1955

# Internal Revenue Code of 1954: Legislative and Administrative Techniques

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# MINNESOTA LAW REVIEW

Volume 39 June, 1955 No. 7


## INTERNAL REVENUE CODE OF 1954: LEGISLATIVE AND ADMINISTRATIVE TECHNIQUES


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In 1938 Mr. Feidler and the present writer published in this Law Review[1] a study of the Federal Statutes from an historical and technical point of view. The great dividing point, it was shown, was the Revised Statutes of 1873, the one and only general revision of all Federal permanent public statutes enacted as law. That is still true, since the United States Code is only *prima facie* the law.[2] However, an increasing number of particular parts of the Federal Statutes have been enacted "into law," as revisions.[3] In 1938 there were only two, the Criminal Code[4] and the Judicial Code.[5]

That article also discussed certain techniques for finding the Federal Statutes and for using legislative history as an aid to interpretation. One of the tools referred to[6] was Scott and Beaman, *Index Analysis of the Federal Statutes* (1908). The second co-author is the late Middleton G. Beaman, who, during the '20s, '30s


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1. Dwan and Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008 (1938).
2. 44 Stat. 777 (1926), Dwan and Feidler, *supra* note 1, at 1021.
3. In the Preface (dated May 1, 1953) to the 1952 edition of the United States Code, it is stated:

> "Inasmuch as many of the general and permanent laws which are required to be incorporated in this Code are inconsistent, redundant, archaic and obsolete, there has been inaugurated a comprehensive project of revising and enacting the Code, consisting of 50 titles, into positive law, title by title. In furtherance of the plan bills have been enacted to revise, codify and enact into positive law Titles 1, 3, 4, 6, 9, 14, 17, 18, 28, and 35. In addition, bills relating to other titles are also being prepared for introduction at an early date. When this work is completed all the titles of the Code will be legal evidence of the general and permanent law and recourse to the numerous volumes of the Statutes at Large for this purpose will be unnecessary.

The Law Revision Counsel of the House Judiciary Committee advises that Title 13 has since been enacted into positive law. Pub. L. No. 740, 83d Cong., 2d Sess. (Aug. 31, 1954).

4. 35 Stat. 1088 (1909); see Dwan and Feidler, *supra* note 1, at 1018. The present version is Title 18, U. S. C.; see Judge Alexander Holtzoff's interesting preface in 18 U. S. C. A.
5. 36 Stat. 1087 (1911); see Dwan and Feidler, *supra* note 1, at 1018. The present version is Title 28, U. S. C.
6. Dwan and Feidler, *supra* note 1, at 1024.

and '40s, was Legislative Counsel for the House of Representatives. He was recognized as a master craftsman in the drafting of statutes, particularly internal revenue statutes. He was also generous in training others in that difficult art.

In 1947 this writer carried forward the study[7] with particular reference to the internal revenue statutes and regulations issued thereunder. By that time the Internal Revenue Code had been "enacted into law," on February 10, 1939, and had been printed as Part 1 of Volume 53 of the Statutes at Large. It was pointed out that the subsequent practice as to changes was (with few exceptions) to make such changes by amendments to particular sections of the Code or additions of new sections. That practice has continued until the enactment of the Internal Revenue Code of 1954.[8] In order to distinguish the two Codes, the enacting statute provides at the outset:

> "(a) *Citation.*—
>
> (1) The provisions of this Act set forth under the heading 'Internal Revenue Title' may be cited as the 'Internal Revenue Code of 1954.'
>
> (2) The Internal Revenue Code enacted February 10, 1939, as amended, may be cited as the 'Internal Revenue Code of 1939.' "

At this point, an important difference in purpose between the two Codes should be emphasized. In the preface to the official version of the original 1939 Code, it was stated:

> "These statutes are codified without substantive change and with only such change of form as is required by arrangement and consolidation. The title contains no provision, except for effective date, not derived from a law approved prior to January 3, 1939."

In that respect the 1939 Code was like the Revised Statutes of 1873.[9] On the other hand, the Internal Revenue Code of 1954 is in large part a deliberate change of substance; and even where no substantive change was intended, the changes of form are often quite extensive. Then, too, the structural rearrangement is very great indeed.[10] For some time to come, the older lawyers will think of Section 22(a) of the old Code for the general definition of gross income and will then try to remember the new section or will look in the excellent tables in the back of the new Code; the younger lawyers will think at once of Section 61(a) of the new Code, with its fuller enumera-

7. Dwan, *Some Technical Aspects of the Internal Revenue Statutes and Regulations*, 28 Minn. L. Rev. 377 (1944).

8. Pub. L. No. 591, 83d Cong., 2d Sess. (Aug. 16, 1954).

9. Dwan and Feidler, *supra* note 1, at 1013.

10. See Silverstein, *An Introduction to the Internal Revenue Code of 1954*, N. Y. U. 13th Inst. on Fed. Tax. 7, 14 (1955).

tion and with the catch-all clause at the beginning. The enacting statute of the 1954 Code also provides:

> "(b) *Publications.*—This Act shall be published as volume 68A of the United States Statutes at Large. . . .
>
> (c) *Cross Reference.*—For saving provisions, effective date provisions, and other related provisions, see chapter 80 (sec. 7801 and following) of the Internal Revenue Code of 1954.
>
> (d) *Enactment of Internal Revenue Title Into Law.*—The Internal Revenue Title referred to in subsection (a)(1) is as follows. . . ."

It will be noted that the enactment "into law" is only by heading. In that connection, Section 7806 provides:

> "CONSTRUCTION OF TITLE.
>
> (a) *Cross Reference.*—The cross references in this title to other portions of the title, or other provisions of law, where the word 'see' is used, are made only for convenience, and shall be given no legal effect.
>
> (b) *Arrangement and Classification.*—No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law."

In the previous article on the 1939 Code, there was some discussion of reliance upon the title of a statute or the heading of a section in a statute as an aid to construction, and it was shown that such use is permitted under the more recent cases, including tax cases.[11] The wide use of section headings in Revenue Acts, starting with the Revenue Act of 1928,[12] has been highly desirable and helpful in the cases. However, the enacting statute of the 1939 Code contained a provision similar to Section 7806, quoted above. There was more reason for such a provision in the 1939 Code because of the desire not to change the law in any way. In the previous article it was suggested[13] that the provision did not apply to a heading which was already in a Revenue Act before the 1939 Code was enacted and to a heading of a section added by a subsequent Revenue Act. Similar considerations would seem to apply to Section 7806 of the 1954 Code. At any rate, the hex on headings does not apply to the heading referred to at the beginning of this paragraph since it is not part of "this title," *i.e.*, the Internal Revenue Title.

11. Dwan, *supra* note 7, at 379.
12. *Id.* at 380.
13. *Id.* at 379.

The explicit proscription of giving any legal effect to cross-references in the new Code is important because the new Code contains many cross-references, which are usually very helpful. They may be misleading, however, as in certain cross-references at the end of Sections 351 and 356. Those sections are in the Part on Corporate Organizations and Reorganizations, but there are cross-references to Section 2501, a general section on the imposition of gift taxes, and Section 61(a)(1), the part of the general definition of gross income relating to compensation for services. The attempt to drag in concepts of gifts or compensation in that way and by statements in the Committee Reports[14] almost amount to legislation by cross-reference and committee report. That is not to say that the Code is not to be considered as a whole in appropriate cases.

The enacting statute quoted above refers, among other things, to "effective date provisions." Traditionally Revenue Acts only apply to certain designated periods or events,[15] and the 1954 Code continues that tradition, with quite elaborate provisions.[16] For years to come the prior law will govern cases under investigation, in the process of settlement, and in litigation.

A useful provision in the enacting statute of the 1939 Code was Section 8, which provided:

> "Copies of this act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original Internal Revenue Code in the custody of the Secretary of State."

The 1954 Code appears to have no corresponding provision.

In view of the considerable changes in the new Code and in view of the relative speed of its drafting and enactment, there are bound to be technical mistakes. In fact, it has been necessary already to remedy by new legislation[17] the inadvertent repeal of penalties for certain violations of the narcotic laws. In the March 24, 1955, Congressional Record[18] the Chairman of the Ways and Means Committee referred to seventy other mistakes "already" reported by the Treasury Department. Such post-natal pains find ample precedent in the history of the Revised Statutes[19] and the United States Code.[20]

14. House Rep. No. 1337, 83d Cong., Sd Sess. A117; Sen. Rep No. 1622, 83d Cong., 2d Sess. 264 (1954).
15. Dwan, *supra* note 7, at 378.
16. Int. Rev. Code of 1954, § 7851.
17. Int. Rev. Code of 1954, § 7237, as amended, Pub. L. No. 1, 84th Cong., 1st Sess. (Jan. 20, 1955). See discussion by the Chairman of the Ways and Means Committee in 101 Cong. Rec. 3116 (March 24, 1955).
18. 101 Cong. Rec. 3117 (daily ed. March 24, 1955).
19. Dwan and Feidler, *supra* note 1, at 1014.
20. *Id.* at 1021.

The careful work of the groups who labored so hard on the Internal Revenue Code of 1954 should not be discounted.[21]

Changes in the new Code will not be limited to technical provisions. There will also be changes in substantive provisions which were deliberately adopted.[22] Already repeal of two of the accounting provisions has been considered, largely for revenue reasons. They will be discussed in another connection;[23] for the present, it may be noted that the debates have given currency to the wonderfully expressive word "blooper."[24]

Looking at the Code more fundamentally, it may be worth-while to consider the merits, with respect to internal revenue statutes, of generality as opposed to particularity (or specificity, as they say in the Customs courts). This does not refer to the problem of preferential treatment of particular taxpayers or groups of taxpayers under the guise of more or less general legislation.[25] Rather, the question presented here is the desirability of spelling everything out in the statute with a minimum being left for administration. Mr. Magill and Mr. de Kosmian have touched upon the question in a recent article,[26] particularly with respect to the tax treatment of grants of scholarships and the like. Under the 1939 Code, such matters were handled under the broad language of Section 22(a). The 1954 Code, in Section 117, has detailed rules on the subject, *e.g.,* that under certain circumstances the excess over $300 per month or all amounts received after 36 months are taxable. The authors seem to prefer less specific rules and thus more flexibility of administration if the Internal Revenue Service could be trusted

21. See Silverstein, *supra* note 10, at 8-10, discussing the groups within the legislative and executive branches of the Government, including the staff of the Joint Committee on Internal Revenue Taxation, the subcommittees formed from that staff and from the Treasury and the Internal Revenue Service, and the Office of the Legislative Counsel of the House. See also Darrell, *The Internal Revenue Code of 1954—A Striking Example of the Legislative Process in Action,* 1955 So. Calif. Tax Inst. 1. Mr. Darrell also discusses, at 16-25, the contributions of groups outside the Government, including the American Bar Association, the Association of the Bar of the City of New York, and especially the American Law Institute. The American Law Institute has published a *Comparison of the American Law Institute February 1954 Income Tax Draft and 1954 Internal Revenue Code* (1955).

22. See *Recommendations for Revision of Internal Revenue Code of 1954,* Committee on Taxation, Association of the Bar of the City of New York (Feb., 1955).

23. See footnotes 82 and 88 *infra* and text thereto.

24. See 101 Cong. Rec. 2182, 2184, 2186, 2189 (March 10, 1955); 101 Cong. Rec. 2366-2367, 2369 (daily ed. March 14, 1955).

25. See Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws,* 68 Harv. L. Rev. 745 (1955).

26. Magill and de Kosmian, *The Internal Revenue Code of 1954: Income, Deductions, Gains and Losses,* 68 Harv. L. Rev. 201, 204-206 (1954).

to take a judicial attitude, but they are quite skeptical on the latter point. This writer has more confidence in the Service but sees merit in the specific rules as to amounts and time. There is something unseemly about a man making a good living in his regular vocation for an indefinite time from scholarships without being required to pay income tax upon such payments, but without a specific statute it is not possible for the Service to take the dollar and time factors into account. Likewise, the unsatisfactory situation with respect to meals and lodging furnished for the convenience of the employer has been improved by more precise statutory rules in Section 119.[27]

A much more serious case of too much detail was narrowly avoided in the corporate reorganization field. A careful job of drafting was done in the Revnue Act of 1924. Section 203 of that Act set the pattern for later Revenue Acts, with some variations and refinements down through the years, all were drafted. The courts added a gloss of substance over form with respect to business purpose and continuity of interests.[28] The fine distinctions between "split-ups, split-offs, and spin-offs" were largely eliminated in the Revenue Act of 1951.[29] Into this reasonably satisfactory situation came the House bill, which proposed sweeping changes designed to eliminate uncertainties. Fortunately, the Senate took a different view, which was well expressed in the Committee Report:

> "Your committee has substantially recast the provisions of the House bill dealing with the tax treatment of corporate distributions and adjustments. Your committee fully shares the objectives sought to be accomplished in the House bill. It shares the belief that this part of the statute must be rewritten in order to provide a degree of certainty which is lacking in existing law. However, such certainty is not to be achieved at the expense of the legislative flexibility necessary to provide a statutory pattern which will tax, in an equitable manner, the myriad business transactions with which this area of the law is concerned. The House bill, in the opinion of your committee, contains several important provisions which, by spelling out detailed rules in an attempt to achieve almost mathematical certainty, would make it difficult for necessary business transactions to be carried out with a minimum degree of intereference from the tax laws.
>
> "The House bill in this area is, in substance, an entirely new

27. The prior law was considered recently in Diamond v. Sturr, 4 1955 P-H Fed. Tax Serv. ¶ 72,568 (2d Cir. 1955). There the extremely liberal regulations of long standing prevailed even though a recent attempt had been made to limit their broad scope by a published mimeograph retroactively modifying an earlier published mimeograph.

28. Magill, Taxable Income 153-164 (rev. ed. 1945).

29. Int. Rev. Code of 1939, § 112(b)(11), added by 65 Stat. 493 (1951). As to the further changes in the Int. Rev. Code of 1954, § 355, see Sen. Rep. No. 1622, 83d Cong., 2d Sess. 266 (1954).

statute using few of the terms or concepts with which the courts or the bar have become familiar over the years. Your committee has sought a less extreme approach. Rather than to replace the existing statute, it has sought to rewrite it so as to preserve the terms and concepts of existing law wherever possible. It has, however, not hesitated to depart from the present statute where such departure was necessary in order to remove unwarranted restrictions on necessary or desirable business transactions or to preclude the use of avoidance devices which have proved successful under the existing code. . . ."[30]

The Senate view prevailed, so that the old law, statutory and judicial, was continued in Subchapter C, with some improvements. Apparently it was recognized that brave men lived before Agamemnon.

On the other hand, a clear case in which a great void was properly filled with detailed legislation in the 1954 Code is that of partnership income taxes. Even in private law, the traditional common law case-by-case method of development has never worked well. Among other things, the aggregate and entity theories could never be reconciled on a piece-meal basis. It took the Uniform Partnership Act to adopt definitely one theory as to certain problems and the other as to remaining questions. In the matter of taxation, the 1939 Code had only a few sketchy provisions on partnership.[31] The rulings and cases never provided a consistent or even reasonably satisfactory pattern. That situation has been replaced in the 1954 Code by the long Subchapter K, which was carefully worked out on the basis of studies by the American Bar Association and the American Law Institute.[32] Here, then, is a clear advance in tax law by the 1954 Code.

Probably less successful is Subchapter J, on the income taxation of estates and trusts. Unlike the partnership situation, there was a highly developed body of law as to estates and trusts before the 1954 Code, and, therefore, there was less need for extensive new legislation. A little tinkering here and there might well have sufficed. Also,

30. Sen. Rep. No. 1622, 83d Cong., 2d Sess. 41-42 (1954).

31. Int. Rev. Code of 1939, §§ 181-188, 53 Stat. 69-70. See also Int. Rev. Code of 1939, § 3797(a)(2), 53 Stat. 469, which defines "partnership" and "partner." Subchapter K of the new Code contains its own definition of those terms in Int. Rev. Code of 1954, § 761(a-b), but, curiously enough, the old definitions are repeated in Int. Rev. Code of 1954, § 7701(a)(2) of the new Code without any cross-references between the two sections.

In view of the form and substance aspects of family partnerships, the provision on that subject are properly rather general in both Codes: Int. Rev. Code of 1939, § 191, added by 65 Stat. 511 (1951), and Int. Rev. Code of 1954, § 704(e). The regulations under § 191 are quite extensive. U. S. Treas. Reg. 118, § 39.191 (1953). They were largely based upon a mimeograph which preceded the enactment of § 191. See Mim. 6767, 1952-1 Cum. Bull. 111.

32. See Jackson, Johnson, Surrey, Tenen and Warren, *The Internal Revenue Code of 1954: Partnerships*, 54 Col. L. Rev. 1183 (1954).

it might have simplified things to separate estates from trusts, in view of the differing functions of those venerable legal institutions, but with most of the rules being the same. However, events took another course, and an elaborate new set of provisions was enacted. As in the case of the partnership provisions, the new sections on trusts and estates were carefully prepared,[33] and they should be given a fair trial, with only a minimum of changes for the time being.[34] The separate treatment of simple trusts and complex trusts may be helpful, or may generate unnecessary new problems—time will tell. The new statutory concept of "distributable net income," analogous to concepts in the taxation of corporations and stockholders, may well be the best contribution in Subchapter J. That concept not only limits deductions by the estate or trust for amounts distributed or distributable, but also limits the amounts taxable to the beneficiaries. The subordinate concept in Section 643 of "taxable income of the estate or trust" effectively overrules or restricts[35] cases like *Plunkett*,[36] *Johnston*,[37] and *McCullough*,[38] in which income was attributed to a distributee even though the trust or estate had no taxable income. The "throwback rule," a term not used in the Code itself,[39] is a new attempt to meet the problems raised by accumulations of a trust which are distributed in a later year. The *Dean* case,[40] decided in 1939, showed the opportunities for manipulation by shifting the tax burden from the beneficiary to the trust. The Revenue Act of 1942 limited those opportunities by amending the 1939 Code[41] to provide that a distribution within 65 days after the end of the year is considered to have been made on the last day of that year, to the extent of the income for the last 12 months of the period from which the income is paid. Under the new "throwback" approach, distributions by a trust in excess of its distributable net income for the current year are "thrown back" to each of five preceeding years in inverse order and taxed to the beneficiaries to

33. See Holland, Kennedy, Surrey and Warren, *A Proposed Revision of the Federal Income Tax Treatment of Trusts and Estates—American Law Institute Draft*, 53 Col. L. Rev. 316 (1953).

34. See Kamin, Surrey and Warren, *The Internal Revenue Code of 1954: Trusts, Estates and Beneficiaries*, 54 Col. L. Rev. 1237 (1954). A more critical view is expressed from the standpoint of trust companies n Fleming, *Income Taxation of Trusts and Estates Under the 1954 Code*, 32 Taxes 931 (1954); see also Farrier, *Income Taxation of Trusts and Estates*, Oklahoma Institute on the Internal Revenue Code, 217 (1954).

35. Sen. Rep. No. 1622, 83d Cong., 2d Sess. 346-347 (1954).

36. Plunkett v. CIR, 118 F. 2d 644 (1st Cir. 1941).

37. Johnston v. Helvering, 141 F. 2d 208 (2d Cir. 1944).

38. McCullough v. CIR, 153 F. 2d 345 (2d Cir. 1946).

39. Int. Rev. Code of 1954, §§ 665-668.

40. CIR v. Dean, 102 F. 2d 699 (10th Cir. 1939).

41. Int. Rev. Code of 1939, § 162(d)(3), added by 56 Stat. 810 (1942).

the extent of the distributable net income of those years not in fact distributed, with adjustments for taxes already paid by the trust.[42] This device has considerable merit, on its face at least, but will be complicated in operation.[43] It applies only to accumulations of income in taxable years beginning after December 31, 1953.[44] Hence there will be ample time to consider the American Bar Association recommendation[45] of only a two-year throwback, which would keep the complications within bounds.

From the standpoint of the proper amount of detail in legislation and in regulations, one of the most interesting parts of Subchapter J, and indeed of the whole 1954 Code, is Subpart E, which, with few changes, puts into statutory form the *Clifford* regulations. The *Clifford* case started out in a modest way with a hearing on June 20, 1938, before the Board of Tax Appeals sitting in Saint Paul, Minnesota, followed on September 26, 1938, by a memorandum decision of that tribunal.[46] But with the affirmance of that decision by the Supreme Court,[47] the case became a *cause celebre*. It will be recalled that the case involved a five-year trust with the grantor, as trustee, having "absolute discretion" as to the time of distribution of income to the wife, and also having broad powers of administration. In affirming the decision that the grantor was taxable on the income, the Supreme Court relied upon the broad language of Section 22(a) of the Revenue Act of 1934[48] corresponding to the same section in the 1939 Code; in the absence of "more precise standards or guides supplied by statute or appropriate regulations," the Court looked to the terms of the trust and all the circumstances of its creation and operation. There followed a veritable flood of litigation. In response to what were considered to be invitations by the Supreme Court in the above quotation and in another case,[49] and in order to bring

42. Sen. Rep. No. 1622, 83d Cnog., 2d Sess. 85 (1954).
43. See the examples, *id.* at 361.
44. Int. Rev. Code of 1954, § 683(a).
45. Hearings before the Committee on Finance on H. R. 8300, 83d Cong., 2d Sess. 440-441 (1954).
46. George B. Clifford, Jr., 387 CCH Dec. 10, 446-B (Docket No. 89054, 1938).
47. Helvering v. Clifford, 309 U. S. 331 (1940), *reversing* 105 F. 2d 586 (8th Cir. 1939).
48. " 'Gross income' includes gains, profits, and income derived from . . . professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ."
49. Harrison v. Schaffner, 312 U. S. 579, 583 (1941). See Eisenstein, *The Clifford Regulations and the Heavenly City of Legislative Intention*, 2 Tax L. Rev. 327, 335 (1947).

some order out of chaos and provide some guidance to draftsmen and others, the Treasury Department took the bold step of issuing detailed regulations in 1945[50] and amended them in 1947.[51] The regulations served their purpose quite well. Their validity was never fully litigated, although the Court of Appeals of the Seventh Circuit rendered a vigorous opinion on the subject.[52] The actual issue in the case was quite narrow, since the trust was created prior to the issuance of the *Clifford* regulations, the trust was extended before issuance of the regulations so that its total term was ten years (usually just long enough to protect the grantor from taxation under the regulation), and the beneficiary was a charitable corporation. However, the court went out of its way to challenge the authority for the regulations as a whole and even the authority of Congress to enact similar rules. The Internal Revenue Service has announced that it will follow that case only upon the same issue and facts.[53] The Congressional Committee Reports ignore the case. It may well be said, then, that the regulations provided a useful guide, which could be relied upon, because of the Commissioner's authority[54] to apply any new rules without retroactive effect.[55] Certain it is that the regulations were largely carried over into the new Code. There is a temptation to generalize and suggest a pattern for the future, whereby, in some areas, rules would be consciously tried out as regulations for a while before enactment into statutory form. However, recent history hardly supports such a suggestion.

Although the new Code follows the general scheme of the regulations, there are changes here and there, which are important in tax planning.[56] One is the elimination, as a basis for taxing the grantor on the trust income, of the longer 15-year term provided for in the regulations in cases where the grantor (or his wife) as trustee has certain administrative powers over the trust property. There is also a new 2-year term if the beneficiary is a school of a designated type, a hospital, or a church. (In that connection, it is noted that the

50. T. D. 5488, 1946-1 Cum. Bull. 19-25.
51. T. D. 5567, 1947-2 Cum. Bull. 9-13; U. S. Treas. Reg. 118, § 39.22(a)-21, 22 (1953).
52. CIR v. Clark, 202 F. 2d 94 (7th Cir. 1953).
53. 1954 Int. Rev. Bull. No. 6 at 5 (1954).
54. Int. Rev. Code of 1939, § 3791(b), 53 Stat. 467 (now Int. Rev. Code of 1954, § 7805(b).
55. The authority has been exercised even when the regulation was based upon a Supreme Court decision. See Minn. 5968, 1946-1 Cum. Bull. 25, relating to the first *Clifford* regulations. See generally Dwan, *Administrative Review of Judicial Decisions: Treasury Practice,* 46 Col. L. Rev. 581, 596-598 (1946).
56. See Casner, *The Internal Revenue Code of 1954: Estate Planning,* 68 Harv. L. Rev. 222, 227-243 (1954).

Commissioner is burdened even more than under the old Code with the application of the term "church" to particular situations.[57])

The evident purpose to limit future administrative discretion in the *Clifford* area is shown by the last sentence of Section 671:

> ". . . No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart."

On its face that provision would seem to foreclose general reasoning like that of the Supreme Court in the *Clifford* case based on the definition in the old Section 22(a). And yet the word *"solely"* suggests that it will be possible to look back to Section 61 on other grounds, *e.g.,* assignments of future income. That ground was relied upon in part in the memorandum opinion of the Board of Tax Appeals in the *Clifford* case itself, and the Supreme Court referred to that theory but declined to examine its applicability in view of the conclusion already reached for other reasons.

Turning from the *Clifford* regulations to more humdrum regulations, the new Code, like the old Code, frequently calls for regulations. It has been stated recently that there are 1338 places in the 1954 Code in which the "Secretary or his delegate" is directed or authorized to prescribe regulations.[58] The general provision is in Section 7805(a):

> "(a) *Authorization.*—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."

The previous article[59] referred to the classification (then in vogue) of regulations in two categories: interpretative regulations and legislative regulations. The former term is now well established, but the latter has not been so well received. Mr. Williams, Assistant to the Secretary of the Treasury, suggests three kinds of regula-

57. As to the attitude of the courts on such matters in non-tax cases, see Chafee, *The Internal Affairs of Associations Not for Profit,* 43 Harv. L. Rev. 993, 1024 (1930); Watson v. Jones, 13 Wall. 679, 733 (U. S. 1871); Kedroff v. St. Nicholas Cathedral, 344 U. S. 94, 121 (1952).

As to the Code provisions, see Garland and Cahill, *The Concept of Church in the 1954 Internal Revenue Code,* 1 The Catholic Lawyer 27 (1955).

58. Williams, *The Treasury Department's Regulation Program,* 2 Fed. Bar News 149, 150 (1955).

59. Dwan, *supra* note 7, at 380-386.

tions:[60] substantive or legislative, procedural, and interpretative. Although there is probably some overlapping, the refinement is useful.

The best example of a substantive or legislative regulation is still the one on consolidated returns of affiliated corporations.[61] There was an attempt in the House bill to handle that complicated matter by putting all the details in the statute.[62] Fortunately, wiser counsel prevailed in the Senate; the reasons are well stated in the Committee Report:

> "The House bill proposed to combine the rules stated in section 141 of the Internal Revenue Code of 1939 and in the consolidated returns regulations (Regulations 129) and thus place all of the rules relating to consolidated returns in statutory form. In view of the fact that desirable flexibility would be lost if this pattern were followed, and conforming amendments would be necessary with respect to each change in other parts of the code relating to income taxes in connection with every amendment made, your committee has determined to retain the present pattern in which the Secretary or his delegate pursuant to regulatory authority prescribes the rules applicable to the filing of a consolidated return. Accordingly, your committee has in substance re-enacted section 141 of the Internal Revenue Code with modifications."[63]

That advantage of flexibility is important in other connections. But even regulations are hard to change, and even greater flexibility is sometimes desirable and obtainable by less formal documents such as mimeographs.[64]

Procedural regulations are said to deal with "administration"—apparently such matters as requiring certain forms to be used for certain purposes.[65] The facilitation of good forms and instructions is, of course, of great importance.[66]

Interpretative regulations, which explain, illustrate and construe, constitute the great bulk of the regulations. In the previous article, the weight given by the courts to such official interpretations

60. Williams, *supra* note 58, at 150-151.

61. The regulations under § 141 of the 1939 Code, 53 Stat. 58, were discussed in Dwan, *supra* note 7, at 383-386; the later regulations were in U. S. Treas. Reg. 129 (1951). The corresponding provisions in the 1954 Code are in Chapter 6.

62. H. R. 8300, 83d Cong., 2d Sess. Ch. 6 (1954); see H. R. Rep. No. 1337, 83d Cong., 2d Sess. 87-88, A296-A308 (1954).

63. Sen. Rep. No. 1622, 83d Cong., 2d Sess. 460 (1954). For changes made in conference, see Conference Report No. 2543, 83d Cong., 2d Sess. 73 (1954).

64. See, *e.g.*, Mim. 6767, 1952-1 Cum. Bull. 111 discussed *supra* note 31.

65. Dwan, *supra* note 7, at 384-385.

66. *Id.* at 383.

in the form of regulations was discussed.[67] Mr. Williams quite properly emphasizes also their importance in day to day administration of the internal revenue laws. He aptly states:

> "Interpretative regulations are of tremendous importance. They freeze the position of the Government on many questions. They are the Revenue Agents' Bible. Until and unless a Court intervenes, the regulations control the position of the Internal Revenue Service on every issue they resolve. . . .[68]

Since the previous article, the procedure followed in promulgating regulations has been greatly changed, as a result of the enactment of the Administrative Procedure Act in 1946.[69] From the beginning the policy has been to avoid any narrow, niggardly application of the Act and rather to go beyond its express requirements.[70] Thus, strictly interpretative regulations are excepted from the notice procedure,[71] but it has been the practice not to invoke that exception. It is gratifying to find the policy reiterated:

> ". . . The Treasury Department believes in the Federal Administrative Procedure Act. We make every effort to comply with it in spirit as well as in form. . . ."[72]

Under the notice procedure, the practice is to publish a Notice of Proposed Rule Making in the Federal Register, inviting written comments within thirty days. (An excellent development beginning with 1954 is a listing in the weekly Internal Revenue Bulletin of pending notices.[73]) Those comments have always been carefully considered, and opportunity has been given for hearings. This process is going on continuously with respect to proposed regulations under the 1954 Code.[74] Thus, the bar and others have an opportunity to participate in the rule making process, for the benefit of themselves, their clients, and the public. It is, therefore, surprising, to say the least, to read in a recent dissenting opinion in the Supreme Court:

> "Regulations do not have the safeguard of federal statutory enactments. Interested parties outside the Internal Revenue Service perhaps may not be heard. Reports explaining the action

67. *Id.* at 380-383. *See* also Lykes v. United States, 343 U. S. 118, 127 (1951).

68. Williams, *supra* note 58, at 151.

69. 60 Stat. 237 (1946), as amended, 5 U. S. C. §§ 1001-1011 (1952). The Act was enacted between the original *Clifford* regulations and the 1947 amendments. The difference in procedure is evident in T. D. 5488, 1946-1 Cum. Bull. 19-25; T. D. 5567, 1947-2 Cum. Bull. 9.

70. See Dwan, *The Federal Administrative Procedure Act and the Bureau of Internal Revenue*, N. Y. U. Institute on the Federal Administrative Procedure Act and the Administrative Agencies 142, 155 (1947).

71. 60 Stat. 238 (1946), as amended, 5 U. S. C. § 1003(a) (1952).

72. Williams, *supra* note 58, at 153.

73. It is called "Announcement Relating to Proposed Regulations Published with Notice of Proposed Rulemaking."

74. Williams, *supra* note 58, at 153.

are not available. Public discussion, such as happens in Congress, does not take place."[75]

All will agree with the need for the technical accuracy of regulations, but some may not fully share the current preoccupation with matters of style.[76] Short sentences may be generally desirable, but Macaulay's long sentences are still remembered with pleasure. Moreover, considerable awkwardness of expression would be suffered gladly if that is the price for more expeditious issuance of regulations under the new Code.

The accounting provisions of the new Code have been reserved for the end of these rather discursive remarks, since they point up most of the considerations set forth above. In Sections 41, 42, and 43 of the 1939 Code and similar sections in prior Revenue Acts, certain general rules were stated, and the Commissioner seemed to be given broad authority to prescribe permissive or mandatory accounting methods as to particular situations or classes of cases, by specific rulings, more general rulings or regulations. Thus, the regulations have long permitted alternative methods of accounting with respect to certain long-term contracts.[77] On the other hand, the installment basis of reporting income from certain sales was provided for by statute in 1926,[78] after the Board of Tax Appeals, in one of its early opinions,[79] had rejected the method provided for by regulations. The scope of the general accounting provisions was further restricted by court opinions, notably the opinion of the Supreme Court in the *Security Flour Mills* case.[80] This unfortunate history[81] resulted in an administrative timidity in this field in sharp contrast to the boldness shown in the *Clifford* regulations. In the process of enactment of the 1954 Code, it was thought necessary not only to continue the general accounting provisions[82] but also to cover certain accounting matters by express provision, notably Section

75. CIR v. Estate of Sternberger, 348 U. S. 187, 206 (1954) (effect of reenactment of a statute after adoption of a regulation). See Dwan, *supra* note 7, at 382-383.

76. See Williams, *supra* note 58, at 152.

77. U. S. Treas. Reg. 118, § 39.42-4 (1953) and like provisions in prior regulations.

78. Revenue Act of 1926, § 212, 43 Stat. 267.

79. B. B. Todd, Inc., 1 B. T. A. 762 (1925); see also Blum's, Inc., 7 B. T. A. 737, 752 (1927).

80. Security Flour Mills Co. v. CIR, 321 U. S. 281 (1944).

81. See the thoughtful articles on accounting under the law prior to the 1954 Code by Mr. Herman T. Reiling, Assistant Chief Counsel, Internal Revenue Bureau: *Tax Accounting and Abnormal Income*, 30 Taxes 409 (1952); *Practical Legal Aspects of Tax Accounting*, 30 Taxes 1028 (1952); *Tax Accounting for Repricing and Other Reserves*, 31 Taxes 990 (1953).

82. Int. Rev. Code of 1954, §§ 446, 451, 461. See Austin, Surrey, Warren, and Winokur, *The Internal Revenue Code of 1954: Tax Accounting*, 68 Harv. L. Rev. 257, 259-261 (1954).

452 (prepaid income) and Section 462 (reserves for estimated expenses). If any specific legislation was called for, a grant of authority to the Commissioner would have been the best legislative device, leaving to the Commissioner the freedom to permit variations from the usual cash and accrual ccounting only when really needed and under proper controls. Instead, the sections went into considerable detail, and the proposed regulations[83] imposed strict requirements, apparently in an effort to keep things within bounds. Recently, the legislative branch has entered the picture again. On February 24, 1955,[84] it was stated on the floor of the House that Section 462 would give a "windfall" to business because of a double deduction. A bill to repeal that section was introduced.[85] Some correspondence then ensued between the Secretary of the Treasury and the Chairman of the Committee on Ways and Means, House of Representatives, with respect to Section 462 and also Section 452. Part of the Secretary's letter of March 7, 1955,[86] is quoted because it shows, among other things, the relationship between the statute and the proposed regulations:

> "The objective of these sections was simply to conform tax bookkeeping with business bookkeeping. They never were intended to cover innumerable items some taxpayers apparently intend to claim. If permitted to remain in the law, they will cause a greater loss in revenue than estimated and cause considerable litigation. We are not able to adequately correct this by regulation. Accordingly, I recommend that the two provisions cited immediately above be repealed retroactively to their original effective dates."

A further explanation by the previous Chairman appears in the Congressional Record of March 8, 1955,[87] and the matter was vigorously debated on the floor of the House.[88] A bill, H. R. 4725, repealing the two sections retroactively, but with certain minor saving provisions, passed the House on March 24, 1955. An interesting part of the Committee Report is a letter of March 22, 1954, from the Secretary of the Treasury to the Chairman. The letter reads, in part:

> "I assure your committee that if H. R. 4725 as reported out by your committee is enacted, as I earnestly hope it will be, the Treasury Deprtment will apply revenue ruling 54-608 (relating

83. Federal Register, Jan. 21, 1955; CCH ¶ 36,134.
84. 101 Cong. Rec. 1734 (Feb. 24, 1955).
85. H. R. 4451, 84th Cong., 1st Sess. (1955); see 101 Cong. Rec. 1845 (Feb. 25, 1955).
86. 101 Cong. Rec. 2187 (Mar. 10, 1955); also in the House Committee Report on H. R. 4725, 84th Cong., 1st Sess. (1955).
87. 101 Cong. Rec. A1520 (Mar. 8, 1955).
88. Committee Report on H. R. 4725, 84th Cong., 1st Sess. (1955).

to the accrual of vacation pay) only to taxable years ending after December 31, 1955.

"Furthermore, the Treasury Department will not consider the repeal of section 452 as any indication of congressional intent as to the proper treatment of prepaid subscriptions and other items of prepaid income, either under prior law or under other provisions of the 1954 code. In other words, the repeal of section 452 will not be considered by the Department as either the acceptance or the rejection by Congress of the decision in *Beacon Publishing Co. v. Commissioner* (218 F. 2d 697, C. A. 10, 1955)[89] or any other judicial decisions."

As this is being written, the matter is pending before the Senate. Regardless of the outcome, the events on the House side have been stated at some length to show the vitality of our governmental system and the close relationship which can exist between the legislative and executive branches on technical matters.

## Conclusion

In spite of the numerous changes in specific rules, changes in phraseology, and extensive rearrangement, the new Code is readily recognizable by one familiar with the old Code. Dean Pound has distinguished between law and laws and has observed that a Coke would find modern rules different but would be at home in the ways of thinking of modern lawyers. Even more, a Beaman would perhaps be surprised by some of the provisions in the new Code but would have no difficulty in seeing their relationship to the old Code and older Revenue Acts. *Plus ca change, plus c'est la meme chose.*

Moreover, the problem of generality versus particularity in statutory drafting remains, and a similar, though less serious, problem carries over into the regulations. There is still ample room for rulings (at the request of taxpayers, or otherwise) in specific matters, which may later be published as Revenue Rulings, and for closing agreements,[90] as well as for more general published rulings on matters not appropriate or ready for regulations. Concepts such as fraud and business purpose defy statutory definition. Others like employment and earnings and profits can be defined only in part. Detailed rules were called for and enacted in the partnership field,[91]

89. *The Beacon Publishing Company* case held, one Judge dissenting, that sums received as prepaid newspaper subscriptions were properly deferred (to be spread over the unexpired subscription periods) by the taxpayer who was on the accrual basis, even though similar receipts had been treated differently in earlier years.

90. Int. Rev. Code of 1939, § 3760, 53 Stat. 462 (now Int. Rev. Code of 1954, § 7121).

91. As pointed out in note 31, the provisions as to family partnerships are necessarily quite general.

largely for historical reasons. Enactment of the *Clifford* regulations, with a few changes, was probably desirable in the interest of even more certain rules for family tax planning. Detailed provisions were overdone with respect to tax accounting, where flexibility both for the benefit of taxpayers and for the protection of the revenue is highly desirable. Better judgment was eventually shown as to consolidated returns.

The Internal Revenue Code of 1954 was the product of many minds in and out of government.[92] Those who participated learned a great deal in the process;[93] they and others will learn more in connection with the issuance of regulations, an activity in which members of the bar have ample opportunity to join, giving the Treasury Department the benefit of their experience and judgment. Proposals for amendments to the Code already call for study by the bar. Then too, there are the numerous "institutes" on the new Code. All this education may prove to be the most enduring effect of the new Code.

92. See note 21 *supra.*
93. See Silverstein, *supra* note 10, at 29.