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Reach out and Tax Someone: I.R.C. Section 4252(b)(1) and the Disappearance of Taxable Long-Distance Service

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REACH OUT AND TAX SOMEONE: I.R.C. SECTION 4252(b)(1) AND THE DISAPPEARANCE OF TAXABLE LONG-DISTANCE SERVICE

"The wisdom of man never yet contrived a system of taxation that would operate with perfect equality."
—Andrew Jackson[1]

The Internal Revenue Code is not immune to changes in the world around it, and on occasion technology or some other machination will wrench an otherwise taxable event from the grasp of the Code's language. In the case of Code sections 4251 and 4252(b)(1) and the tax they impose on long-distance services, this is exactly what has happened. The change in the nature of the services the provisions were intended to tax, and more importantly the disparate results in the provisions' application subsequent to the change, is the focus of this Comment.

Most people would agree that an ideal tax system would be fair to all of those on whom it imposed the responsibility to pay. However, as Andrew Jackson suggested, such a system has been historically elusive, and the years since his statement have provided nothing to discredit that notion. Even assuming that Congress could contrive a perfectly equitable taxation scheme, that scheme would be perfectly equitable only at its moment of creation. Because the world in which the Internal Revenue Code operates constantly changes while the Code itself changes only when Congress sees fit to do so, the mere passage of time may create inequitable results unintended by the Code's original drafters.

In the past decade, this is precisely what has happened with a couple of sleepy sections of the Code, sections 4251 and 4252, as technological progress has moved the commercial activity taxed by the pro-

[1] Andrew Jackson, Proclamation to the People of South Carolina, Dec. 10, 1832, *available at* http://www.multied.com/documents/MessagesC.html.

visions beyond the original language of those sections. Specifically, the provisions tax certain long-distance telephone services and delineate their scope by carefully defining what constitutes such a service; a key component of this definition is the method by which taxable services are billed. Recent changes in the billing methods employed by long-distance companies, however, have opened the door for formerly taxable long-distance services to elude the grasp of the Code's language. As such, read literally, the provisions no longer apply to the services which they were intended to tax.

A few enterprising companies have taken note of this change and have attempted to use it to their advantage with varying results. These businesses have filed for refunds on taxes paid under the provisions and have based their cases on the inapplicability of the provisions' language to modern billing methods. While only a handful of such cases have so far been tried, inconsistencies have already arisen in outcomes: one plaintiff was denied a refund, while three others enjoyed more favorable results.

Each case turned on whether the respective court found section 4252(b)(1)'s definition of a taxable long-distance service to be ambiguous in its language, thus allowing the court to look beyond the language to the presumable congressional intent to tax everything in sight. If no ambiguity existed, the result was clear-cut, as the language of the statute unquestionably does not apply to modern billing methods. Courts that adopted this view held for the taxpaying plaintiff, while the single court finding for the government embarked on a twisting analysis to justify its finding of purported statutory ambiguities.

These cases, while small in number, have potentially far-reaching consequences. The first problem (one that is suggested by Andrew Jackson's observation) is inconsistency in application: in factually indistinguishable situations, some taxpayers have been able to avoid taxation while at least one has not. Likewise, the amounts of money involved are not insubstantial, as frequently the refunds sought involve hundreds of thousands of dollars, and the potential for multi-million dollar refunds may arise as more businesses join the fray.[2] Although some inconsistency is perhaps the inevitable result of multiple trial courts addressing the same issue (with appellate courts yet to weigh in), as the stakes grow it becomes increasingly clear that it is

[2] *See* Warren Rojas, *Phone Tax Fix Could Put Refund Suits on Hold*, 106 TAX NOTES 412, 412 (2005) (noting that, as of January 2005, courts had sided with taxpaying plaintiffs in cases involving approximately $1.25 million in taxes).

patently unfair to require one business to pay large sums of money to the IRS while another escapes taxation on the exact same services.

As such, given that the language of the relevant provisions is clear to all but the most meddling court, Congress must either do away with these provisions altogether or amend them to reflect modern technology. Until this happens, the potential for litigation and inequitable application will only increase as businesses realize the potential tax savings involved. To illustrate the need for change, this Comment will, in Part I, consider the provisions themselves, the context in which they were enacted and then amended to their current form, and the changes in billing methods that have created the current problem. Then, by considering two key cases and courts' rationales, Part II will attempt to illustrate the logic behind courts' disparate conclusions and the potential consequences involved. Finally, Part III will reiterate the need for congressional intervention.

I. SECTIONS 4251 AND 4252 AND THEIR HISTORY

The deceptively simple sources of these problems are sections 4251 and 4252(b)(1) of the Internal Revenue Code. Section 4251 imposes a three percent excise tax on fees paid for "communication services," including "toll telephone services."[3] To clarify the scope of section 4251, section 4252(b)(1) in turn defines "toll telephone service" to include a "telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States."[4]

Originally, the provisions were enacted as emergency revenue-raising measures during the Great Depression, World War II, and the Korean War.[5] By 1965, however, Congress had apparently grown weary of these and related excise taxes. The result was the Excise Tax Reduction Act of 1965,[6] the aim of which was to reduce and restrict the application of these taxes.[7] Congress lamented the fact that

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[3] I.R.C. § 4251 (2004).

[4] I.R.C. § 4252(b)(1) (2004). The section also includes as a "toll telephone service" "a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time) to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located." *Id.* This portion of the section, however, is not the focus of the issue at hand.

[5] *See* H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645 (noting that the 1965 amendments were a "comprehensive overhaul" of these and other taxes levied during the earlier periods).

[6] Pub. L. No. 89-44, 79 Stat. 136 (1965).

[7] H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645.

the long-distance tax imposed was not developed on any systematic basis and indeed was often discriminatory in its application, even going so far as to label the tax an "undesirable . . . permanent feature of our excise tax system."[8] Because it fell more heavily on those with lower incomes, the tax therefore was to be phased out over the next half-decade.[9] Obviously, this was not to be its fate.

In addition to (supposedly) phasing out the tax, Congress attempted to clarify which services were subject to the provisions. Specifically, when the Excise Tax Reduction Act of 1965 changed section 4252(b)(1)'s definition of "toll telephone service" to its current form,[10] the then-new definition reflected and largely encompassed the billing methods used by AT&T, the primary provider of long-distance service at the time.[11] While the amended language rendered most long-distance service taxable for many years after the change, in the past decade traditional long-distance service providers have largely abandoned using distance (and sometimes even time) as a factor in charging for such services. As a result, a call across the street is now often billed at the same rate as a call across the country.[12]

Even after this recent change in billing methods took place, there existed little evidence that a potentially major taxation issue was imminent. Within the span of one month in early 2004, however, two courts reached opposing conclusions in considering whether the language of section 4252(b)(1)'s definition of "toll telephone service" could impose a tax under modern long-distance billing systems. These cases, *Office Max, Inc. v. United States*[13] and *American Bankers Insurance Group, Inc. v. United States*,[14] along with a handful of

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[8] H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645, 1676.

[9] *Id.*

[10] *See* Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, § 302, 79 Stat. 136, 146 (1965) (amending the statute to reflect its current form). The overall purpose of the act was to reduce and restrict the application of federal excise taxes. H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645.

[11] *See* Am. Bankers Ins. Group, Inc. v. United States, 308 F. Supp. 2d 1360, 1367 (S.D. Fla. 2004) (describing the state of long-distance service at the time of amendment).

[12] *See* Nicholas Thompson, *Phone Companies See Their Future in Flat-Rate Plans of Many Services*, N.Y. TIMES, May 23, 2003, at C1 (citing competition from wireless carriers, which often offer flat-rate nationwide calling, as one reason for the change).

[13] 309 F. Supp. 2d 984 (N.D. Ohio 2004).

[14] 308 F. Supp. 2d 1360 (S.D. Fla. 2004). Immediately prior to publication, the Eleventh Circuit Court of Appeals reversed this case, finding the word "and" to be unambiguous. *See* Am. Bankers Ins. Group, Inc. v. United States, 2005 U.S. App. LEXIS 8132 (11th Cir. May 10, 2005). Nevertheless, the district court's decision stands as a testament both to the legal wrangling these issues may cause and to the need for clarification of the relevant provisions of the Internal Revenue Code.

subsequent decisions, have begun what is rapidly becoming a contentious and potentially expensive battle over taxes.

II. THE PRIMARY CASES CONSIDERING SECTIONS 4251 AND 4252(B)(1)

The relevant facts are essentially the same in the cases addressing sections 4251 and 4252(b)(1). In each, the plaintiff business paid taxes under the provisions for "toll telephone service" to its long-distance service provider; the provider in turn remitted those sums to the Internal Revenue Service. Each business filed a claim for a refund for the amount of taxes paid, claiming that the amounts surrendered to pay for long-distance service did not vary with distance and thus were not paid for "toll telephone services" taxable under sections 4251 and 4252(b)(1). The Service refused each request, prompting lawsuits from the taxpaying businesses.

A. American Bankers Insurance Group, Inc. v. United States: *Modern Long-Distance Services are Taxable*

In January 2004, the first case addressing the applicability of sections 4251 and 4252 to modern long-distance billing methods appeared. In *American Bankers Insurance Group, Inc. v. United States*, the taxpayer sought a refund of over $360,000 for three and one-half years' worth of taxes paid under the statute.[15] In support of its argument that it had not purchased a taxable "toll telephone service," the American Bankers Insurance Group (hereinafter "ABIG") pointed out that it had not paid fees based on both time and distance. Instead, it had paid a flat rate (*i.e.*, a distance-independent rate that varied only with the time of the call) for all interstate and most intrastate calls within the United States. For international calls, ABIG paid a rate that varied depending only on the length of a call and the country to which the call was placed.[16] As such, ABIG argued, it had not purchased a taxable "toll telephone service" under section 4252(b)(1).[17]

The trial court in the Southern District of Florida, however, disagreed, and first identified situations in which it could look beyond a statute's language to consider congressional intent. Both ambiguity in the statutory language and evidence of legislative intent contrary to a plain meaning reading would suffice to prompt such analysis.[18] In this instance, the court found both situations were present.

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[15] *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1362-63.

[16] *Id.*

[17] *Id.* at 1362.

[18] *Id.* at 1363-64.

First, the court eschewed the traditional notions that the words "and" and "or" mean two very different things and, especially in dealing with the Code, that the words thus must be taken literally.[19] According to the court, section 4252(b)(1) was ambiguous because the word "and" in the phrase "distance and elapsed transmission time" could be read disjunctively to actually mean "or."[20] In support of its finding, the court cited the dictionary definition of "and," which states that the word may mean "or," especially when used in legal language.[21] The court found further ambiguity by looking to section 4252(b)(1)'s definition of "toll telephone service" itself as well as other portions of the statute and found that Congress could have been using "and" in either its usual sense or alternatively to mean "or."[22] Either way, in the court's view, this evidence sufficed to allow an examination of legislative intent beyond the statutory language itself.[23]

In addition to statutory ambiguity, the court found that evidence of legislative intent contrary to the statute's apparent plain meaning provided grounds on which it could look beyond the language of section 4252(b)(1). After examining the legislative history, the court determined that the intent of the section was to tax almost all commercial long-distance service.[24] The court noted that, at the time of the 1965 amendment, the AT&T monopoly offered only two options for billing long-distance service.[25] The 1965 amendment appeared to be an effort to describe both of these options and, the court inferred, to tax all available long-distance services.[26] If so, a literal reading of the stat-

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[19] There exist numerous examples in the Code where the distinction between "and" and "or" is critical. For example, section 708(b)(2)(A) provides that if two partnerships merge, the resulting partnership is a continuation of the partnership whose members own an interest of more than 50% in capital *and* profits of the resulting partnership. Needless to say, restating this condition to require a greater-than-50% interest in capital *or* profits (thus leaving open the possibility that the members of one partnership have a majority interest in capital while members of the other have a majority interest in profits) would significantly complicate things. Compare this to section 706(b)(3), which defines a "principal partner" for purposes of determining a partner's or a partnership's taxable year as a partner having an interest of five percent or more in partnership profits *or* capital. *See* I.R.C. §§ 706(b)(3), 708(b)(2)(A) (2004).

[20] *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1366.

[21] *Id.* at 1364-65 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 80 (1966)).

[22] *Id.* at 1365. The court also found it important that the word "and" connected subsections 4252(b)(1) and (b)(2) (each of which describes a communication that can be a "toll telephone service" under the statute, and, importantly, either of which is taxable). Additionally, it noted the use of "and" to connect three separate definitions in section 4251(b), which defines various kinds of communications, any one of which may be a "communication service" under section 4251(a). *Id.*

[23] *Id.* at 1363-64.

[24] *Id.* at 1367.

[25] *Id.*

[26] *Id.*

ute, by allowing certain long-distance services to escape taxation, would have defeated the statute's apparent purpose of taxing all such services.[27]

Having concluded that both ambiguity in the statute's language and evidence of a contrary legislative intent justified looking beyond the statute's plain meaning, the court next sought to clarify what Congress's intent might have been. In sum, the court again found that the statute was intended to tax all commercial long-distance services; thus, time and distance were not both required in order to have a taxable "toll telephone service" under section 4251(b)(1).

Support for this conclusion came from familiar sources: to the court, the 1965 amendment's description of all billing methods available at the time and the fact that reading "and" as "or" would further the purported purpose of taxing all commercial long-distance calls both evidenced Congress's aims.[28] Further, the legislative history of the 1965 amendment added support to the notion that Congress intended a broad scope for the statute. By the court's reasoning, because the legislative history did not explicitly indicate that there was to be a change in the type of services taxed, the statute's broad scope was unaffected by the amendment. Thus, services such as those purchased by the plaintiff that would have been taxable before the change would continue to be taxable after the change.[29]

The court also found support for its view that distance is not a necessary component of a "toll telephone service" under section 4252(b)(1) in a 1979 revenue ruling cited by the government in support of its argument. The court found that only the deference due the ruling was at issue, although it failed to note the debatable validity of the government's citing its own pronouncement as "authority." Specifically, Revenue Ruling 79-404 addressed whether communications between seafaring ships and the shore charged at a single, distance-independent rate were taxable under section 4251.[30] The IRS conceded in the ruling that the communications did not literally fall within 4252(b)(1)'s definition. However, it took a stance similar to

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[27] *Id.* at 1368.

[28] *Id.* at 1369.

[29] *Id.* at 1369-70. As discussed *infra*, under the pre-1965 statute, a toll telephone service was a telephonic communication for which there was a toll charge that was paid within the U.S.; the 1965 amendment changed the definition to its present-day form. The legislative history behind the change, however, states that the reason for the alteration was only to make sure that long-distance services, and not simply the equipment used for such services, were to be taxed. *See* H.R. REP. NO. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1676-77. Nevertheless, the court found Congress's silence on the type of services to be taxed to be an indication that no substantive change in the provision's scope was intended.

[30] Rev. Rul. 79-404, 1979-2 C.B. 382.

that of the court in concluding that the statute's purpose would be frustrated by not taxing services within the scope of the statute's intent but nevertheless outside of its literal language.[31] Conceding that the ruling was not subject to notice-and-comment rulemaking or similar formal processes and thus had neither the force nor effect of a regulation, the court found the ruling entitled to as much force as its persuasiveness allowed.[32]

The court determined that the ruling was persuasive, noting that it had been frequently applied in the years since its issuance. Further, a treasury regulation proposed in 2003 adopted the interpretation, and if the regulation were adopted it would give the underlying logic inherently more weight.[33] With this in mind, the court thus gave the ruling substantial deference, noting that it "expresses a longstanding IRS interpretation of § 4252(b)(1), it is entirely reasonable, and it is consistent with the intent of Congress to tax commercial long-distance telephone services."[34]

Thus, considering section 4252(b)(1)'s ambiguity and Congress's apparent intent, the court had essentially expanded the statute's reach in holding that the long-distance services the plaintiff had purchased fell within the definition of a taxable "toll telephone service."

B. Office Max, Inc. v. United States*: Modern Long-Distance Services are Not Taxable*

Soon after *American Bankers Insurance Group*, in *Office Max, Inc. v. United States*, the district court for the Northern District of Ohio considered facts identical to those in *American Bankers Insurance Group* but reached a markedly different conclusion. The taxpayer in *Office Max* sought a refund of over $380,000 for taxes paid on four years' worth of long-distance service.[35] In support of its case, Office Max used a familiar argument, claiming that because distance was not a factor in how it was billed for long-distance services, it did not receive a "toll telephone service" taxable under section

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[31] *Id.* Specifically, the ruling noted that "the intent of the statute would be frustrated if a new type of service otherwise within such intent were held to be nontaxable merely because charges for it are determined in a manner which is not within the literal language of the statute." *Id.*

[32] *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1371.

[33] *Id.* at 1372. The *Office Max* court, discussed *infra*, also noted the existence of this proposed regulation but seemingly dismissed its significance due to its status as a merely proposed regulation. As such, discussion of the proposed regulation was relegated to a footnote. *See* Office Max, Inc. v. United States, 309 F. Supp. 2d 984, 997 n.15 (N.D. Ohio 2004).

[34] *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1372.

[35] *Office Max, Inc.*, 309 F. Supp. 2d at 987.

4252(b)(1).[36] Once again, the key issue was whether the long-distance service purchased by the plaintiff constituted a "toll telephone service" under the statute; more specifically, the question was whether the absence of distance as a factor in how the taxpayer was billed placed the long-distance service received outside section 4252(b)(1)'s grasp.

Like its counterpart in *American Bankers Insurance Group*, the court in *Office Max* first tackled the issue of section 4252's purported ambiguity, noting the common rule of statutory construction that where a statute's language is clear, a court's sole function is to enforce the statute according to its terms.[37] Unlike its predecessor, however, the court found the language of section 4252(b)(1) "clear and unambiguous" and thus not providing justification for an excursion beyond the statute's plain meaning.[38]

Even so, each party argued for a different interpretation of the statute's plain language. Office Max argued that variation in both distance and time were required to make long-distance service a "toll telephone service," while the government advocated a less literal reading that would have allowed the long-distance services purchased by the plaintiff to be taxable.[39] The court found the plaintiff's interpretation the better one, noting the presumption that every word in a statute served a purpose and that Congress had expressly and carefully chosen to define "toll telephone service" in terms of variation in both distance and time.[40] As such, the plain language of the statute was unambiguous and thus enforceable by its terms.

The *Office Max* court next addressed the *American Bankers Insurance Group* court's conclusion that the statute was ambiguous, adding that it "respectfully disagree[d]" with the holding.[41] Quite simply, the

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[36] *Id.*

[37] *Id.* at 992 (quoting Chapman v. The Higbee Co., 319 F.3d 825, 829 (6th Cir. 2003)).

[38] *Id.* at 993. The court also noted the time-honored notion that "statutes imposing a tax are construed liberally in favor of the taxpayer." *Id.*

[39] *Id.* Specifically, the government argued that the statute required only that calculation of a charge include a "distance toll rate" in order to satisfy the distance component of the statute. As such, neither the distance of an individual call nor the distance toll rate applied to the call need vary with each communication. Instead, only the product of the distance toll rate times the elapsed transmission time need vary in order to meet the statute's requirements. As the charges for the services purchased by the plaintiff varied with elapsed transmission time, the service at issue was thus a taxable "toll telephone service" according to the government. The government acknowledged that this construction would require neither a variation in the distance of the call itself or even in the toll rate applied to the call in order for it to be a "toll telephone service." This, the court noted, effectively read the requirement of variation by distance out of the statute. Finally, in addition to rejecting the government's view, the court pointed out its inconsistency with Revenue Ruling 79-404, on which the government relied heavily and which is discussed both *supra* and *infra*. *Id.* at 993-94.

[40] *Id.* (quoting Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173 (6th Cir. 2003)).

[41] *Id.* at 995.

Office Max court felt that "the use of the word 'and' in [section 4252(b)'s] 'distance and elapsed transmission time' [requirement] can [not] be read other than in the conjunctive."[42] Because both distance and time were factors in calculating long distance charges at the time of the statute's 1965 amendment, it was only logical that Congress meant for "and" to be read conjunctively and thus require variations of both distance and time.[43] Further, even though the modern-day Congress may wish to tax all long-distance services whether or not they fall within the statute's language, the court found that the relevant inquiry was what Congress intended when it amended the statute in 1965.[44] Taking all of this into consideration, the court found that the statute was not ambiguous and thus that the statute's requirement that charges vary with both distance and time "should be given full effect."[45]

Because the statute was unambiguous, the court did not feel that it was compelled to further investigate legislative intent nor was such investigation even appropriate.[46] Nonetheless, the court addressed the government's argument and determined that it would have reached the same conclusion even if evidence of congressional intent were taken into account.

As before, the government attempted to bolster its case with Revenue Ruling 79-404, claiming that the ruling evidenced a broad intended scope for section 4252(b)(1). Once again, the determinative issue was the level of deference due the ruling, and again the *Office Max* court reached a conclusion different from the *American Bankers Insurance Group* court. The *Office Max* court began by finding that a revenue ruling is entitled to some deference unless it conflicts with the statute it allegedly interprets, conflicts with the statute's legislative history, or is otherwise unreasonable,[47] and noted that revenue rulings lack the force and effect of regulations.[48] Instead, the defer-

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 995. This, of course, was to tax the two then-existing types of long-distance service billing.

[45] *Id.* The government argued in the alternative that the fact that the fees paid by the plaintiff varied depending on whether calls were placed interstate, intrastate or international meant that distance was a factor in computing charges. The plaintiff naturally disagreed, pointing out that a call from Cleveland, Ohio, to any location inside the U.S. (outside of Ohio) would be billed at the same rate regardless of the distance of the actual communication. Again, the court found the plaintiff's view persuasive. *Id.* at 995-96.

[46] *Id.* at n.14.

[47] *Id.* at 997 (citing Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 173 (6th Cir. 2003)). The *Aeroquip-Vickers* court noted recent Supreme Court cases limiting the deference given to issuances created by delegation of power by Congress to an agency. *Aeroquip-Vickers*, 347 F.3d at 180.

[48] *Id.* at 997-98 (citing *Aeroquip-Vickers*, 347 F.3d at 181).

ence afforded the ruling would depend on its "power to persuade," or, in other words, "the validity and thoroughness of its reasoning and its consistency with earlier and later pronouncements."[49] Because the logic behind the ruling was not reasonable, the court found it entitled to no deference.[50]

The court's justification for this conclusion was multi-faceted. First, the revenue ruling relied on the statutes' legislative history (especially that behind the 1965 amendment) to reach its conclusion that no substantive change was intended for the statutes. The legislative history, however, did not in fact support this result. Because the taxes at issue were enacted as emergency war-time measures and were not developed on any systematic basis, Congress had, at the time of the 1965 amendment, concluded that their application caused undesirable discrimination.[51] The amendment was intended to remedy this discrimination by, among other things, updating and modifying the definition of "toll telephone service" in section 4252(b)(1).[52]

As noted by the court, the statute previously had included as "toll telephone services" any "telephone or radio telephone message or conversation for which (1) there [was] a toll charge, and (2) the charge [was] paid within the United States"; the amendment changed the definition to its current form.[53] The only existing explanation for the definitional change comes from the legislative history to the amendment, and this suggests merely that the change was intended to clarify that the tax was to be imposed on services and not equipment while also reiterating the definition of "toll telephone service."[54] In Revenue Ruling 79-404, the IRS had interpreted this history to mean that Congress generally intended no change in the types of services taxed.[55] As such, the IRS found that congressional intent would be frustrated by exempting a service from taxation simply because it fell outside the literal language of the statute.[56]

Nevertheless, the *Office Max* court did not interpret the brevity of the amendment's legislative history to mean that no substantive change was intended. Rather, such a conclusion was "belied by the

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[49] *Id.* at 998.

[50] *Id.* at 999.

[51] *Id.* (citing H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645).

[52] *Id.*

[53] *Id.* (citing I.R.C. § 4252(b), as enacted by P.L. 85-859).

[54] H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645, 1676-77. As discussed *supra*, The *American Bankers Insurance Group* court found that the brevity of this history signified that the statute was to continue to tax all long-distance service.

[55] The ruling did note that Congress intended to exempt certain private communications services from tax, but they were inapposite to the issue at hand. *See* Rev. Rul. 79-404, 1979-2 C.B. 382.

[56] *Id.*

fact that Congress expressly chose to alter the formerly broad statutory language [of section 4252(b)(1)] to include the requirements that the [long-distance] charge vary by both distance and time."[57] Further, the language of the legislative history was "identical in all material respect[s] to the plain language of the statute itself."[58] The court felt it necessary to presume that Congress "meant what it said" when it altered the statute, especially considering that the overall goal of the Excise Tax Reduction Act of 1965 (which contained the modification to section 4252(b)(1)) was to reduce and restrict the application of federal excise taxes.[59]

Further, the court found inadequate support for one of the ruling's key contentions — the conclusion that a statute may be given an interpretation other than that given by its literal language.[60] According to the court, the case law on which the ruling relied to support this proposition was inappropriately used by the IRS.[61] Instead, the *Office Max* court found the Supreme Court case of *Crooks v. Harrelson*[62] more applicable to the situation, noting the case's proposition that "to justify a departure from the letter of the law [because of an absurd result], the absurdity must be so gross as to shock the general moral or common sense."[63] Further, "[i]t is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of

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[57] *Office Max, Inc.*, 309 F. Supp. 2d at 1000.

[58] The court noted:

> Revenue Ruling 79-404's conclusion that Congress intended only to exempt certain private communication services and repeal the tax on telegraph and wire/equipment service but that "there is no indication that Congress otherwise intended to make changes in the types of service subject to tax," is belied by the fact that Congress expressly chose to alter the formerly broad statutory language to include the requirements that the charge vary by both distance and time. Defendant's argument that this Court should nevertheless interpret the current definition of "toll telephone service" to include charges that do not vary with distance would render Congress' modification of this definition meaningless.

Office Max, Inc., 309 F. Supp. 2d at 1000.

[59] *Id.*

[60] Rev. Rul. 79-404, 1979-2 C.B. 382.

[61] *Office Max, Inc.*, 309 F. Supp. 2d at 1001. For various reasons, cases on which the ruling relied, United States v. Amer. Trucking Ass'ns, 310 U.S. 534 (1940) and Corn Prod. Refining Co. v. Comm'r, 350 U.S. 46 (1955), failed to provide the support necessary to reach the ruling's conclusion. *Id.* at 1001-02.

[62] Crooks v. Harrelson, 282 U.S. 55 (1930).

[63] *Office Max, Inc.*, 309 F. Supp. 2d at 1003 (quoting *Crooks*, 282 U.S. at 60). The *Office Max* court also noted that case's commentary that "[c]ourts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship." *Id.* (quoting *Crooks*, 282 U.S. at 60). Whether intentionally or not, the court did not refer to the *American Bankers Insurance Group* court in citing this quotation.

legislation. . . . [T]he remedy lies with the lawmaking authority, and not with the courts."[64]

Summing up its rejection of the ruling's reasoning, the court found that "there is nothing in the context or in other provisions of § 4252 which warrants the conclusion that the word 'and' was used otherwise than in its ordinary sense," and the ruling did not provide a persuasive reason to depart from the language of the statute.[65] As a result, the court found that "Revenue Ruling 79-404 does not possess the 'power to persuade' as required . . . and, thus, is entitled to no deference."[66]

Finally, the court considered the fact that section 4251 had been reenacted and amended to extend the expiration of its tax in the time after the promulgation of Revenue Ruling 79-404. Specifically, the question was whether reenactment was indicative of congressional intent to adopt the ruling's position. The government argued that the fact that these occurrences happened during and after the time that distance was phased out as a factor in computing long-distance charges suggested that Congress could have changed the statute if there was any possibility that the new pricing plans exempted any long-distance services from the tax.[67] The court skeptically noted the importance of determining whether the ruling had actually been brought to Congress's attention; otherwise, it would hardly be a reliable indicator of Congress's objectives.[68] There was no indication that Congress had been made aware of the ruling, however, and there was no mention of it in the legislative history to subsequent amendments to sections 4251 and 4252.[69] As a result, Congress could not be assumed to have implicitly adopted the ruling's logic by reenacting the provisions after its release.

Having dismissed Revenue Ruling 79-404, the court thus found that the long-distance services the plaintiff had purchased were not "toll telephone services" under 4252(b)(1) even when taking into account extrinsic evidence of congressional intent.

C. Other Cases Addressing Sections 4251 and 4252

Since *American Bankers Insurance Group* and *Office Max*, a few more cases have tackled the issue of whether modern billing methods

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[64] *Id.* (quoting *Crooks*, 282 U.S. at 60).

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1003-04.

[68] *Id.* at 1004.

[69] *Id.* The government also cited United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001), in support of its argument, but the court found the case distinguishable. *Id.* at 1005.

constitute "toll telephone services" under section 4252(b)(1). Each sided with the *Office Max* court by rejecting the idea that section 4252(b)(1) is somehow ambiguous. Among these cases were *National Railroad Passenger Corp. v. United States*[70] and *Fortis, Inc. v. United States*,[71] tried in the district courts for the District of Columbia and the Southern District of New York, respectively. Each court found the plain meaning of section 4252(b)(1) sufficiently clear to hold for the plaintiff taxpayers. As with the original cases, the quantity of money at issue was significant, involving refunds for approximately $86,000 for three months' taxes[72] and $392,000 for three and one-half years' taxes.[73] These are not the only cases to consider the issue, however — numerous others are pending around the country.[74]

III. CONCLUSION

The Internal Revenue Code is not immune to technological change, and sections 4251 and 4252 provide ample proof of this. Because the provision of long-distance services has moved beyond methods encompassed by the original statutes, large sums have been placed beyond the reach of the statutes' literal language.[75] This leaves the application of the outdated provisions to the courts, creating the potential for unfair application such as in *American Bankers Insurance Group*. Likewise, just as more and more businesses will note the opportunity created by the Code's language, modern technologies such as Voice over Internet Protocol (VOIP) will continue to push the notion of what constitutes a "toll telephone service" further away from the vision of the statutes' drafters. Those providers that remain may, after further judicial developments, even stop collecting the taxes from their customers.[76]

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[70] Nat'l R.R. Passenger Corp. v. United States, 338 F. Supp. 2d 22 (D.D.C. 2004).

[71] Fortis, Inc. v. United States, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686 (S.D.N.Y. Sept. 16, 2004).

[72] *Nat'l R.R. Passenger Corp.*, 338 F. Supp.2d at 24.

[73] *Fortis*, 2004 U.S. Dist. LEXIS 18686, at *5.

[74] *See* Rojas, *supra* note 3, at 413 (giving a detailed summary of both pending and decided actions).

[75] As discussed, the language itself is quite clear, and others seem to agree. *See id.* at 415 ("According to [one tax lawyer], the plain language stance taken by the Supreme Court in *Gitlitz v. Commissioner* ensures that modern courts will continue to shoot holes in the IRS's congressional-intent argument.") (citation omitted).

[76] *See id.* (citing a telecom industry source who suggested that, once an appellate court upholds one of the decisions finding for the taxpayer, some service providers may cease collecting the taxes in the first place).

The Internal Revenue Service has already made its position clear.[77] Whether Congress feels that these war-time provisions are still an appropriate source of tax revenue, however, is uncertain. As long as section 4252(b)(1) exists in its current form, a few courts will stretch the boundaries of logic to apply the provision to hapless taxpayers. Obviously, this is undesirable, although as Andrew Jackson observed, man has yet to devise the ideal tax system. This does not, however, excuse society from trying.

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[77] In addition to the position the Service has taken in litigation, late in the summer of 2004 it released a notice reiterating its position that it will continue to tax services as long as either one of section 4252(b)(1)'s distance or time requirements is satisfied. *See* I.R.S. Notice 2004-57, 2004-35 I.R.B. 376.

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