the purpose of which was to discourage the use of cocoanut oil and to force the use of domestic oil substitutes.

⁴³See also *City of Brandon v. Municipal Commissioners*, [1931] 3 D. L. R. 397 (Man.)

(provincial tax acts claimed *ultra vires* as not direct tax with meaning of Br. No. Amer. Act, 1867).

⁴⁴*Adams Mfg. Co. v. Storen*, 304 U. S. 307, 58 S. Ct. 913 (1938) (gross receipts tax illegally included receipts from interstate sales);

West India Oil Co. v. Sancho (later *Domenech*), 108 F. (2d) 144 (1939), 311 U. S. 20, 61 S. Ct. 90 (1940) (oil in bonded warehouse in Porto Rico drawn off into ships for use on high seas);

National Linen Service Corp. v. State Tax Commission, 237 Ala. 360, 186 So. 478 (1939) (transaction claimed interstate, hence not subject to state "use" tax);

Long et al. v. Sherrill Terminal Co., 237 Ala. 166, 187 So. 412 (1939) (state claimed foreign terminal company organized to escape state distributor's and sales tax);

Graybar Electric Co. v. Curry, 238 Ala. 116, 189 So. 186 (1939) (not "sales" and even if so, protected by interstate commerce clause);

the allegation that the petitioner is a federal instrumentality, and hence immune.⁴⁵

Another group of cases challenges by declaration the jurisdiction of the state to tax transactions in which one or more of the operative elements occur outside the state or affect non-residents and for that reason escape state jurisdiction.⁴⁶

A somewhat similar group of cases challenges the power and privilege of the taxing authority to make a levy, either because the tax has been invalidly levied or is intended for an invalid purpose, or because the petitioner's land or property is not within the taxing jurisdiction or is not benefited or because the tax is or has become inappropriate or inapplicable for some other constitutional or statutory reason.⁴⁷

Curry v. Feld, 238 Ala. 255, 190 So. 88 (1939) (local distributor claimed agent for interstate commerce);

Century Distilling Co. v. Defenbach, 61 Idaho 192, 99 P. (2d) 56 (1940) (sale of foreign corporation to state liquor commission claimed "interstate" and not "doing business" in state);

Harrison v. Darling, etc., 52 C. L. R. 68 (1934) (situs).

⁴⁵Federal Land Bank of St. Paul v. De Rochford, 69 N. D. 382, 287 N. W. 522 (1939) (Federal Land Bank sued gasoline dealer and state auditor claiming exemption from gasoline tax); cf. *infra* p. 843, n. 85.

Winston Bros. Co. v. Tax Commission, 156 Ore. 505, 62 P. (2d) 7 (1936) (immunity from Oregon excise tax on profits by plaintiff Minnesota corporation on contract with federal Bonneville dam).

Cf. Colorado Nat'l. Bank v. Bedford, Treasurer, 310 U. S. 41, 60 S. Ct. 800 (1940) (Treasurer sued bank).

⁴⁶Thompson v. State of Louisiana, 98 F. (2d) 108 (C. C. A. 8th, 1938) (state sued trustee of Missouri Pacific Ry. for franchise tax against claim that bankrupt railway had no property in Louisiana);

Durr Drug Co. v. Long, 237 Ala. 689, 188 So. 873 (1939) (bottles purchased outside state);

Maloney Davidson Co. v. Martin et al., 274 Ky. 449, 118 S. W. (2d) 708 (1938) (liquors sold to dealers outside state);

Holmes v. Borgen, 200 Minn. 97, 273 N. W. 623 (1937) (stock owned by decedent in domestic corporation, already taxed);

New York Life Ins. Co. v. Sullivan, 89 N. H. 21, 192 Atl. 297 (1937) (receipts from annuity contracts paid foreign insurance companies claimed non-taxable);

City Bank Farmers' Trust Co. v. New York Central R. R. Co., 253 N. Y. 49, 170

N. E. 489 (1930) (duty of railroad to transfer stock without requiring evidence that Pennsylvania transfer tax paid);

Midwest Dairy Products Corp. v. Crenshaw, 170 Tenn. 361, 95 S. W. (2d) 313 (1936) (distributor of foreign breweries);

Union Planters Nat. Bank & Trust Co. v. Beeler, 172 Tenn. 317, 112 S. W. (2d) 11 (1938) (executor in Tennessee, beneficiaries non-residents—income from stock in executor's hands);

Box Elder County v. Conley, County Assessor, 75 Utah 199, 284 Pac. 105 (1930) (that automobile assembled in California and shipped to Utah was not taxable in Utah);

Re Corlet, [1939] 4 D. L. R. 111 (Alta.) (trustee and beneficiary in Isle of Man claim insurance funds of Alberta decedent immune from Alberta succession tax);

Kerr v. Sup't. of Income Tax, [1938] 3 D. L. R. 23 (Alta.), *rev'd* [1939] 1 D. L. R. 149 (immunity from Alberta tax for dividends earned in Washington);

Barwick v. South Eastern & Chatham Ry. Cos., [1921] 1 K. B. 187, *aff'g* [1920] 2 K. B. 387 (whether reclaimed land within taxing district);

Hope v. Edinburgh Corp., 5 Scot. L. T. 195 (1897) (land not within jurisdiction);

Re Parker and Succession Duty Act, 36 B. C. 299 (1925) (mortgage debts outside province);

Murray v. Federal Com'r of Taxation, 29 C. L. R. 134 (1921) (dividends paid to resident of England by Australian companies);

Erie Beach Co. Ltd. v. Attorney General, 61 Ont. L. R. 507 (1927) (shares of capital stock claimed immune from succession duty).

⁴⁷Bank of Commerce and Trust Co. of Memphis v. Union Central Life Ins. Co., 94 F. (2d) 422 (C. C. A. 5th, 1938) (lands not subject to levies for drainage district);

Suits by Government. As already observed, the government or taxing authority often finds it of advantage, instead of enforcing a demand the propriety of which is doubtful, to test the validity of the disputed levy or assessment in advance of enforcement and as a guide to future conduct. Thus, the liability of certain land or business or personalty to taxation on grounds of situs, use, nature or function, has conveniently been tested by declaratory action before positions have been materially changed.⁴⁸ This

State Tax Commission v. Board of Education of Jefferson County, 235 Ala. 388, 179 So. 197 (1938) (that plaintiff Board under no duty or power to pay defendants gasoline taxes on its school busses; court held contra);

E. E. McCalla Co. v. Sleeper, 105 Cal. App. 562, 288 Pac. 146 (1930) (land improperly described in assessment book);

Fleming v. City of Los Angeles, 127 Cal. App. 699, 16 Pac. (2d) 355 (1932) (improperly described in ordinance);

General Pipe Line Co. v. State Board of Equalization, 47 P. (2d) 702 (Cal. 1935), *rev'd* 5 Cal. (2d) 253, 54 P. (2d) 18 (1936) (that not defendant state board, but local assessors had jurisdiction to tax);

Denver Land Co. v. Moffat Tunnel Impr. Dist., 87 Colo. 1, 284 Pac. 339 (1930) (past levies invalid, because bond issue which they served, invalid);

Montgomery v. City and County of Denver, 102 Colo. 427, 80 P. (2d) 434 (1938) (defendants' power to levy general tax in aid of and to redeem improvement bonds charge on improvement districts);

Conzelman v. City of Bristol, 122 Conn. 218, 188 Atl. 659 (1936) (that defendant's grand list was illegal—failure to make revaluation every ten years—alleged defects in procedure, hence levy claimed invalid);

Bemis Bros. Bag Co. v. Wallace, 197 Minn. 217, 266 N. W. 690 (1936) (capital tax claimed superseded by income tax);

510 Groveland Ave., Inc. v. Erickson, 201 Minn. 381, 276 N. W. 287 (1937) (levy claimed to be in excess of that allowed);

Hamilton v. Arch Hurlley Conservation Dist., 42 N. M. 86, 75 P. (2d) 707 (1938) (levy would exceed tax limits);

Brown v. Ward, 246 N. Y. 400, 150 N. E. 184 (1927) (taxpayer's suit; levy for bridge illegal except under statute);

Gwynne v. Board of Education of Union Free School Dist., 234 App. Div. 629, 252 N. Y. S. 625 (1931) (that defendant could not legally tax property);

Socony-Vacuum Oil Co. v. City of New York, 247 App. Div. 163, 287 N. Y. S. 288, *aff'd without opinion*, 272 N. Y. 668, 5 N. E.

(2d) 385 (1936) (city tax law in violation of state authority);

Public Utility District No. 1 v. Superior Court for Whatcom County, 199 Wash. 146, 90 P. (2d) 737 (1939) (intervenor, county assessor and treasurer claimed right to levy tax for District on all property in defendant cities for water and electric supply; denied);

Villeneuve v. Rural Municipality of Kelvington, [1929] 2 D. L. R. (Sask.) 919;

Fletcher v. Wainono Drainage Board, [1917] N. Z. 405 (invalid for want of notice to, and hearing of, landowners involved);

Blenheim Corp. v. Australian Mut. Provident Soc., [1922] N. Z. 1229 (validity of a rate imposed to pay off loan for gas works construction);

In re Succession Duties Act, 1932, Royal Trust Co. (Ex'r. of Cochrane Estate) v. Att'y. Gen. of Alberta, [1934] 1 W. W. R. 828, 831 (what property liable);

Mason v. City of Victoria, 26 B. C. R. 418 (1917) (levy illegally adopted).

⁴⁸*Moore v. Farmers Mut. Mfg. & Ginning Co.*, 51 Ariz. 378, 77 P. (2d) 209 (1938) (classification for tax);

Chesapeake & Ohio R. R. Co. v. City of Morehead, 223 Ky. 698, 4 S. W. (2d) 726 (1928) (plaintiff city sought declaration of rights as to paving assessment, from which defendant railway claimed exemption);

Dean v. Board of Education of Harrodsburg, 247 Ky. 553, 57 S. W. (2d) 477 (1933) (defendant's land included in the district);

Secretary of State v. Potter, 252 Mich. 460, 233 N. W. 380 (1930) (malt and wort tax; "for the guidance of the plaintiff in enforcing . . . this statute");

Town Board of Greece v. Murray, 130 Misc. 55, 223 N. Y. S. 606 (1927), *supra* p. 396

State Board of Examiners v. Standard Engineering Co., 157 Tenn. 157, 7 S. W. (2d) 47 (1928) (plaintiff sought declaration fixing the liability to a license tax of an organization using a trade name);

Town of Oneida v. Pearson Hardwood Flooring Co., 169 Tenn. 449, 88 S. W. (2d)

has also proved a convenient method to adjudicate a claim to specific exemption from or reduction of tax.⁴⁹

Taxability of Property or Person. One of the commonest types of case is the declaratory action of a taxpayer asserting his immunity from a threatened or actual tax because the nature of the property, income or source or the personal character of the taxpayer is such as to exclude them from the disputed taxation. This is a somewhat different case from those in which the issue is one of plain statutory construction, the plaintiff claiming exemption from the statute, or from those in which the issue is one of mere classification. Here the taxpayer asserts that the allegedly taxable *res* is not subject to tax because it is a war risk insurance policy,⁵⁰ a federal or state instrumentality,⁵¹ property leased to the United States,⁵² "self-raised

998 (1935) (statute changing town boundary, thus excluding defendant from tax rolls);

Public Utility Dist. No. 1 v. Superior Court for Whatcom County, 199 Wash. 146, 90 P. (2d) 737 (1939) (District sued two cities asserting right to levy tax on two cities for water and electric service);

Islington Corp. v. London School Board, [1902] 2 K. B. 701 (defendants' liability for deficiencies under an assessment);

Provincial Treasurer v. Smith, 51 N. S. 490 (1917) (situs of bank shares to ascertain liability to succession tax);

Mayor, etc., of Napier v. McDougall, 31 N. Z. 1081 (1912) (plaintiff sought to determine whether it could levy a special rate in a certain district);

Wellington Harbour Board v. Union Steamship Co., [1916] N. Z. 849 (validity of a by-law imposing a tax on goods discharged);

Eastbourne Borough Council v. Wellington City Corp., [1929] N. Z. 441.

⁴⁹City of Phoenix v. State *ex rel.* Conway, Atty. Gen., 53 Ariz. 28, 85 P. (2d) 56 (1938) (state sues to establish its own power to tax cities engaged in business [selling water]);

City of Wyandotte v. State Board of Tax Administration, 278 Mich. 47, 270 N. W. 211 (1936) (cities sue to establish privilege of taxing municipally owned utilities);

Roman Catholic Archbishop of Sydney v. Metropolitan Water, Sewerage & Drainage Board, 40 C. L. R. 472 (1928) (plaintiff administrative authorities sought a declaration that defendant was liable under statute for water rates on certain property);

Wellington Harbour Board v. Union Steamship Co. of New Zealand, 32 N. Z. 766 (1913) (plaintiff sought declaration determining defendant's liability to wharf tax);

Mayor, etc. of Miramar v. Devoy, 34 N. Z. 1072 (1915) (liability to tax of property used for school during the week and church on Sunday);

Napier Borough v. Hawke's Bay Ed. Board, [1924] N. Z. 596 (defendant's liability for tax imposed to pay loans. The land was used for school purposes);

Napier Borough Council v. Napier Harbour Board, [1930] N. Z. 239 (whether land used for quarrying stone for harbor works was subject to tax);

Northcote Borough Council v. Buchanan, [1930] N. Z. 798 (plaintiff sought to determine when a statutory provision for reduction of rates on vacant property applied).

⁵⁰State *ex rel.* Smith v. Board of Com'rs of Shawnee County, 132 Kan. 233, 294 Pac. 915 (1931);

Martin v. Storrs, 277 Ky. 199, 126 S. W. (2d) 445 (1939) (business insurance policies not subject to inheritance tax).

⁵¹Regents of University System of Georgia v. Page, 81 F. (2d) 577 (C. C. A. 5th, 1936) (exemption from federal tax of state university, on receipts from football games);

Tirrell v. Johnston, Atty.-Gen., 86 N. H. 530, 171 Atl. 641 (1934) (exempt from gasoline road tax, because engaged as rural mail carrier, hence federal instrumentality. Denied. See *supra* p. 431);

State *ex rel.* Smith v. Board of Com'rs of Shawnee County, 132 Kan. 233, 294 Pac. 915 (1931) (property belonging to minor children of deceased soldier in hands of guardian claimed tax-exempt).

See cases *supra* n. 45.

⁵²State Tax Commission v. Commercial Realty Co., 236 Ala. 358, 182 So. 31 (1938) (dismissed because suit against state; poor pleading also alleged).

ing" flour and not intended to be taxed as a luxury,⁵³ intangibles,⁵⁴ furniture, and not "moneyed capital",⁵⁵ a store wholly owned by local operators and not a "controlled" or "directed" chain store,⁵⁶ not oleomargarine, but a number of separate ingredients sold individually,⁵⁷ a discontinued railroad,⁵⁸ an estate which the collector has failed to notify in time and hence immune for laches,⁵⁹ a fund, *res* or estate which for some other reason is not subject to tax.⁶⁰

On the other hand, the claim to the inapplicability of the tax may rest on the alleged personal immunity of the victim, such as a trustee of a railroad in bankruptcy,⁶¹ a fraternal association,⁶² a lawyer who claims immunity from an occupation tax,⁶³ or on the nature of the taxpayer's interest in the property assessed.⁶⁴ These cases are of course somewhat analogous to those in which exemption is claimed because of the statutory or contractual immunity of the owner or his property, or because of the

⁵³Holt v. Long, 234 Ala. 369, 174 So. 759 (1937).

⁵⁴Maricopa County v. Trustees of Arizona Lodge, etc., 52 Ariz. 329, 80 P. (2d) 955 (1938) (mortgages and conditional sales agreements not taxable).

⁵⁵Title Guarantee Loan & Trust Co. v. Hamilton, 238 Ala. 602, 193 So. 107 (1940).

⁵⁶Bedford v. Gamble-Skogmo, Inc., 104 Colo. 424, 91 P. (2d) 475 (1939).

⁵⁷Goodman v. Jacobs Packing Co., 174 Tenn. 399, 126 S. W. (2d) 309 (1939).

⁵⁸Beach Tramways Subdivision Proprietary, Ltd. v. City of Sandringham, 52 C. L. R. 399 (1935).

⁵⁹Sherwood v. City of Bridgeport, 123 Conn. 348, 105 Atl. 744 (1937);

Hogan v. Special Com'rs of Income Tax, [1932] Ir. R. 53 (immune from supertax, assessed after death on past income).

⁶⁰In re Hodson's Settlement, Brookes v. Attorney General, [1938] 1 Ch. 916, [1939] 1 Ch. 343 (accumulation claimed not subject to estate duty; held, *contra*, but no aggregation permitted);

Erie Beach Co. v. Attorney-General for Ontario, (P. C.) [1930] 1 D. L. R. 859, *aff'g* [1929] 2 D. L. R. 754, *rev'g* [1928] 1 D. L. R. (Ont.) 739 (succession and transfer tax, on shares issued and unissued);

In re Succession Duties Act, 23 Alta. 521 (1928) (taxability of provincial bonds);

In re Succession Duty Act and Wilson, 36 B. C. 450 (1926) (not subject to succession duty);

Bowman v. Attorney-General, 38 B. C. 1 (1926) (devise of real estate, decided preliminary to probate);

Fowkes v. Minister of Finance, 38 B. C. 395 (1927) (certain stocks and bonds);

McLeod v. City of Windsor, 52 Ont. L. R. 562 (1922) (assessment on income of estate);

Macrae Mining Co. v. Township of Bucke, 58 Ont. L. R. 453 (1926) (mining rights not merged in surface rights);

Grigg v. Commissioner of Taxes, [1920] N. Z. 508 (net earnings from race meetings);

Wright, Stephenson & Co. v. Commissioner of Taxes, [1921] N. Z. 633 (pension fund).

⁶¹Thompson v. State of Louisiana, 98 F. (2d) 108 (C. C. A. 8th, 1938) (trustee in bankruptcy claims immunity from franchise tax).

Cf. Martin, Commissioner v. F. H. Bee Shows, 271 Ky. 822, 113 S. W. (2d) 448 (1938) (itinerant carnival).

⁶²Sovereign Camp W. O. W. v. Murphy, 17 F. Supp. 650 (S. D. Iowa 1936) (Commissioner of Insurance claimed business had changed, hence subject to tax on gross premiums).

⁶³Newlin v. Stuart, 273 Ky. 626, 117 S. W. (2d) 608 (1938) (claimed to be officer of the court, hence exempt).

⁶⁴In the Matter of Finance Acts, 1894-1910; Hendrick v. Revenue Com'rs, [1931] Ir. R. 98 (interest of testator in property);

McPhedran & Cleland v. Toronto, [1932] 1 D. L. R. 439, 2 D. L. R. 202 (improvements on leased property);

Vaughn v. Attorney-General, 20 Alta. 424 (1924) (holder in escrow only, not owner);

Public Trustee v. Chairman, etc., of County of Waipawa, [1921] N. Z. 1104 (property held in trust for king).

charitable, religious, educational or non-profit function of the taxpayer or of the property.⁶⁵

Category and Classification. Among the most interesting cases to which the declaratory procedure has been applied are those in which the taxpayer, and sometimes the state, seeks a construction of the terms of a statute taxing a business or a transaction. The taxpayer usually claims that the terms of the statute do not apply to him or his business or that he is included within the terms of an exception. This type of case has been especially prominent since the introduction of sales taxes, where the taxpayer, threatened or actual, claims that his transaction is not a "sale,"⁶⁶ or if retail sales are taxed, that his sale by quantity or type or nature is not a "sale at retail,"⁶⁷ e.g., that the supply of containers or wrappers or auto parts to dealers who resell them to consumers is not a sale to a consumer or a retail sale,⁶⁸ or that his business is not included within the terms

⁶⁵*Infra* p. 844.

⁶⁶*Graybar Electric Co. v. Curry*, 238 Ala. 116, 189 So. 186 (1939) (interstate filling of orders claimed as not "sales");

State ex rel. Diefendorf v. Idaho Egg Producers, 59 Idaho 38, 80 P. (2d) 28 (1938) (state asserts transactions among members constitute "sales"; dismissed, poor pleading);

School District of Kansas City v. Smith, State Auditor, 342 Mo. 21, 111 S. W. (2d) 167 (1937) (supply of flooring by contractor for school building not a "sale").

⁶⁷*Frazier v. State Tax Commission*, 234 Ala. 353, 175 So. 402 (1937) (wholesale or retail; statute exempted from retail sales tax carload lots consigned to manufacturers, processors, miners, etc.);

Southern Ry. Co. v. Curry, 239 Ala. 263, 194 So. 523 (1940) (sales in carload lots; since not plaintiff buyer, but seller paid tax, plaintiff denied standing);

Moore v. Pleasant Hansler Constr. Co., 51 Ariz. 40, 76 P. (2d) 225 (1937), *aff'g* 50 Ariz. 317, 72 P. (2d) 573 (1937) (contractor builds bridge on lump-sum contract);

National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. (2d) 283, 79 P. (2d) 381 (1938) (sales of ice to express company to refrigerate railroad cars);

Dept. of Treasury of Indiana v. J. P. Michael Co., 105 Ind. App. 255, 11 N. E. (2d) 512 (1937);

Harco v. Martin, Commissioner, 271 Ky. 572, 112 S. W. (2d) 693 (1937) (itinerant, not stationary, seller of gasoline, hence claims exemption);

Maloney Davidson Co. v. Martin, 274 Ky. 449, 118 S. W. (2d) 708 (1938) (distributor of alcoholic beverages contests applicability of sales and stamp tax);

Boyer-Campbell Co. v. Fry, 271 Mich. 283, 260 N. W. 165 (1935) (meaning of "sales at retail"; applicability to gross proceeds of sales by importer in original packages; to sales to manufacturers, etc.);

Acorn Iron Works v. Auditor General, 295 Mich. 143, 294 N. W. 126 (1940) (supply of structural steel to contractors not retail sale);

Atlas Supply Co. v. Maxwell, 212 N. C. 624, 194 S. E. 117 (1937) (sales to contractors for use on lump-sum contracts held "retail");

State Board of Equalization v. Oil Wells Supply Co., 51 Wyo. 226, 65 P. (2d) 1093 (1937) (supplies to dealers in oil business held "wholesale"; collector sued);

State Board of Equalization v. Stanolind Oil & Gas Co., 51 Wyo. 237, 65 P. (2d) 1095 (1937) (transportation of crude from field to refinery held "wholesale").

⁶⁸*Doby v. State Tax Commission*, 234 Ala. 150, 174 So. 233 (1937) (auto parts used in repair, paint, etc.);

Cody v. State Tax Commission, 235 Ala. 47, 177 So. 146 (1937) (auto parts, some retained for use in repair, etc., others resold; first type retail);

City Paper Co. v. Long, 235 Ala. 652, 180 So. 324 (1938) (wrapping paper; sold to merchants for consumption, not resale, hence subject to sales tax);

Birmingham Paper Co. v. Curry, 238 Ala. 138, 190 So. 86 (1939) (paper boxes; *ibid.*);

Sterling Bag Co. v. City of New York, 168 Misc. 179, 4 N. Y. S. (2d) 521 (1938), 169 Misc. 5, 7 N. Y. S. (2d) 45 (1938), 256 App. Div. 645, 11 N. Y. S. (2d) 207 (1939), 281 N. Y. 269, 22 N. E. (2d) 369 (1939) (burlap

of a regulation or a sales or license tax,⁶⁹ that the benefit or material supplied the customer is a "service" and not the sale of a commodity,⁷⁰ that his is not "a retail store or mercantile establishment,"⁷¹ or a "chain store,"⁷² that certain supplies do not constitute "building materials" and

and cotton bags sold to sugar refineries, held resold, hence not taxable);

American Molasses Co. v. McGoldrick, Comptroller, 281 N. Y. 269, 22 N. E. (2d) 369 (1939) (molasses containers sold to packers of molasses not taxable as "retail" sale; differs from Alabama construction).

⁶⁹*State Tax Commission v. Hopkins*, 234 Ala. 556, 176 So. 210 (1937) (optometrist liable on finished glasses, notwithstanding price includes services and materials);

Long et al. v. Roberts, 234 Ala. 570, 176 So. 213 (1937) (printer and bookbinder subject to sales tax on his services and products);

Pappanastos v. State Tax Commission, 235 Ala. 50, 177 So. 158 (1937) (restaurant serving food and drink subject to sales tax);

Bedford v. Johnson, 102 Colo. 203, 78 P. (2d) 373 (1938) (storage warehouse not garage);

Bedford v. Hartman Bros., 104 Colo. 190, 89 P. (2d) 584 (1939) (car dealer paying sales tax on new car, not subject to additional tax on sale of traded-in old car);

Cusick v. Commonwealth, 260 Ky. 204, 84 S. W. (2d) 14 (1935) (photographs subject to sales tax);

H. O. Hurley Co. v. Martin, Commissioner, 267 Ky. 182, 101 S. W. (2d) 657 (1937) (whether certain preparations containing ethyl alcohol made product an "alcoholic beverage");

Webb's Transfer Line v. Commonwealth, 282 Ky. 121, 137 S. W. (2d) 1096 (1940) (whether truck-owner worked "for hire" or for state in constructing roads);

Dun & Bradstreet, Inc. v. City of New York, 276 N. Y. 198, 11 N. E. (2d) 728 (1937) (supply of credit information and reference books not sales at "retail");

Anderson v. City of New York; *Paganó v. Same*, 172 Misc. 370, 15 N. Y. S. (2d) 155 (1939) (photographers producing and selling pictures and illustrations merely sell "intangible right of reproduction");

E. B. Ficklen Tobacco Co. v. Maxwell, 214 N. C. 367, 199 S. E. 405 (1938) (large

license fee on dealers in "scrap tobacco"; plaintiff claims exclusion);

Moore v. Lewis et al., County Commissioners, 10 D. & C. (Pa.) 466 (1928) (mules and geldings included in "horses" and "neat cattle");

Frank v. Lindsey, 156 Tenn. 456, 2 S. W. (2d) 412 (1928) (that tax on auto tire merchants did not apply to plaintiff);

Parmer v. Lindsey, 157 Tenn. 29, 3 S. W. (2d) 657 (1928) (that plaintiff not a "general contractor" or within the enumerated occupations subject to tax);

United Biscuit Co. v. Stokes, 174 Tenn. 112, 124 S. W. (2d) 230 (1939) (supply from warehouses not subject to merchant's privilege tax);

Vaughn v. Attorney-General, 20 Alta. 424 (1924) (husband held vendor's deed in escrow only, hence not owner, and exempt);

Grigg v. Commissioner of Taxes, [1920] N. Z. 508 (racing society claimed immune from income tax).

⁷⁰*State Tax Commission v. Hopkins*, 234 Ala. 556, 176 So. 210 (1937) (*supra* n. 69);

Long et al. v. Roberts, 234 Ala. 570, 176 So. 213 (1937) (*supra* n. 69), especially dissenting opinion by Gardner, J.;

Dun & Bradstreet, Inc. v. City of New York, 276 N. Y. 198, 11 N. E. (2d) 728 (1937) (*supra* n. 69);

Empire City Subway Co. v. City of New York, 168 Misc. 775, 6 N. Y. S. (2d) 55 (1938) (subway power conduits leased for housing low tension cables not subject to sales or excise taxes).

⁷¹*State Tax Commission v. Gay-Teague Realty Co.*, 237 Ala. 133, 185 So. 739 (1939) (restaurant, with cigar and soft drink counter).

⁷²*Bedford, Treasurer v. Gamble-Skogmo, Inc.*, 104 Colo. 424, 91 P. (2d) 475 (1939) (locally operated and owned);

Dunlop Tire & Rubber Co. v. Lee, Comptroller, 126 Fla. 369, 171 So. 331 (1936) (retail tire stores);

Detroit Edison Co. v. Sec'y of State, 281 Mich. 428, 275 N. W. 196 (1937) (plaintiff claims his shops are offices to promote sale of electricity).

hence are exempt,⁷³ that a certain tax applies to all and not merely to some magazines.⁷⁴

These cases manifestly involve questions not merely of the applicability of a tax to a particular type of business or transaction, but incidentally questions of classification for tax purposes. Whether a business transaction is wholesale or retail, whether a product shall be taxed as an "alcoholic beverage," whether a particular business is subject to a license tax levied under a generic name, all involve complicated questions of fact and law, on which considerable testimony must often be taken. But the question of the appropriate classification, within a schedule, of a business, a person, a tax, a rate, or the source of income, may be directly raised, the outcome determining taxability, the amount of tax, and sometimes constitutionality. For example, the classification of chain stores for independent taxation⁷⁵ and the cumulation of separate licenses on the sale of different commodities in the same store⁷⁶ have been held arbitrary as a matter of law. The effort of a coal company generating electric power for its mining operations and supplying tenants and a few others with power, to escape the Kentucky franchise tax on public utilities and a "like company" was not successful.⁷⁷ More successful was the effort of a fraternal beneficiary association to escape classification as a regular insurance company, thus avoiding taxes on its gross premiums.⁷⁸ Quite common has become the effort of employers to maintain that particular agents or business associates were not "employees" within the meaning of Unemployment Compensation Acts but independent contractors for whom they were under no duty to pay tax contributions.⁷⁹ The classification of particular types of

⁷³Lone Star Cement Corp. v. State Tax Commission, 234 Ala. 465, 175 So. 399 (1938) (cement);

Wood Preserving Corp. v. State Tax Commission, 235 Ala. 438, 179 So. 254 (1938) (telephone material);

Southern Railway v. Curry, 239 Ala. 263, 194 So. 523 (1940).

⁷⁴Long v. Poulos, 234 Ala. 149, 174 So. 230 (1937) (construction of tax exemption);

cf. Chicago & Calumet Dist. Transit Co. v. Mueller, Sec'y of State, 213 Ind. 530, 12 N. E. (2d) 247 (1938) ("any" city operation in which reduced motor bus fees means "one" city and not "all").

Holt v. Long, 234 Ala. 369, 174 So. 759 (1937) (self-raising flour included in "flour");

Title Guarantee Loan & Trust Co. v. Hamilton, Collector, 238 Ala. 602, 193 So. 107 (1940) (tax on "moneyed capital" included plaintiff's furniture).

⁷⁵Great Atlantic & Pacific Tea Co. v. Kentucky Tax Commission, 278 Ky. 367, 128 S. W. (2d) 581 (1939); same case, 280 Ky. 606, 133 S. W. (2d) 947 (1939).

⁷⁶Henry v. Shevinsky, 239 Ala. 293, 195 So. 222 (1940).

⁷⁷Consolidation Coal Co. v. Martin, 113 F. (2d) 813 (C. C. A. 6th, 1940).

⁷⁸Sovereign Camp W. O. W. v. Murphy, 17 F. Supp. 650 (S. D. Iowa 1936).

⁷⁹For insurance agents and newspaper carriers, see *supra* pp. 493, 677.

See also Barnes v. Indian Refining Co., 280 Ky. 811, 134 S. W. (2d) 620 (1940) (operators of bulk stations handling employer's petroleum products);

Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940) (special agents; court wrong in assuming issues of fact not determinable by declaratory judgment);

Commercial Motors Freights, Inc. v. Unemployment Compensation Commission, 28 Ohio Abs. 433 (1939) (payments to independent contractors for service and use of trucks excluded);

McDermott v. State, 196 Wash. 261, 82 P. (2d) 568 (1938) (barber shop employees leasing equipment not excluded).

goods for license or customs duty,⁸⁰ the classified source of particular income,⁸¹ the classification of the tax whether excise or property, county or state,⁸² may be raised by declaration, the decision having a direct bearing on the obligations incurred by the taxpayers or the duties imposed on public officials.

Exemptions and Immunities. Many of the situations of fact cited above involve an effort by the prospective victim of a tax to obtain a judgment that it is not applicable to him or that for some reason he escapes its incidence. There are other cases, however, in which the plaintiff more directly seeks to demonstrate that he comes within the terms or implications of an exemption, statutory, customary or contractual. Thus, we find cases in which conflicting statutes require consideration, the plaintiff claiming that he is exempt by the superior or later or prevailing law.⁸³ He may claim that the literal words or proper construction of the statute exclude him from its application or that he is embraced within the terms of a statutory or common law exemption.⁸⁴

⁸⁰Moore v. Farmers Mut. Mfg. & Ginning Co., 51 Ariz. 378, 77 P. (2d) 209 (1938) (meaning of "processing" and "any tangible personal property whatsoever"—applicable section and rate in issue);

Storen et al. v. J. D. Adams Mfg. Co., 212 Ind. 343, 7 N. E. (2d) 941 (1937);

Clark's Laundry & Dry Cleaning Co. v. Dept. of Treasury, 103 Ind. App. 359, 5 N. E. (2d) 683 (1937) (preparing articles for use or "personal service"—rates differed);

Dept. of Treasury of Indiana v. J. P. Michael Co., 105 Ind. App. 255, 11 N. E. (2d) 512 (1937);

Newman Mfg. Co. v. Marrable, [1931] 2 K. B. 297 (that beads imported were not "unfinished buttons" and hence dutiable);

Tilling-Stevens Motors, Ltd. v. Kent County Council, (C. A.) [1929] 1 Ch. 66 (that plaintiff's motor car is "electrically driven" and not assessable);

Incorporated Council of Law Reporting for Queensland v. Federal Com'r of Taxation, 34 C. L. R. 580 (1924) (whether appellant was a person and liable to, or a corporation, hence exempt from, income tax).

⁸¹Oursler v. Tawes, Comptroller, 13 Atl. (2d) 763 (Md. 1940) (whether "investment income" or "ordinary income").

⁸²Rinn v. Bedford, 102 Colo. 475, 84 P. (2d) 827 (1938) ("excise" or "property" tax);

Eugene School Dist. No. 4 v. Fisk, 159 Ore. 245, 79 P. (2d) 262 (1938) ("state" or "county" tax).

⁸³Hattermer v. State Tax Commission, 235 Ala. 44, 177 So. 156 (1937) (earlier statute claimed paramount);

Harco v. Martin, Commissioner, 271 Ky. 572, 112 S. W. (2d) 693 (1937) (statute repealed by implication and does not cover plaintiff; *held*, contra);

Board of Education of Duluth v. Borgen, 192 Minn. 367, 256 N. W. 894 (1934) (later statute superseded earlier one, and authorized limitation on Board's expenditures and on taxes).

⁸⁴Bowman et al. v. State Tax Commission, 235 Ala. 190, 178 So. 216 (1938) (cattle and horse traders allegedly embraced within exemption of "farm products"; denied);

Topeka State Bank v. State Tax Com'n, 114 Kan. 267, 217 Pac. 304 (1923) (statutory deductions from assessments);

State *ex rel.* Smith v. Board of Com'rs of Shawnee County, 132 Kan. 233, 294 Pac. 915 (1931) (property belonging to minor children of deceased soldier in hands of guardian claimed as federal tax-exempt funds);

Wyatt v. City of Louisville, 206 Ky. 432, 267 S. W. 146 (1924) (who bears costs of curbs);

Board of Common Councilmen of Frankfort v. Morris, 209 Ky. 634, 273 S. W. 443 (1925) (assessment discriminatory);

Hughes & Co. v. City of Lexington, 211 Ky. 596, 277 S. W. 981 (1925) (ice cream maker not "engaged in manufacturing");

Illinois Central R. R. v. City of Paducah, 228 Ky. 65, 14 S. W. (2d) 172 (1929) (same, maker of spare parts for own locomotives);

Newlin v. Stuart, 273 Ky. 626, 117 S. W. (2d) 608 (1938) (lawyer, officer of the court, claims immunity from occupation tax);

He may claim that the public nature of the property exempts it from taxation.⁸⁵

On the other hand, statutes granting tax exemption to new enterprises have induced such enterprises to come into the state, expend money, open new businesses, and thus create not merely a statutory but a contractual exemption. In an important federal case arising in Mississippi, the state tax officials undertook retroactively to assess taxes on a pipe line company which had entered the state under a five-year statutory exemption to "pipe lines . . . used in the transportation . . . of natural . . . gas . . . for fuel, light and power," all under authority of the Constitution of Mississippi. Contending that the pipe line was not a public utility, that it had not been established on the basis of the statute, that it did not carry out the purposes of the statute, and that it did not apply to the plaintiff foreign corporation, the Attorney General denied the claimed exemption from state, county and levee taxes.⁸⁶ The issue involved questions of fact and law. The Circuit Court of Appeals in a decision which has often been quoted, sustained the propriety of a bill for a declaration of exemption, notwithstanding the fact that an appeal had not yet been taken to the state courts from the determination of the administrative authorities to levy the tax and sell property. In maintaining the validity and applicability of the exemption so far as concerned state and county taxes, but not with respect to levee taxes, Circuit Judge Hutcheson supported the propriety of the procedure for a declaration of rights by observing that the declaratory judgment "certainly does purport in cases where federal jurisdiction is present, to effect and we think it does effect, thoroughgoing, remedial

Frank v. Lindsey, 156 Tenn. 456, 2 S. W. (2d) 412 (1928) (tax on auto tire merchants);

Parmer v. Lindsey, 157 Tenn. 29, 3 S. W. (2d) 657 (1928) (privilege tax on contractors for buildings, plumbers, steam fitters, etc. Plaintiff claimed to be subcontractor);

Shelton Hotel Co. v. Bates, 4 Wash. (2d) 498, 104 P. (2d) 478 (1940) (not an employer of eight or more, hence released from Unemployment Compensation Act);

Nash Sales, Inc. v. City of Milwaukee, 198 Wis. 281, 224 N. W. 126 (1929) (declaration construing tax statute to exempt plaintiff's business);

Automatic Totalisators, Ltd. v. Federal Com'r of Taxation, 27 C. L. R. 513 (1920) (none of the dividends declared or to be declared were cash prizes in a lottery within statutory meaning);

Oceanic & Oriental Navigation Co. v. The King, [1931] N. Z. 304;

Vaile & Sons, Ltd. v. Mayor, etc., of Auckland, [1931] N. Z. 769 (plaintiff sought to determine the meaning of "dwelling house

or other building" as used in tax statute).

⁸⁵United States v. Query, 37 F. Supp. 972 (E. D. S. C. 1941) (Sales in U. S. Army Post Exchange exempt from state license tax; *cf. supra* p. 835);

Commodity Credit Corp. v. County of Oklahoma, 36 F. Supp. 694 (W. D. Okla. 1941) (cotton pledged to or owned by federal corporation exempt from county tax);

City of Phoenix v. State *ex rel.* Conway, Atty. Gen., 53 Ariz. 28, 85 P. (2d) 56 (1938) (irrigation district);

City of Louisville v. Cromwell, State Treasurer, 233 Ky. 828, 27 S. W. (2d) 377 (1930);

State v. Underwood, 54 Wyo. 1, 86 P. (2d) 707 (1939) (university assets);

The King v. Mayor, etc., of Inglewood, [1931] N. Z. 177 (Crown exempt on land taken over in default of mortgage debt).

⁸⁶Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (C. C. A. 5th, 1936); Gully v. Memphis Natural Gas Co., 82 F. (2d) 150 (C. C. A. 5th, 1936), *cert. denied* 298 U. S. 688, 56 S. Ct. 958 (1936). See decisions of Holmes, J. below in 8 F. Supp. 169, 174.

changes, by adding to the coercive or warlike remedies in those courts by way of prevention and of reparation, the more pacific and more prophylactic one of a declaration of rights."⁸⁷ In a somewhat similar case the Vermont Supreme Court construed the vote to exempt as an offer which became a valid contract by acceptance and action upon it, provided the conditions of the offer were complied with.⁸⁸

The question frequently arises whether a particular institution is exempt in whole or in part because it is religious, charitable or non-profit-making. This has occurred in connection with both property and sales taxes, and again involves issues of fact and law. Under the New York local law which exempted from the sales tax "those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowments and are not organized or operated for profit," the Y.M.C.A. and the German Masonic Temple Association both claimed the exemption.⁸⁹ While the Y.M.C.A. was held exempt, the Masonic Temple was not, even though the profits of its building were devoted to the maintenance of a charitable asylum. Because part of its buildings were used for rented dormitories, the Y.M.C.A. in Philadelphia was held entitled to partial exemption only.⁹⁰ Questions have arisen whether a particular institution was "charitable,"⁹¹ whether tax-exempt educational property was not rented to private persons and whether that did not nullify the tax exemption,⁹² whether a successor institution was entitled to the tax exemption of its predecessor,⁹³ whether the property was received by an educational institution in time to escape the tax for a particular year,⁹⁴ whether a particular organi-

⁸⁷82 F. (2d) 145, at 149 (C. C. A. 5th, 1936).

⁸⁸Spaulding v. City of Rutland, 110 Vt. 186, 3 Atl. (2d) 556 (1939) (exempt business occupied only portion of building; held, exemption extends to whole building).

⁸⁹Y. M. C. A. v. City of New York, 159 Misc. 539, 287 N. Y. S. 287 (1935), *aff'd* 251 App. Div. 821, 298 N. Y. S. 191 (1937), 276 N. Y. 619, 12 N. E. (2d) 605 (1938);

German Masonic Temple Ass'n. v. City of New York, 253 App. Div. 680, 3 N. Y. S. (2d) 596 (1938), 279 N. Y. 552, 18 N. E. (2d) 657 (1939). Court of Appeals reversed Appellate Division which had ruled that a well-known remedy was available, and that issues of fact would not be determined by declaratory judgment. Even though Court of Appeals held no issue of fact involved, the Appellate Division was wrong in its view that issues of fact are not justiciable by declaration.

Supra p. 391.

⁹⁰Y. M. C. A. v. City of Philadelphia, 323 Pa. 401, 187 Atl. 204 (1936);

Hodge v. City of Moose Jaw, 19 Sask.

369 (1925) (part used for public worship, exemption on whole claimed);

Perpetual Trustees, Estate & Agency Co. of New Zealand v. Mayor, etc., of City of Dunedin, 34 N. Z. 877 (1915) (part leased).

⁹¹Swinburne v. Federal Com'r of Taxation, 27 C. L. R. 377 (1920) (whether certain institution was "charitable," so as to entitle plaintiff to deduction from tax on gift of money to it);

President, etc., of Shire of Nunawading v. Adult Deaf & Dumb Soc. of Victoria, 29 C. L. R. 98 (1921) (whether land used for growing flowers to sell for maintenance and leased for picnics was "charitable" use);

Daly v. State of Victoria, 29 C. L. R. 491 (1921) (charitable bequests in will).

⁹²University of Manitoba v. Portage La Prairie, [1937] 2 D. L. R. 584 (Man.).

⁹³Trustees of Pillsbury Academy v. State, 204 Minn. 365, 283 N. W. 727 (1939);

Re Assessment Navy League of Canada, 59 N. S. 212 (1927) (having taken over work of tax-exempt Seamen's Society, question, had exemption carried over).

⁹⁴Connecticut College for Women v. Town of Groton, 123 Conn. 196, 193 Atl. 873 (1937).

zation had sufficiently brought itself within the category of a non-profit enterprise,⁹⁵ or whether the property was tax-exempt on other grounds.⁹⁶

Correctness of the Tax. Many declaratory actions turn upon disputes as to the tax base,⁹⁷ the method of computation,⁹⁸ the rate of the

⁹⁵Charter Oak Council, Inc., Boy Scouts of America v. Town of New Hartford, 121 Conn. 466, 185 Atl. 575 (1936) (summer camp property);

Storen v. Jasper County Farm Bureau Co-op. Ass'n., 103 Ind. App. 77, 2 N. E. (2d) 432 (1936);

Burrow v. Pleasant, 136 Kan. 670, 17 Pac. (2d) 833 (1933) (bequest immune as not for profit).

⁹⁶State *ex rel.* Peterson, Atty.-Gen., v. Maricopa County, 38 Ariz. 347, 300 Pac. 175 (1931) (whether mortgage foreclosure sale merged a prior tax lien);

City of Wyandotte v. State Board of Tax Administration, 278 Mich. 47, 270 N. W. 211 (1936) (cities sue to establish privilege of taxing municipally owned utilities);

People's Telephone Corp. v. City of Butler, 99 Pa. Super. Ct. 256 (1930) (that lot and building used in good faith for plaintiff's business, hence tax-exempt);

Canadian Northern Pac. Ry. Co. v. City of Kelowna, 25 B. C. 514 (1917) (that land sold for delinquent taxes was actually tax-exempt. So held);

Canadian Northern Pac. Ry. Co. v. City of Vernon, 26 B. C. 222 (1918) (same. Contention that tax appeal should have been taken, dismissed).

⁹⁷Dixie Coaches, Inc. v. Ramsden, 238 Ala. 285, 190 So. 92 (1939) (whether license schedule for motor busses based on manufacturer's rated seating capacity or on actual emergency seating capacity);

Conzelman v. City of Bristol, 122 Conn. 218, 188 Atl. 659 (1936) (that defendant's grand list illegal, because revaluation every decade not made);

Hanzlick v. Board of County Commissioners, 149 Kan. 667, 88 P. (2d) 1111 (1939) (valuation);

L. & N. R. v. Long, 203 Ky. 681, 262 S. W. 1116 (1924) (that June not December valuation should be used);

State Tax Commission v. Safety Transfer & Storage Co., 230 Ky. 225, 18 S. W. (2d) 991 (1929) (base to measure carrying capacity of plaintiff's trucks);

City of Louisville v. Churchill Downs, Inc., 267 Ky. 339, 102 S. W. (2d) 10 (1937) (whether fee law and gross receipts law were cumulative or alternative);

State *ex rel.* Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P. (2d) 759 (1937) (no power to reconvene County Board to increase valuation of real property);

Edinburgh & Glasgow Ry. Co. v. Meek, 12 D. 153 (Scot. 1849) (declarator fixing the assessable value of the railroad and the proportion payable in each parish);

Tyler v. Attorney General, [1938] 1 Ch. 426 (trustees claim death duties on sold art collection should be assessed on net proceeds, not gross);

Rex v. Miebach, 22 Alta. 482 (1927) (construction of "net value" under succession duty statute);

Cornell v. Deputy-Federal Commissioner of Taxation (So. Aus.) 29 C. L. R. 39 (1920) (tax basis questioned; stockholder in company assessed to income tax);

Finch v. Commissioner of Stamps, 33 N. Z. 144 (1913) (property deeded to sons at a price less than its true value);

Mayor, etc., of Christchurch v. Christchurch Drainage Board, [1925] N. Z. 837 (boroughs and cities had used unimproved value. Counties and defendant had used capital value);

Ellis & Burnand, Ltd. v. Waitomo County, [1926] N. Z. 669 (assessment on value of whole block or license);

Edginton & Bernstone v. Waihopai River Board, [1929] N. Z. 823 (defendant's area was subject to tax on unimproved value. The county council levied on capital value).

⁹⁸State Tax Commission v. Burns, 236 Ala. 307, 182 So. 1 (1938) (restaurant owner claims food eaten by employees is part of overhead in computing unemployment and social security taxes);

City of Louisville v. Churchill Downs, Inc., 267 Ky. 339, 102 S. W. (2d) 10 (1937) (computation; gross sums bet or portion taken by proprietor);

Eugene School District v. Fisk, 159 Ore. 245, 79 P. (2d) 262 (1938) (county's duty to pay state gross or net, deducting delinquencies, and what proportion);

Cameron v. Deputy Federal Commissioner of Taxation, (Tasmania) 34 C. L. R. 8 (1924);

McLean v. Commissioner of Taxes, 31 N. Z. 469 (1910) (method of calculation of absentee tax).

tax,⁹⁹ an allegedly discriminatory or illegal mode of assessment,¹ the amount due,² deductions allowable,³ the applicability of one of two con-

⁹⁹*Clark's Laundry & Dry Cleaning Co. v. Dept. of Treasury*, 103 Ind. App. 359, 5 N. E. (2d) 683 (1937) (preparing articles for use (¾%) or "personal service" (1%); classification). See other cases cited *supra* n. 80.

Anderson, Sheriff, v. Gillis, 242 Ky. 404, 46 S. W. (2d) 508 (1932) (tax rate illegal. The rate had been increased in 1918, in 1922 by a bond issue, and in 1927 by election authorizing continuance of 1922 levy);

Parrish v. Hackney Corp., [1911] 2 K. B. 822 (that a certain rate was illegal, in so far as it differed from those fixed by the quinquennial valuation list);

Attorney General v. De Trafford, [1934] 1 K. B. 1 (Crown sued—rate of succession duty depended on who was predecessor, father or son);

Donnelly v. Commissioner of Stamps, 33 N. Z. 79 (1913) (5%, not 10%, the proper rate); *Raglan Town Board v. Raglan County*, [1920] N. Z. 646 (not a general rate for the tax district but distinctions should be made between the town and outlying districts);

RG. May 12, 1911, *Soergel* 1911, p. 582 (no higher stamp for deed claimable).

¹*Pittman v. Johnson, Assessor*, 237 Ala. 64, 185 So. 753 (1939) (assessment at full or 60% value, effect of constitutional amendment and alleged conflicting statute);

Wilcox v. Town of Madison, 106 Conn. 223, 137 Atl. 742 (1927), *certiorari denied* 276 U. S. 606, 48 Sup. Ct. 337 (1928) (assessment claimed out of proportion to real value of property, and that classification wrong);

Dunlop Tire & Rubber Co. v. J. M. Lee, Comptroller, 126 Fla. 369, 171 So. 331 (1936) (discriminatory assessment);

McKinney v. Holt, Drainage Commissioner, 211 Ky. 512, 277 N. W. 851 (1925) (discriminatory mode of assessment); *City of Jackson v. Riffle*, 219 Ky. 689, 294 S. W. 142 (1927) (not discriminatory);

Thompson v. City of Williamsburg, 229 Ky. 81, 16 S. W. (2d) 772 (1929) (immunity from city assessment, after state assessment);

Harco v. Martin, Commissioner, 271 Ky. 572, 112 S. W. (2d) 693 (1937) (itinerant vendor of gasoline, claims tax discriminatory);

Oursler v. Tawes, 13 Atl. (2d) 763 (Md. 1940) (allowed discretion in classifying income according to source, affecting rate, methods of ascertaining base and computation of tax, deductions and exemptions);

Secretary of State v. Potter, 252 Mich. 460, 233 N. W. 380 (1930) (mode of assessment of malt tax);

Manufacturers Nat'l Bank of Detroit v. City of Detroit, 285 Mich. 273, 280 N. W. 760 (1938) (majority dismissed because allegedly adequate remedy at law; minority held assessment on bank shares wrong, for failure to allow deductions for capital investments and found equitable jurisdiction);

Moeller, McPherrin & Judd v. Smith, Tax Commissioner, 127 Neb. 425, 255 N. W. 551 (1934) (change in classification of tangibles and intangibles, held invalid);

City of Portland v. Welch, 154 Ore. 286, 59 P. (2d) 228 (1936) (city sued assessor to challenge power of State Tax Commission to order reduction of budgets and assessment);

Attorney-General v. Hackney Corp., (C. A.) [1918] 1 Ch. 372 (discrimination);

Cornell v. Deputy-Federal Commissioner of Taxation (So. Aus.) 29 C. L. R. 39 (1920) (assessment on fund claimed invalid).

²*Leath, County License Inspector v. Wilson*, 238 Ala. 577, 192 So. 417 (1939) (that no further county tax, half having been paid, is demandable);

Louisville, H. & St. L. Ry. v. Powell, 213 Ky. 563, 281 S. W. 532 (1926) (that percentage levied too high and that amount limited);

Brady v. State Tax Commission, 258 App. Div. 739, 15 N. Y. S. (2d) 109 (1939) (amount due up to the time of dissolution);

Cupp Grocery Co. v. Johnstown, 288 Pa. 43, 135 Atl. 610 (1927) (owner of 33 stores claims liability to only one license tax of \$100 as a corporation, not \$915 as assessed);

In re Gallwey's Estate, [1933] Irish R. 430 (tender of amount admittedly due);

In re Succession Duties Act, 1932, *Royal Trust Co. (Cochrane Estate) v. Atty. Gen. for Alberta*, no. 1, [1934] 1 W. W. R. 824, no. 2, *ibid.*, 831 (Under Sec. 35 court may declare amount due);

Re Corlet, [1939] 4 D. L. R. 111 (Alta.) (amount due on insurance policies in estate);

In re Aschrott; Clifton v. Strauss, [1927] 1 Ch. 313 (administrator seeks declaration of estate duty on securities purchased for German by London branch of German bank);

In re Succession Duties Act, 23 Alta. 521 (1928) (what property in estate, including provincial bonds, taxable and amount due);

Donnelly v. Commissioner of Stamps, 33 N. Z. 79 (1913) (plaintiff claims only 5% rate due, as he is a relative within fourth degree, not 10% as claimed).

³*Hattermer v. State Tax Commission*, 235 Ala. 44, 177 So. 156 (1937) (named

ficting laws,⁴ or the time when the tax is payable or the exemption or deduction allowable.⁵ The question at issue occasionally involves the incidence of the tax as between two litigants, private or public, who by

deductions from receipts, including mining);

United Pacific Ins. Co. v. Bakes, 57 Idaho 537, 67 P. (2d) 1024 (1937) (right to make deductions from premium tax for policies cancelled);

Glenmore Distilleries Co. v. Dept. of Revenue, 279 Ky. 505, 131 S. W. (2d) 460 (1939) (company claims privilege of manufacturing without tax whisky equal to quantity destroyed by fire);

Manufacturers Nat'l Bank of Detroit v. City of Detroit, 285 Mich. 273, 280 N. W. 760 (1938), *supra* note 1;

Hall Hardware Co. v. Gage, 197 Minn. 620, 268 N. W. 202 (1936) (deduction of federal income tax for particular year);

Steuart v. Parochial Board of Keith, 8 M. 26 (Scot. 1869) (plaintiff sought declarator that he was entitled to greater deductions than the blanket deduction given);

Swinburne v. Federal Com'r of Taxation, 27 C. L. R. 377 (1920) (whether a certain institution was a charitable institution);

Hoysted v. Federal Com'r of Taxation, 29 C. L. R. 537 (1921), 37 C. L. R. 290 (P. C. 1925) (whether certain persons were joint owners for purposes of taxation);

Union Steamship Co. of New Zealand v. Federal Com'r of Taxation, 35 C. L. R. 209 (1924) (tax deductions to be allowed);

Commissioner of Stamps (Western Australia) v. West Australian Trustee, Executor & Agency Co., 36 C. L. R. 98 (1925) (whether income taxes paid on the basis of the testator's returns should be deducted as debts);

Taupo Potara Timber Co. v. Commissioner of Taxes, 31 N. Z. 617 (1912) (to deduct value of standing timber cut and used in the course of business).

⁴Pittman v. Johnson, Assessor, 237 Ala. 64, 185 So. 753 (1939) (constitutional amendment and statute, held reconcilable);

Century Distilling Co. v. Defenbach, 61 Idaho 192, 99 P. (2d) 56 (1940) (relief claimed from duty to make return);

Price et al. v. Fox, Judge, 220 Ky. 373, 295 S. W. 433 (1926);

Gillis v. Anderson, 256 Ky. 472, 76 S. W. (2d) 279 (1934) (two taxes, bond and road, collected, one of which invalid);

Harco v. Martin, Commissioner, 271 Ky. 572, 112 S. W. (2d) 693 (1937) (tax claimed repealed by implication);

Board of Education of Duluth v. Borgen,

192 Minn. 367, 256 N. W. 894 (1934) (whether one law superseded another);

Bemis Bro. Bag Co. v. Wallace, 197 Minn. 217, 266 N. W. 690 (1936) (subsequent laws repealed earlier tax);

Board of Education of Duluth v. Anderson, 205 Minn. 77, 285 N. W. 80 (1939) (distribution of income tax to schools on basis of one law or another);

John Bardenheier Wine & Liquor Co. v. City of St. Louis, 345 Mo. 637, 135 S. W. (2d) 345 (1939) (city tax in conflict with state law);

Frazier v. City of Chattanooga, 156 Tenn. 346, 1 S. W. (2d) 786 (1928) (alleged implied repeal of statute);

Wiseman v. Smith, 170 Tenn. 293, 95 S. W. (2d) 42 (1936) (distribution of tax under conflicting statutes).

⁵City and County of Denver v. Tax Research Bureau, 101 Colo. 140, 71 P. (2d) 809 (1937) (when assessment became complete);

Connecticut College for Women v. Town of Groton, 123 Conn. 196, 193 Atl. 873 (1937) (exemption claimed because title taken by college in adequate time during year);

Mayor and Council of Baltimore v. Perrin, 12 Atl. (2d) 261 (Md. 1940) (time when taxes became payable, for non-payment of which licenses could be refused);

Hall Hardware Co. v. Gage, 197 Minn. 620, 268 S. W. 202 (1936) (year in which federal income tax payment deductible from state tax; "accrual" plan of accounts);

Lincoln Telephone & Telegraph Co. v. Albers, 126 Neb. 329, 253 N. W. 429 (1934) (when did interest begin to run);

Brady et al. v. State Tax Commission, 258 App. Div. 739, 15 N. Y. S. (2d) 109 (1939) (time of dissolution, rate before and after dissolution);

Box Elder County v. Conley, County Assessor, 75 Utah 199, 284 Pac. 105 (1930) (whether property in jurisdiction);

Granby Consol. Mining, Smelting & Power Co., v. Attorney-General, 31 B. C. 262 (1922) (that taxes had not yet become in arrears, so as to justify discount);

Bank of New Zealand v. Commissioner of Stamps, [1916] N. Z. 1 (whether property owned at certain time);

Borough of Birkenhead v. Colonial Sugar Refining Co., [1923] N. Z. 445 (time for appeal from valuation).

reason of contract or statute, dispute the propriety of the tax on the person or property.⁶

In a well-known New York case the Socony-Vacuum Oil Co. claimed that the sales tax should not be computed upon the price of the gasoline *plus* a gasoline tax, but only on the price of the gasoline. Failure to pay the sales tax was a misdemeanor and entailed civil and criminal penalties. Although the Socony-Vacuum were only a collection medium—for the tax was passed on—Justice Dore for the New York Appellate Division in an opinion affirmed by the Court of Appeals, held that they were not bound to pursue the remedies of certiorari or a claim for refund, but were privileged to resort to the declaratory judgment. The Court added:

“ . . . The case at bar, however, involves great numbers of the municipal population, namely, every seller of gasoline in the city of New York as well as every purchaser thereof, all of whom, under the mandate of article 88, are ordered to collect and to pay, respectively, a tax which exceeds the amount properly chargeable. Wide public interests are involved and a judicial declaration will be of public assistance affording warranted and needed relief to the purchasers and sellers of gasoline in the city of New York. For these reasons and because of the position of peril in which plaintiffs are placed, in view of the civil and criminal penalties imposed if they fail in their designated duties, and to avoid a multiplicity of suits and circuity of action, and because of the invalidity of the regulation so far as it is attacked, we consider that a declaratory judgment is the appropriate remedy to settle these controversies before they lead to the repudiation of obligations, the invasion of rights, or the commission of wrongs . . . ”

⁶National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. (2d) 283, 79 P. (2d) 381 (1938) (defendant's duty, in silence of contract, to reimburse plaintiff for sales taxes newly imposed);

Zoercher et al. v. Indiana Asso. Tel. Corp., 211 Ind. 447, 7 N. E. (2d) 282 (1937) (not issuer, but owner of bonds, pays tax);

City of St. Louis v. Smith, 342 Mo. 317, 114 S. W. (2d) 1017 (1938) (which of two plaintiffs, city or contractor, bears state sales tax);

Boston & Maine Ry. v. Wilton Ry., 87 N. H. 416, 181 Atl. 545 (1935) (that defendant lessor, not plaintiff lessee, must pay income taxes levied on lessor);

Federal Land Bank of St. Paul v. De Rochford, 69 N. D. 382, 287 N. W. 522 (1939) (that state gasoline tax does not fall on land bank as federal instrumentality; denied);

In the Matter of the Estate of Drew; Marry v. Drew, [1923] 1 Ir. R. 35 (whether freehold or personalty of testator should bear estate duty);

East London Hosp. v. Cobbett, 30 C. L. R. 278 (1922) (estate tax as between property in Tasmania and elsewhere);

Death v. Gower, [1916] N. Z. 751 (whether plaintiff vendor or defendant vendee is liable for mortgage tax).

⁷Socony-Vacuum Oil Co. v. City of New York, 247 App. Div. 163, 287 N. Y. S. 288, *aff'd* without opinion, 272 N. Y. 668, 5 N. E. (2d) 385 (1936).

⁸City of Opp v. Brogden, 236 Ala. 180, 181 So. 752 (1938) (procedure to be followed by probate judge in assessing and collecting tax. Also compensation to be paid);

Hamilton, Tax Collector, v. City of Birmingham, 237 Ala. 8, 185 So. 164 (1938) (followed Opp v. Brogden, although minority thought it was advisory opinion);

State *ex rel.* Eubanks v. Board of Commissioners, 150 Kan. 143, 91 P. (2d) 2 (1939) (state sued county commissioners to determine right to enter into contract with individual to collect delinquent taxes);

Norristown Borough School Dist. v. Hoffman, 24 D. & C. (Pa.) 56 (1935) (that defendant collector not entitled to commissions on delinquent taxes collected, since he was on salary);

City of Erie v. Phillips, 323 Pa. 557, 187 Atl. 203 (1936) (city sued collector to determine latter's right to commissions);

Collection and Enforcement. Problems of various kinds have arisen in connection with the collection and enforcement of taxes to the prompt solution of which the declaratory procedure has proved adaptable. Thus, both government and taxpayer have had occasion to question the legality and regularity of the proceedings connected with the assessment, collection and enforcement of taxes, the duties or rights of the collector, including compensation, the power of the city to enter into contracts with private individuals for tax collection, and similar issues.⁸ An issue was thus raised as to the regularity of the proceedings for foreclosing tax liens.⁹ The question may arise between competing tax gatherers or authorities as to who is entitled to tax, or if more than one, which tax or lien has priority, an issue raised either by interested public officials or by the executor of an estate or debtor.¹⁰ In the well-known case of *Penn v. Glenn*¹¹ it was asserted that the alleged tax to induce compliance with the federal Kerr-Smith Tobacco Restriction Act was in reality a penalty and its collection might properly be declared invalid and enjoined; and in a Nebraska case the court sustained, as a remission of penalties, a statute which cancelled unpaid interest on delinquent taxes.¹² The question has arisen whether a state may compel an intermediary, like a bank or retailer, to act as its agent to collect and remit the tax.¹³ But even if an agent, and *a fortiori* when not, the inter-

Swaney v. County of Fayette et al., 38 D & C. (Pa.) 467 (1940) (collector sought declaration that statutes required not two bonds, but only one);

Spokane County ex rel. Sullivan v. Glover, County Treasurer, 2 Wash. (2d) 162, 97 P. (2d) 628 (1940) (that defendant need notify only those on tax roll and hence required no increased staff).

⁹*City of Opp v. Brogden*, 236 Ala. 180, 181 So. 752 (1938) (*supra* n. 8);

Hamilton, Tax Collector, v. City of Birmingham, 237 Ala. 8, 185 So. 164 (1938) (*supra* n. 8);

City of Paducah v. Paducah Newspapers, 249 Ky. 401, 60 S. W. (2d) 981 (1934) (whether notice ten days before sale means one notice or ten successive publications);

City of Detroit v. Sitter, 288 Mich. 505, 285 N. W. 40 (1939) (city vs. tax purchaser; priority of tax liens and right to redeem);

Childs v. Marion County et al., 163 Ore. 411, 97 P. (2d) 955 (1940) (challenging validity of proceedings to foreclose for delinquent taxes);

cf. State ex rel. Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P. (2d) 739 (1937) (validity of short notice to increase valuation for assessment).

¹⁰*Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900 (1939), *supra* p. 833;

Fresno County v. Commodity Credit Corp., 112 F. (2d) 639 (C. C. A. 9th, 1940);

City of Sterling v. Board of County Commissioners, 99 Colo. 77, 60 P. (2d) 222 (1936) (whether city must turn over to county all or only half of beer license fee);

City and County of Denver et al. v. Armstrong, Treas., 105 Colo. 290, 97 P. (2d) 448 (1939) (state treasurer sued city and county to establish priority of lien of state sales tax over Denver personal property tax. Receiver of bankrupt had enough to pay either, but not both);

City of Detroit v. Sitter, 288 Mich. 505, 285 N. W. 40 (1938);

Bowes v. United States, New Jersey, et al., 127 N. J. Eq. 132, 11 Atl. (2d) 720 (1940) (executor sued to establish priority among defendant governments' tax liens);

Lehman Township v. Lehman Township Poor District, 32 D. & C. (Pa.) 561 (1938) (whether township or district entitled to keep funds collected by district, taxes being now invalidated).

¹¹10 F. Supp. 483 (W. D. Ky. 1935).

¹²*Tukey v. Douglas County*, 133 Neb. 732, 277 N. W. 57 (1938).

¹³*Bedford, State Treasurer v. Colorado Nat'l Bank*, 104 Colo. 311, 91 P. (2d) 469 (1939), *aff'd* 310 U. S. 41, 60 S. Ct. 800 (1940) (treasurer successfully sued bank to compel it to collect and remit taxes on safe deposit boxes);

mediary as an interested party may challenge the constitutionality or construction of the taxing statute.¹⁴

Some interesting cases involving penalties have arisen. In one, a tax official sued the Commissioner of Licenses to determine the exact date (mailing or receipt of the license tax) when penalties for delinquency became assessable.^{14a} In another, a company which had compromised its tax liability, resisted by declaratory action for immunity the attempt of the state subsequently to assess penalties for alleged delinquency in the original payments of the taxes assessed.^{14b}

FEDERAL TAXATION

These many applications of declaratory relief to issues arising out of taxation in the states have been set out in some detail in order to illustrate the diversity of facts that have been presented to the courts and the utility of the procedure as a speedy method of settling such disputes. While no precise place for declaratory relief in the scheme of federal tax procedure had been worked out when the Federal Declaratory Judgments Act was adopted in 1934, it was an error for Assistant Attorney General Wideman to suggest to the Senate Committee on Finance in 1935 that Congress intended to apply the Act to matters of private law and that tax matters were intended to be excluded.¹⁵ A simple reading of the Senate Report on the Declaratory Judgments Act¹⁶ and an examination of the first edition of this book should have refuted so unfounded an assumption. But the Department of Justice moved the Congress, without participation in the regular hearings and without opportunity for opponents to be heard, to amend the Federal Declaratory Judgments Act so as to exclude from its scope all actions involving "federal taxes."

The Federal Amendment of August 30, 1935. The need for this amendment was explained to the Senate Committee by officials of the Government as arising out of the desire to prevent any interference with the collection of income taxes and with the administrative procedure adopted to adjudicate issues arising out of errors in tax assessments. The majority report from the Senate Finance Committee on the Revenue Bill of 1935 reads as follows:

" . . . The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as ex-

Cf. Manufacturers Nat'l Bank of Detroit v. City of Detroit, 285 Mich. 273, 280 N. W. 760 (1938) (*supra* n. 3);

Socony-Vacuum Oil Co. v. City of New York, *supra* n. 7.

¹⁴See cases cited *supra* n. 13, and *Martin, Commissioner v. Dixie Ice Cream Co.*, 280 Ky. 334, 133 S. W. (2d) 82 (1939) (tax on dealers, even though passed along in raised price but not as tax, leaves dealer a tax-

payer and not state agent for collection).

^{14a}*McDowell, License Inspector v. Henry, Commissioner of Licenses*, 238 Ala. 662, 193 So. 108 (1940).

^{14b}*Peterson et al. v. Central Arizona L. & P. Co.*, 107 P. (2d) 205 (Ariz. 1940).

¹⁵Frank J. Wideman, *Application of the Declaratory Judgment Act to Tax Suits*, 10 Tax Magazine 539-541, 562 (Sept. 1935).

¹⁶*Infra* Appendix.

pressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment and collection of federal taxes.

"Your committee believes that the orderly and prompt determination and collection of federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors."¹⁷

Errors in Explanation of Need for Amendment. These allegations of the report deserve analysis. The first objection to the application of the Declaratory Judgments Act to taxes would seem to involve a suggestion that it conflicts with the policy of Section 3224 of the Revised Statutes,¹⁸ prohibiting an injunction against the assessment or collection of any federal tax. Apart from the fact that Section 3224, as will presently be shown, is being given increasingly narrower scope, it would seem better to encourage an early adjudication of the disputed question of tax liability, especially where the constitutionality of the operative statute is involved, than to insist on the collection of the tax and then have to undertake large-scale refunds. Government fears of financial embarrassment from the challenge of tax liability are more apparent than real; the principle of "pay first and litigate later" has been whittled down by exceptions, especially in income and estate taxes; the embarrassment to both parties, Government and taxpayer, arises out of the delay in the adjudication of the issue, *i.e.*, out of the necessary uncertainty in the matter of legality and not out of the method of manifesting the challenge, whether by injunction, declaration or claim for refund. Refunds now bear six per cent interest.

The suggestion that the declaratory judgment would interfere with the orderly and prompt determination and collection of federal taxes "by a procedure designed to facilitate the settlement of private controversies" and "that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors" is open to several objections. The implication that the income tax was in issue is not accurate. So far as the author is advised no challenge to income tax assessment had been attempted by declaratory action. If it had been, the decision of the courts should have been that there was a special statutory procedure provided for that type of issue which the declaratory judgment was not designed to alter or modify. This is a complete answer to the bugaboo raised by Mr. Wideman, and he himself cited some of the leading cases which prove it.

Challenge to Processing Taxes the Real Grievance. What was really involved, it is understood, was not apparently stated to the Committee or by the Committee to the Senate. That was the challenge to the collection of the A. A. A. processing taxes and the penalty taxes under the Kerr-Smith Tobacco Restriction Act.¹⁹ In the former cases many injunctions had been

¹⁷Sen. Rep. 1240, 74th Cong., 1st Sess., p. 11.

¹⁸26 U. S. C. A. § 1543 (1935 ed.).

¹⁹Act of June 28, 1934, 49 Stat. 778, 7 U. S. C. A. § 751 (Supp. 1935).

granted, notwithstanding Section 3224, on the ground that the exaction was not a tax but a penalty or coercive measure or exhibited extraordinary and exceptional circumstances so as to come within the exceptions to Section 3224, and that adequate relief was not afforded by a suit for refund,²⁰ *a fortiori*, therefore, the milder declaratory judgment, granted in a few cases, would have been appropriate.

In *Penn Bros. v. Glenn*,²¹ a declaratory action was sustained against the collector of internal revenue, contesting the legality of the Kerr-Smith Act and the penalty taxes to be collected under it, notwithstanding the objection of the Government that the only method of challenging the con-

²⁰*Suits directed at invalidity of processing tax—declaratory judgment and injunction:*

Danahy Packing Co. v. McGowan, 11 F. Supp. 920 (W. D. N. Y. 1935) and 12 F. Supp. 457 (W. D. N. Y. 1935) (after amendment; injunction granted);

Fisher Flouring Mills v. Vierhus, 78 F. (2d) 889 (C. C. A. 9th, 1935) (injunction only considered);

F. G. Vogt v. Rothensies, 11 F. Supp. 225 (E. D. Pa. 1935) (declaration given, following *Penn v. Glenn*, 10 F. Supp. 483 (W. D. Ky. 1935));

Frye & Co. v. Vierhus, 12 F. Supp. 597 (W. D. Wash. 1935) (heard on injunction only);

Gold Medal Foods, Inc. v. Landy, 11 F. Supp. 65 (Minn. 1935) (temporary injunction given—after amendment—hence declaration deemed unnecessary);

Henrietta Mills v. Hoey, 12 F. Supp. 61 (S. D. N. Y. 1935) (after amendment);

Inland Milling Co. v. Huston, 11 F. Supp. 813 (S. D. Iowa 1935) (temporary injunction given);

John A. Gebelein, Inc. v. Milburne, 12 F. Supp. 105 (D. Md. 1935) (injunction granted, declaration left undetermined);

Kingan & Co. v. Smith, 12 F. Supp. 329 (S. D. Ind. 1935) (heard only on injunction);

Neild Mfg. Co. v. Hassett, 11 F. Supp. 642 (Mass. 1935) (followed *Gold Medal Foods v. Landy, supra*);

Rieder v. Rogan, 12 F. Supp. 307 (S. D. Cal. 1935) (after amendment);

Los Angeles Soap Co. v. Rogan, 14 F. Supp. 112 (S. D. Cal. 1936) (declaration no escape from Sec. 3224, even before amendment).

Suits directed at invalidity of A. A. A.—declaratory judgment and injunction:

Black v. Little, 8 F. Supp. 867 (E. D. Mich. 1934) (injunction denied, but declaration granted);

Jones v. Viley, 12 F. Supp. 476 (E. D. Idaho 1935) (statutory remedy at law exclusive);

Lake Erie Provision Co. v. Moore, 11 F. Supp. 522 (N. D. Ohio 1935) (injunction ruled out, hence court considered itself without jurisdiction to grant declaration);

Louisville Provision Co. v. Glenn, 12 F. Supp. 545 (W. D. Ky. 1935) (injunction and declaration denied, after Amendment);

Meridian Grain & Elevator Co. v. Fly, 12 F. Supp. 64 (S. D. Miss. 1935) (same).

Suits directed at invalidity of:

(1) *social security taxes*

Aponaug Mfg. Co. v. Fly, 87 F. (2d) 997 (C. C. A. 5th, 1937), *memo decision aff'g* 17 F. Supp. 944 (S. D. Miss. 1937) (declaration and injunction denied);

Beeland Wholesale Co. v. Davis, 88 F. (2d) 447 (C. C. A. 5th, 1937) (not even unconstitutionality can be challenged by declaration or injunction, in absence of "special and extraordinary circumstances," an exception to Section 3224); *cf. supra* n. 32a.

Allen v. Shelton, 96 F. (2d) 102 (C. C. A. 5th, 1938) (declaration and injunction denied);

(2) *unjust enrichment taxes*

White Packing Co. v. Robertson, 17 F. Supp. 120 (M. D. N. C. 1936), *aff'd* 89 F. (2d) 775 (C. C. A. 3rd, 1937) (neither declaration nor injunction granted);

Union Packing Co. v. Rogan, 17 F. Supp. 934 (S. D. Cal. 1937) (same);

(3) *miscellaneous*

Regents of University System of Georgia v. Page, 81 F. (2d) 577 (C. C. A. 5th, 1936) (tax exemption on university football game receipts; equitable jurisdiction sustained);

William B. Scaife & Sons Co. v. Driscoll, 94 F. (2d) 664 (C. C. A. 3rd, 1937), *aff'd* 18 F. Supp. 748 (1937) (neither declaration nor injunction to compel Collector to accept amended capital stock return).

²¹10 F. Supp. 483 (W. D. Ky. 1935).

stitutionality of the tax and the Act under which it was collected was to pay the tax first and then sue for its refund. Injunction was deemed inapplicable. Federal Judge Dawson, in the Kentucky District, held that the declaratory action was appropriate, since it was against the collector personally, that this was not an evasion of Section 3226 of the Revised Statutes²² governing proceedings for refunds and that it was an efficient adjudication of liability, thereby avoiding complications arising out of prior payment to the Treasury as well as the subsequent proceedings. Judge Dawson remarked:

" . . . I do not mean by this, however, to hold that a declaratory judgment proceeding under the Federal Act was intended to or does destroy or lessen the force of section 3224, Rev. St. (section 154, title 26 USCA), prohibiting the granting of injunctions against the collection of taxes. Just as in an ordinary equitable proceeding, an injunction against the collection of a tax cannot be granted in this character of proceeding, unless it is alleged and shown that there exist such extraordinary and exceptional circumstances as to render that section inapplicable; nor do I hold that it was intended to or does supersede the present statutory method for the recovery of taxes claimed to have been illegally or improperly exacted. The method of recovering such taxes provided by section 3226, Rev. St., as amended (section 156, title 26 USCA), is exclusive; but this is not a suit to recover such taxes. This suit, as it now stands, involves only the constitutionality of the act under which the collector intends to act. It is true the question to be decided of necessity would also be decided in a suit to recover the taxes after they had been paid, if the claim of right to recover is based upon the unconstitutionality of the act; but this fact does not make this action the equivalent of an action under section 3226, Rev. St., as amended (section 156, title 26 USCA), to recover taxes illegally collected. As applied to tax statutes, this proceeding is merely a convenient means of settling the law before payment of the tax, or after payment of the tax and before the institution of a suit for a refund. In the absence of circumstances justifying the granting of an injunction, however, and the actual granting of an injunction, the pendency of such an action does not have the effect of delaying or hindering the collector from proceeding with the collection of the tax in the manner provided by law. . . . If he did not bow to the decision, however, and later on it became necessary for the taxpayer to sue him for a refund, as is authorized by section 3226, Revised Statutes, as amended 26 USCA § 156, the trial court would probably be justified in refusing him a certificate of probable cause, and thus he and his bond would be liable for the judgment obtained. . . ."²³

In the matter of state taxes, a declaratory action establishing liability had previously been deemed an appropriate middle road between the prohibited injunction on the one hand and the expensive suit for the recovery of an already paid tax on the other.²⁴ The federal amendment was made applicable "to any proceeding now pending in any court of the United States," in order apparently to strike down the decision in *Penn Bros. v. Glenn* and the few declaratory judgments on the A. A. A. processing taxes. Ultimately the Kerr-Smith Tobacco Act was repealed at the request of

²²26 U. S. C. A. §§ 1672-3 (1935 ed.).

²³10 F. Supp. 483, 486-7 (W. D. Ky. 1935).

²⁴Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249 (1933). See also

Gully, State Tax Collector of Mississippi v. Interstate Natural Gas Co., 82 F. (2d) 145 (C. C. A. 5th, 1936), *aff'g* 8 F. Supp. 174 (S. D. Miss. 1934).

the Administration after the A. A. A. taxes had been held unconstitutional on injunction proceedings.²⁵

How the Government officials who advised the Senate Finance Committee acquired the idea that the declaratory procedure was designed to facilitate the settlement of "private" controversies but not "public" controversies, it is not easy to surmise. There was no justification for such a belief and the Committee was misled. Experience would indicate that the declaratory judgment is used very commonly in England and the United States to challenge the validity of public action whenever it affects the rights or claims of private individuals or other public bodies.²⁶ It has been especially useful in tax questions where the issue was the duty to pay, the jurisdictional powers of the administration, the immunity of the plaintiff from particular assessments by reason of the nature, or situs of, or interest in, or use or contractual exemption of the property or person, or the propriety of a classification or administration of the tax, where there has been actual or threatened illegality or error, *e.g.*, in the Government's failing to comply with the statutory or lawful requirements for a valid assessment, in the matter of valuation, tax rate, mode of assessment, amounts claimed, incidence of the tax, discrimination, deductions allowed, time for appeal and similar matters. In all these cases the issue has been narrowed to the precise question on which tax liability or exemption depends.

On the other hand, insofar as a federal income and estate tax assessment or tax errors are concerned, the procedure of the Board of Tax Appeals, where applicable, must necessarily be followed.²⁷ The advance of that ground as justification for the amendment seems therefore misleading and irrelevant. An argument can be made for the point that the prohibition against injunction should not be avoided by a suit for a judicial declaration of non-liability.²⁸ Yet the policy of Section 3224 is now so questionable that a legitimate way to avoid it and secure speed of adjudication ought not to incur judicial disapproval.²⁹

Policy of Sec. 3224 and Its Limitations. The wisdom of the policy manifested in Section 3224 has been questioned on numerous occasions.³⁰ Just how it helps the federal Government to make an erroneous or illegal collection of internal revenue taxes, only to be obliged to make refunds with interest, it is hard to see. The unwisdom of the Section was appreciated by

²⁵United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936).

²⁶Jennings, *Declaratory Judgments Against Public Authorities in England*, (1932) 41 Yale L. J. 407; *cf.* this chapter and *infra* p. 877.

²⁷There was no case for this procedure in Penn Bros. or in the processing tax cases.

²⁸See Note (1935) 44 Yale L. J. 1451. Yankwich, J. in Los Angeles Soap Co. v. Rogan, 14 F. Supp. 112 (S. D. Cal. 1936) (processing tax on Philippine vegetable oils).

²⁹The author was commissioned by Senator King to draft the report of the Senate Subcommittee which became the Committee report. He asked Senator King whether the Senator considered that an exception should be made for the application of the declaratory judgment in tax cases so as to avoid any conflict with Section 3224. Senator King saw no reason to make an exception for tax questions.

³⁰See especially Gorowitz, I. H., in 10 Tax Magazine 446 at 450 (1932).

Congress itself, for in the large field of income and estate taxes, the establishment of the Board of Tax Appeals now provides a method of testing the propriety of a deficiency assessment *before* payment of the tax. If immediate judicial challenge is desired, then payment must precede litigation, but judicial review of the Board's determination is possible, certainly on all legal issues, without prior payment.

Thus the scope of Section 3224 has been materially limited by statute. In addition the Supreme Court has engrafted exceptions upon it, so as to grant injunctions where there is a real basis for equitable jurisdiction, such as a threatened multiplicity of suits, irreparable injury to the taxpayer's business—this covered injunction against the processing taxes of 1935—probable unconstitutionality under aggravating or exceptional circumstances—a "nullity," as it has been called—and where the tax is in reality a penalty or police power regulation.³¹ When, then, District Judge Dawson held unconstitutional the Kerr-Smith Tobacco Restriction Act in *Penn Bros. v. Glenn*³² because by levying a penalty sales tax of 25 to 33 $\frac{1}{3}$ % upon tobacco growers who would not or could not reduce their acreage under A. A. A. principles, the federal Government was regulating production in the state in the guise of the taxing power, it should have occasioned no surprise. He could have enjoined collection of the penalties on authority of *Hill v. Wallace*.³³ But while denying an injunction against the collector, Judge Dawson issued a declaratory judgment, the first case in which declaratory procedure had been employed to hold unconstitutional a federal Act.

Need for the Declaratory Judgment. But the Government's argument for the amendment of 1935, while suggesting that the declaration was a circumvention of Section 3224 in the matter of income tax assessment, goes much beyond the reason advanced in its support and denies the possibility of challenging federal taxes of any kind on any ground by declaratory action. On its face, it might seem that while injunction may still be granted within the numerous exceptions to Section 3224, the milder declaration could not be granted. This would be anomalous. A sounder view would make the prohibition of declaratory judgments in tax cases cover precisely the ground reserved against injunction by Section 3224 and no more, thus merely preventing the use of the declaratory judgment to escape the now limited restrictions of Section 3224. Even this is pretty harsh, since the need for equitable relief is a condition of injunction but not necessarily of a declaratory judgment. But at least such a construction³⁴ would limit the destructive and anti-social effects of the Amendment of 1935.

³¹The cases are discussed in the article of Gorowitz, *supra* n. 30, in 45 Harv. L. Rev. 1221 (1932), in 44 Yale L. J. 1451 (1935), and in 49 Harv. L. Rev. 109 (1935). While illegality alone has not been deemed sufficient to sustain equitable jurisdiction for injunction, it has been enough in most of the states to

sustain a declaration—certainly where no charge of evading injunction is entertained.

³²10 F. Supp. 483 (W. D. Ky. 1935).

³³259 U. S. 44 (1922).

³⁴*Cf. Filipowicz v. Rothensies*, 31 F. Supp. 716 (E. D. Pa. 1940) (priority of tax and other liens declared).

The report of the minority of the Senate Finance Committee reads as follows:

"Income and estate tax liabilities may now be determined prior to the payment of any asserted deficiency, by the Board of Tax Appeals, an impartial tribunal composed primarily of experts, which for many years has heard and decided controversies between the government and taxpayers upon the merits and judicially.

"However, no similar method is available for determining additional liabilities for miscellaneous internal revenue taxes proposed by the Bureau of Internal Revenue—unless it is the declaratory judgment law. A few courts have decided, and, we think properly, that the declaratory judgment law permits a determination of liabilities for these taxes. We believe that any doubt should be removed and that the declaratory judgment law should be specifically amended to make it applicable to all taxes not within the jurisdiction of the Board of Tax Appeals. As an alternative, we recommend that the Board of Tax Appeals be given jurisdiction to determine liabilities for all miscellaneous internal revenue taxes prior to payment of asserted additional taxes."³⁵

The minority, apparently realizing that income taxes were not really involved in the amendment, was opposed to it on the ground that the issues arising out of the exaction of the miscellaneous taxes which it covered required for their adjudication either the declaratory action or a specific form of statutory relief similar to that of the Board of Tax Appeals. Before August 30, 1935, however, it required no amendment of the Declaratory Judgments Act, as the minority assumed, to permit of its application to miscellaneous federal tax statutes and exactions. Had the Act been left alone, it would have enabled both Government and taxpayer to place in issue for speedy adjudication the manifold legal questions arising out of such statutes. Other federal governments, notably Australia and Canada, appear to have found such procedure useful; it has been found so in our states; but it may no longer be applied to federal taxes unless the amendment is repealed.

In the assessment of excise taxes, disputes arise as to who is the manufacturer to be taxed, whether a certain commodity falls within a certain classification or is subject to tax,³⁶ and similar issues. The Government now generally decides such issues in its own favor, sometimes taxing two intermediaries, and then awaits a suit by the disgruntled taxpayers. This is not even in the interests of the Government, since a reputation for oppression encourages tax evasion. Even in income tax matters, the Government's power to delay a decision by delaying the writing of a deficiency letter causes injury and suspense to the taxpayer. Whether a reorganization or merger of corporations realizes a profit, who are the recipients of a dividend, whether a particular activity is exempt from tax and hence necessity for a return under the language of a statute, what, in the case of the sale of

³⁵Sen. Rep. 1240, 74th Cong., 1st sess., Pt. 2, p. 9.

³⁶Since the amendment, a manufacturer is not entitled to a declaratory decree

that his product is not subject to an excise tax. *Red Star Yeast & Products Co. v. La Budde*, 83 F. (2d) 394 (C. C. A. 7th, 1936).

a plant, is the basis on which gain is to be determined, are among the issues that require early adjudication.³⁷ Some involve questions of fact, others of law. If such issues cannot be adjudicated promptly by the courts, at least machinery for their prompt disposition, if necessary at the initiative of the challenged taxpayer, should be created in the administrative channel. The limited practice of "closing agreements" will be discussed hereafter.³⁸ But whether or not income or estate taxes should be left exclusively to present statutory methods of disposition, there is no reason why excise and other internal revenue taxes should not be justiciable by fairer and speedier methods than now prevail. At least the Amendment of 1935 should be amended by limiting its scope to income and estate taxes, the source of alleged grievance advanced by the Department of Justice in pressing for the Amendment.

³⁷The author is indebted to Robert N. Miller of Washington for these illustrations. They were drawn from the large practical experience of Mr. Miller.

³⁸*Infra* p. 922. The Attorney General's Committee on Administrative Procedure (Senate Doc. 8, 77th Cong., 1st Sess.)

p. 30, remarks: "As to tax controversies, where the need for advance determination of liabilities has been particularly acute, the possibility of using declaratory judgments has been specifically negatived by Congress. Act of Aug. 30, 1935, 49 Stat. 1027."