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Kathleen M. Weiden
Christopher Companik

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Article 44 of the 8th Directive.

Article 44 which incorporates Articles 4, and 6-14 of the 8th Directive.

Article 46 of the 8th Directive.

Article 45(1) of the 8th Directive.

Article 45 (3)(4) with exception of equivalence as provided in Article 46 of the 8th Directive.


Id. at 3.1.1.

Id. at 3.1.2.

Id. at 3.1.3.

Id. at 3.3.

Id. Annex.


OF BASEBALLS CAUGHT AND KEPT

by

Kathleen M. Weiden*

Christopher Companik**

INTRODUCTION

A baseball stadium seems an unlikely place to think about taxes. More likely than not, fans and players gathering for a baseball game consider recent team records, batting averages and fielding percentages, the likelihood of a perfect game, or maybe even the hotdog and beer to be consumed, as they prepare for the game to begin. However, on a regular basis, fans or players go home from a baseball game with something they did not have when the game began — a baseball that had been in play during the game. Those fans or players may also take home a tax liability when they go home with a baseball that had been in play during the game.

Several legal scholars have recently examined the theories by which a fan or a player could claim ownership of a baseball that had been in play.¹ These are not frivolous inquiries, as milestone or monumental home runs can have very significant economic value in the sports memorabilia marketplace. For example, the baseball Mark McGwire hit for his 70th home run in 1998 ultimately sold for $3 million, and

*Kathleen M. Weiden, C.P.A., M.S., Taxation, Ph.D., Assistant Professor of Taxation at Fairfield University

**Christopher Companik is M.S., Taxation Candidate at Fairfield University.
the baseball Eddie Murray hit for his 500th home run in 1996 ultimately sold for $500,000.

The market for foul balls hit into the stands, tossed into the stands by players, or retained by players is markedly different from the market for home runs hit into the stands. It may even be non-existent. However, the presence or absence of a market for used baseballs has not been cited by the legal scholars as a determinative factor in their analysis of how ownership of a foul or home run baseball can pass from the home ball clubs to a fan or player.  

An additional, related, issue is the tax consequences associated with a fan or a player coming into possession of a baseball that had been in play. For example, what are the tax consequences to a fan that catches a baseball (milestone, home run or foul ball) hit into the stands? What are the tax consequences when two fans claim to have caught the same baseball? We begin with these two tax questions, but also examine several others arising from well-publicized events involving fans, players and baseball at recent games. We use as our starting point the analysis of the aforementioned legal scholars, Finkelman (2002) and McEvoy (2005). As we simply summarize the arguments made by the legal scholars for purposes of our examination of potential tax consequences, we refer readers who wish for a more complete understanding of the underlying legal theories to the full works of those legal scholars.

"WATCH OUT FOR FOUL BALLS"

At every Major League Baseball game played, a baseball is hit into the stands and either caught or retrieved by a fan. Sometimes, the baseballs are hit out of the stadium and are retrieved by an individual not attending the game. Finkelman (2002), McEvoy (2005), and other legal scholars argue that the ownership of a baseball hit into the stands or out of the stadium passes to the person who catches or retrieves the ball, and offer several arguments in support: (1) the traditional law of abandonment, (2) the "common law of baseball", (3) a statutory claim argument and (4) a contract claim argument.

Abandonment occurs when there is a relinquishment by the former owner, either intentionally or by failure to retrieve after an unintentional loss. Thus, legal scholars argue, home ball clubs intentionally and routinely abandon baseballs hit into the stands by not sending agents of the home ball club into the stands to retrieve the baseballs. Legal scholars also argue that under the "common law of baseball," most Major League Baseball clubs have allowed the evolution of fan property rights, by permitting and even urging fans to bring baseball gloves into stadiums. Because baseball gloves are of not much use in holding a beverage or a hot dog, it can reasonably be assumed that, by allowing fans to bring their gloves, the club is signaling its intention to abandon baseballs hit into the stands and allow ownership to pass to the lucky fan. Statutory claims of ownership can be made by fans, legal scholars further argue, in stadiums where home ball clubs have posted signs indicating fans are free to keep foul and home run balls, where the home ball club has a posting to that effect on the team web site, or where the home ball club uses the public address system to encourage and/or celebrate a catch by a fan. And finally, legal scholars argue that a contract claim may arise in stadiums where the ticket to the game contains a warning that physical injury may result from baseballs hit into the stands.

Consider the case of a baseball club that posts signs in the stadium, or on its web page, indicating that fans may keep any foul or home run baseballs hit into the stands, and/or which encourages fans to bring gloves to the game (i.e., common law
of baseball or statutory claim arguments). According to the online encyclopedia, dictionary.com, prizes are given as “rewards for victory, to provide incentives in competitions, etc.” If title to foul balls and home run balls is transferred from the home ball club to fans when those baseballs enter the stands under either a common law of baseball or statutory claim argument, then home ball clubs can be viewed as creating a de facto competition or contest when they allow title to the baseball to pass to the fan who catches it, in lieu of some other means of selecting the fan to receive the baseball, such as, the fan sitting in a randomly selected numbered seat. Thus, because the fan who catches the baseball must compete with, or strive against, other fans to catch the baseball, the baseball can be viewed as a prize in a competition or contest. Fans appear to be aware of this potential competition, as many arrive at the stadium with their personal baseball gloves, to improve their chances of catching a ball. It is unknown how many fans select their particular seat as a further means of improving their odds of catching a baseball. Joe Fignone, who sat waiting in a boat in a cove outside Pacific Bell Park (now known as AT&T Park) for Barry Bond’s 500th career home run in April 2001, gave quite a bit of thought to how he could improve his odds of catching or retrieving that milestone baseball. Other fans apparently use baseball players’ stadium-specific batting statistics to select seats for upcoming games.

Internal Revenue Code (“IRC”) §74(a)(1) indicates that, in general, gross income includes amounts received as prizes and awards, and that the term includes amounts awarded in contests of all types. An exclusion from income is provided by §74(b) for awards for religious, charitable, scientific, educational, artistic, literary and civic achievements (e.g., Noble- or Pulitzer-type awards), so long as the taxpayer was selected for the award or prize without any action on his or her part to enter the contest or competition, and is not required to render substantial future services as a condition of receiving the award or prize. An exclusion from gross income for scholarships that meet the requirements of §117 is provided by §74(c).

While no one is likely to argue that a baseball hit into the stands is akin to either a Noble or Pulitzer Prize, taxpayers have shown initiative in arguing that certain prizes were received for one or more of the achievements specified under §74(b). For example, the taxpayer in Simmons v. U.S. argued, unsuccessfully, for the exclusion of a $25,000 cash prize received for catching a special tagged fish in a contest sponsored by, and promoting, a local brewery, claiming a civic achievement in catching the fish (i.e., promoting the recreational and resort aspects of the state of Maryland). Try as it might, the Simmons court could not “swallow” the taxpayer’s argument, nor conceive of some other public good being served by the taxpayer’s capture of the tagged fish. The court did not consider the stimulation of the sale of beer a civic achievement, but indicated it might have reached a different conclusion if the fish had instead been a killer whale terrorizing the Maryland seashore. Thus, it appears that, barring the existence of a realistic (and highly creative) argument that catching or retrieving a foul or home run baseball hit into the stands achieves some “greater public good,” fans catching or retrieving a foul ball or a home run hit into the stands would be required to include the value of the caught or retrieved baseball in gross income.

Under both §74(a)(2) and Reg. § 1.74-1, if a prize is not given in cash, but in property, the amount includible in gross income is the fair market value of the property received. Thus, in terms of amount of income to include, fans catching foul balls or home runs are required to include the fair market value of the caught baseball in income. The definition of fair market
value, formulated by U.S. v. Cartwright, is "... the price at which the property would exchange hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Recent prior sales of the same or a similar item are typically relied upon by appraisers to establish the fair market value of property. The number of sports memorabilia auction web sites suggests a healthy market for historic home run baseballs, and that the fair market value of milestone baseballs can be estimated without too much trouble. The same may not be true of foul balls.

The fact that income is received in the form of property, as opposed to cash, does not alter the timing of the recognition of (prize) income associated with catching the baseball. If most baseball fans use the cash method of accounting for tax purposes (one of the permitted methods under Sec. 446), then the fan that catches a baseball will be required to include the fair market value of the baseball in income in the year in which the ball was caught or retrieved, pursuant to Sec. 451(a) and Reg. Sec. 1.451-1(a). Under these rules, a fan would be required to recognize the income on the day of the catch or the retrieval, even though a substantial amount of time may pass before the baseball is sold.

In stadiums where the home ball club does not post a sign, either at the stadium or on the club website, indicating fans can keep foul and home run baseballs hit into the stands, title to a baseball hit into the stands would remain with the ball club. Fans that caught any baseballs in such a stadium would be required to return the ball to the club. However, as discussed above, under the traditional law of abandonment, ball clubs that do not assert their ownership rights and request the return of the baseballs are considered as abandoning their ownership rights by their failure to attempt to retrieve the baseball.

Gross income includes all income from whatever source derived, pursuant to §61. The IRS has generally interpreted this section broadly in its administration of tax law, and taxpayers have spent a lot of time and money arguing otherwise. The courts have also interpreted the statute to mean that Congress intended a broad, all-inclusive definition of income, and generally find in favor of the government. Despite the courts' predilection to include virtually all items in gross income, some taxpayers have nonetheless argued that "found" property is not within the category of items meant to be swept into the definition of gross income. In Cesarini v. U.S., the taxpayers sought to exclude from their 1964 gross income the amount of cash found in a piano purchased several years earlier. The IRS had issued a revenue ruling in 1953, indicating that the finder of treasure-trove is deemed to be in receipt of taxable income, in an amount equal to the U.S. currency value of the found property, in the year the property is reduced to the taxpayer's undisputed possession. The taxpayers in Cesarini argued that the enactment of §74 subsequent to the issuance of the 1953 revenue ruling indicated that found property or treasure-trove should be excluded from gross income, since Congress enacted only a statute explicitly including prizes in gross income. The Cesarini court noted that both the taxpayer and the government seemed to miss completely Reg. §1.61-14, which specifically provides that treasure trove constitutes gross income in the year in which it is reduced to the undisputed possession of the taxpayer. Thus, based on the 1953 revenue ruling, a lengthy judicial record of the broad interpretation of the meaning of gross income, and a Treasury Regulation, the court concluded that the $4,467 of cash found in the used piano in 1964 constituted gross income to the taxpayer in that year.
If ball clubs are considered to have abandoned their property by not seeking return of the foul or home run baseball hit into the stands, then the fan who catches or retrieves the property can be viewed as the “finder” of the abandoned property. If a fan who catches or retrieves a baseball hit into the stands, abandoned by the former owner, is the finder, then under §61, the fan would be required to include the caught or retrieved baseball in income. Although a caught or retrieved baseball is non-cash, Reg. §1.61-1(a) (analogous to Reg. § 1.74-1), indicates that gross income includes income realized in any form, whether in money, property or services. And, consistent with the above arguments, if most baseball fans use the cash method of accounting for tax purposes, the fan that catches or retrieves a baseball abandoned by the home ball club will be required to include the fair market value of the baseball in income in the year in which the ball was caught or retrieved, pursuant to Sec. 451(a) and Reg. Sec. 1.61-1(a).

Thus, whether a caught or retrieved foul or home run baseball is viewed as a prize or as found property, fans are required to include the fair market value of the baseball in income in the year it is caught or retrieved.

“**I GOT IT, I GOT IT**”

A Barry Bonds home run plays the central role in our second baseball tax analysis. In October 2001, Bonds hit his 73rd home run of the season into the stands at Pacific Bell Park in San Francisco. When the ball reached the stands, Alex Popov got his glove on the ball or part of the ball, but the momentum of the fans around him, all simultaneously trying to catch the baseball, knocked him to the ground. A melee ensued, and the ball did not remain in Popov’s glove. Another fan, Patrick Hayashi, was also knocked to the ground by the out-of-control crowd, but emerged holding the ball. Popov demanded the return of the ball, but Hayashi refused. Popov filed suit, claiming that he had caught the baseball but that Hayashi had ripped it from his glove. The California Superior Court took possession of the baseball until the question of ownership could be resolved.

Under the assumption that title to baseballs hit into the stands at Pacific Bell Park passes to fans, an alteration in tax consequences occurs in the case of the Bonds’ 73rd home run because two taxpayers both claimed to have caught the baseball.13

The first alteration is with respect to the timing of the recognition of income. Although the general rule of Sec. 451 would require the income realized by catching the Barry Bonds’ baseball to be included in the year the ball was caught, the regulations under Sec. 451 provide for situations where taxpayers are not able to enjoy, or make use of, their income. Reg. Sec. 1.451-2 indicates that income not actually reduced to a taxpayer’s possession is constructively received by the taxpayer (and includible in income) if it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, even if notice of intent to withdraw was required. This regulation keeps taxpayers from turning their backs on income that is really available to them. However, this same regulation goes on to indicate that a taxpayer is not considered in constructive receipt of income if the taxpayer’s control of its receipt is subject to substantial limitations or restrictions. A long line of case law, beginning with *North American Oil Consolidated v. Burnet*14 provides support for the exclusion of contested income from a taxpayer’s gross income, and until such time as the contest is resolved. In 1916, North American Oil Consolidated operated a section of oil land owned by the U.S. government. Sometime
prior to 1916, the government filed suit to remove the company from possession of the oil lands, and a receiver was appointed to collect and retain the 1916 oil revenue until entitlement to the oil revenue could be resolved by the courts. The suit concluded in 1917, with the determination that North American was entitled to the oil revenue. The court-appointed receiver released the funds and paid them over to the taxpayer later that same year. In holding that the revenue constituted gross income to North American in 1917, the Supreme Court held that the taxpayer was not in constructive receipt of the income in 1916 because the company had no right during that year to compel remittance of the revenue. The oil revenue constituted gross income only when released by the receiver to North American in 1917.

Because the court took possession of the Bonds' baseball until the issue of ownership could be resolved, it would appear that there were substantial limitations and restrictions on the ability of either Popov or Hayashi to enjoy, or make use of, the baseball while the lawsuit was in progress. Thus, under Reg. Sec. 1.451-2 and following North American Oil Consolidated, neither Popov nor Hayashi would be required to realize any income arising from catching the baseball until the court decided the question of ownership.

On December 18, 2002, the Judge Kevin M. McCarthy handed down his decision: the legal claims of Popov and Hayashi were equal and both men were entitled to the baseball. The judge ordered the baseball sold and the proceeds split. Thus, because the ownership question was resolved in 2002, following North American, it would appear that the income realized from catching the baseball would be includible in the 2002 income of Popov and Hayashi. Popov and Hayashi would each be required to report a significant amount of gross income in 2002, but would not have the cash to pay the income taxes until the baseball was sold, which occurred in June, 2003. However, because the two adversaries had to work together following the judge's decision to arrange for the sale of the baseball, efforts that would likely consume a significant amount of time, an argument be could made that such efforts to sell would constitute new and different substantial limitations or restrictions for purposes of Reg. Sec. 1.451-2.

Neither man was free to do as he pleased without the other's cooperation. Their respective interests in the baseball were not severable. Cutting the ball in half would destroy the ball's value and be a violation of the court's order. Further, the judge's decision on December 18, 2002 left the parties with twelve days remaining in the 2002 tax year to effect a sale. While it was possible that Popov and Hayashi could have begun to make these arrangements in advance of the judge's decision, it is unreasonable to have expected them to work together, when each believed his position would prevail. The awarding of joint ownership and the requirement that the ball be put up for sale imposed a new set of substantial limitations or restrictions on the enjoyment of the baseball. As a result, pursuant to Reg. Sec. 1.451-2(a) and North American, the recognition of the income from the baseball would be deferred from 2002 until those particular limitations or restrictions were lifted, at the auction of the baseball in 2003.

The second alteration in tax consequences is with respect to the amount to include in income. While in the general case of a fan catching a baseball, the amount includible in income is the fair market value at the time the baseball is caught, in the presence of a dispute over ownership, the amount of income to be recognized is determined at the time the ownership dispute is resolved. §74(a)(2) indicates that the amount to include in income as a result of receiving a non-cash prize is the fair market value of the property received, and
North American indicates that the time of recognition is when the income is placed in the taxpayer’s unfettered control. Taken together, these authorities still leave open the issue of the appropriate fair market value - the fair market value of the baseball at the time it was caught (October 2001) or the fair market value when the ownership dispute is resolved (December 2002). According to media reports, the estimated fair market value of the Bonds’ baseball in October 2001 was in excess of $1.0 million, but the baseball ultimately sold for $450,000 at auction in June 2003.\textsuperscript{17} As North American, and the case law that follows deal with contested income ultimately paid out in the form of cash, further guidance is required. The analogy is to §83, which deals with the transfer of property to a taxpayer in exchange for services. When a taxpayer receives property in exchange for services rendered, the amount includible in income is the fair market value of the property received over the amount paid for the property at the time the taxpayer gains unfettered control of the property, pursuant to §83(a). Although neither Popov nor Hayashi rendered services in catching the Bonds’ baseball, it seems equitable, following §83(a), to include the fair market value of the baseball at the time all restrictions on their control of the baseball lapse or expire. Because all restrictions on their control of the baseball expired with the sale of the baseball at auction in June 2003, each man would include one-half of the baseball’s selling price of $450,000, or $225,000, in income for 2003.

The sale of the Bonds’ baseball in June 2003 was also a tax event, and gave rise to tax consequences for both Popov and Hayashi. Under Sec. 1001(a), the gain or loss realized at the sale of the baseball is the difference between the amount realized from the sale and the adjusted basis of the baseball on the sale date. Under Sec. 1001(b) and Reg. Sec. 1.263(a)-2(e), the amount realized from the sale of the baseball was the selling price, less any selling expenses. According to media reports, the ball sold for $450,000, and Popov and Hayashi engaged the services of a sports memorabilia agent and an auction house to represent them and handle the sale.\textsuperscript{18} It is likely that they also engaged the services of an attorney with respect to the sale. Thus, the amount realized by each man would be $225,000 less his share of the fees to the sports memorabilia agent, the auction house and the attorney handling the sale. In terms of adjusted basis, each man’s initial basis, for purposes of Sec. 1012, would equal the amount of income he realized from catching the baseball. Based on the discussion above, each man’s initial basis in the baseball was approximately one-half of $450,000, or $225,000. Sec. 1016(a) provides that property’s initial basis is adjusted by capital expenditures made with respect to property, and under Reg. Sec. 1.212-1(k), expenditures paid or incurred in defending or perfecting title to property constitute part of the cost of the property. Because both Popov and Hayashi incurred substantial legal fees in asserting ownership over the baseball, those fees would be required to be added to their initial basis to determine adjusted basis for calculating gain or loss at sale.

Hayashi’s arrangement with his attorney was initially on a 20% (of sale price) contingency basis, although his attorney agreed after the sale to reduce his fees so Hayashi could actually receive some money from the sale of the baseball.\textsuperscript{19} If we assume the legal fees for perfecting title were 15% of the sales price of the baseball, Hayashi’s adjusted basis in the baseball would likely be approximately $258,750 [$225,000 initial basis plus $33,750 legal expenses to perfect title, calculated as 15% of baseball sale price]. Hayashi’s amount realized, without considering the agent’s commission or the auction house fee at sale, is no more than $255,000. If his adjusted basis is at least $258,750, then Hayashi’s loss on the sale could be in excess of $33,750.
Popov was on a time basis with his attorney, and his legal fees to perfect title were approximately $473,000. Based on this information, it would appear that Popov’s adjusted basis in the baseball was approximately $698,000, and his loss realized at the sale of the baseball, after including the agent’s commission and the auction house fee, would exceed $473,000.

Clearly, both Popov and Hayashi realized a loss from the sale of the baseball. However, there is the issue whether they would be able to recognize the loss for tax purposes, and if so, in what amount. For tax purposes, gains and losses are treated somewhat asymmetrically as a function of the use to which a particular asset or property is put. Gains realized by individuals from trade or business, production-of-income or personal use assets are generally recognized, unless a provision specifically allows for exclusion or deferral. Recognition of losses realized by individuals is limited to those arising from any form of disposition of trade or business or production-of-income use property, or only those dispositions arising from casualty, theft, fire, storm or shipwreck for personal use property (Sec. 165(c)). Because the sale of the baseball took place via an auction, Popov and Hayashi could not claim the loss arose via a casualty, theft, etc. If either man was a dealer in milestone baseballs or baseball memorabilia, the baseball arguably would constitute trade or business property for that man. However, since Hayashi was reported to be a software engineer and Popov a restaurant owner, the baseball was not dealer property. It is reasonable to assume that Popov and Hayashi considered the baseball a production-of-income asset, to be held for long term appreciation, and thus, pursuant to Sec. 1221, a capital asset. Under Sec. 1211, the loss from the sale of the baseball, a capital asset, would be available to offset capital gains, if any, the men had. To the extent that the loss from the sale of baseball exceeded capital gains realized in 2003, the excess loss could be deducted in 2003 to the extent of $3,000 (assuming Popov and Hayashi file jointly with their spouses). In the absence of realized capital gains arising from other sources at any point in time in future tax years, Popov and Hayashi would be entitled to deduct $3,000 per year until the loss was fully recognized; simple division indicates that would take Hayashi approximately 12 years to amortize the loss and Popov approximately 158 years.

In conclusion, Popov and Hayashi would each recognize, in 2003, ordinary income of approximately $225,000 and a capital loss of $3,000, but have capital loss carryforwards to future tax years of in excess of approximately $30,000 for Hayashi and $470,000 for Popov.

“I’M TAKING MY BALL AND GOING HOME”

Mike Piazza’s 300th career home run plays the central role in another baseball tax analysis. On July 13, 2001, Piazza hit this milestone home run into the picnic area, just outside the stands, at Shea Stadium in New York. The Mets organization has a policy of permitting fans to keep baseballs hit into the stands. The ball was retrieved by Rafael Vasquez (“Vasquez”), who attended the game with his wife and six-year old daughter. Vasquez immediately banded the ball to his daughter, Denise, a Piazza fan, but within minutes, the Vasquez family was surrounded by as many as ten Shea Stadium security guards, who forced her to turn the ball over to them. In exchange for the ball, Denise was promised the bat used by Piazza to hit that particular home run. However, when a security guard later returned to the stands with a bat, it was another bat, definitely not the one Piazza used to hit the home run. Denise was subsequently invited to meet Piazza and received a collection of souvenirs at this meeting.
Because the Mets and Shea Stadium have a policy of allowing fans to keep baseballs hit into the stands, Vasquez took title to the ball when he picked it up. At the same time, he realized income under Sec. 74, because the ball equates to a prize he won. The amount of income realized at that moment was equal to the fair market value of the baseball, and, under Sec. 1012, Vasquez’s initial basis in the baseball would be the amount he was required to include in income.

When Vasquez handed the baseball to his daughter, either he was just letting her hold the ball for him, without relinquishing ownership, or he made a gift to her for tax purposes, relinquishing ownership. If Vasquez intended to make a gift of the baseball to Denise and if the fair market value of the baseball exceeded $10,000 (the annual gift tax exclusion in 2001), Vasquez likely incurred a federal (and possibly at state) gift tax liability. Assuming the baseball was a gift, then, pursuant to Sec. 1015, Denise would take an initial basis in the baseball equal to her father’s. Similar to the treatment accorded to Popov and Hayashi above, Denise would have to determine the character of the baseball in her hands. Because, at the age of six, it is unlikely that Denise was a dealer in milestone baseballs or sports memorabilia, the baseball was not inventory to her. And, because Denise was a baseball fan in general, and a Mike Piazza fan in particular, it is also unlikely that she intended to take the baseball home and use it for personal purposes. It is likely that the baseball was production-of-income type property to Denise, to be held for long-term appreciation, and therefore would be treated as a capital asset under Sec 1221.

There are three possible ways to characterize what happened after Vasquez handed the baseball to Denise: (1) She was the victim of a theft, (2) she was a participant in a sale or exchange transaction, or (3) she was simply holding the baseball for her father, who voluntarily returned the ball to the Mets Organization.

The Theft Scenario

If we accept the first possible characterization of events, Finkelman (2002) suggests that Denise has a case against the Mets for theft. Because the Mets have a stated policy of letting fans keep balls hit into the stands, the ball became Vasquez’s when he picked it up. When he gave the ball to his daughter, it became her property, and the confiscation of the ball from Denise by the agents of the Mets (i.e., the security guards) amounted to, in Finkelman’s opinion, confiscation or theft of property. Since the baseball was a capital asset in Denise’s hands, the confiscation of the baseball would result in a capital loss to Denise. While Sec. 1001(c) allows a deduction for a capital loss sustained during the year, Sec. 1211(b) limits the deduction of net capital losses (the extent to which the sum of long and short-term capital losses exceeds the sum of long and short-term capital gains) by individuals to $3,000 per year for a single taxpayer. Any loss limited by operation of the rules under Sec. 1211(b) is allowed in subsequent years as a carryover under Sec. 1212(b), but again subject to the annual limit of $3,000 of net capital losses in excess of net capital gains. If Denise was otherwise required to file a tax return for 2001, the $3,000 net capital loss deduction would have been used to offset her other taxable income. If not, the capital loss deduction is, in a sense, wasted, in that it was reported on Denise’s tax return but yielded no benefit via the reduction of her tax liability.

From the perspective of the Mets, it appears that the Mets would have a tax event arising from the confiscation of the baseball. The security guards, in their capacity as
employees and agents of their employer, carried out the confiscation on behalf of the ball club. Reg. Sec. 1.61-14(a) specifically states that illegal gains constitute gross income, and a long line of cases, including *James v. U.S.* indicate that where money or property is received, lawfully or unlawfully, without restriction on its use and without recognition of an obligation to repay, the money or FMV of the property is includible in gross income. It is interesting to note that, following *Zuckerman*, taxpayers need not be charged or convicted of illegal acts as a prerequisite to the inclusion of illegal gains in gross income. Thus, for tax purposes, the Mets would be required to include the fair market value of the confiscated baseball in gross income under Reg. Sec. 1.61-14 at the time of confiscation.

In addition, a second tax event would arise for the Mets. While employees of the Mets (i.e., the security guards) were the means by which the baseball was confiscated from Denise, the Mets did not retain ownership of the baseball. Piazza, another employee of the Mets, ended up going home with the baseball. It would appear that the Mets transferred the baseball to Piazza. The Mets cannot call the baseball a gift to Piazza; Sec. 102(c) prohibits the characterization of the transfer of money or property by an employer to an employee as a gift. Assuming the Mets either allowed or ordered the security guards to turn the baseball over to Piazza, the transfer of the baseball to him should be construed as the payment of additional employee compensation to Piazza, and under Sec. 61, the fair market value of the baseball should have been included in his 2001 gross income as additional compensation for services. The Mets would end up with no net tax effect from the confiscation of the baseball and its subsequent transfer to Piazza, as the amount required to be included in gross income as income from illegal activities would be offset by a deduction for employee compensation of the same amount.

**The Sale or Exchange Scenario**

If Denise was a participant in a sale or exchange transaction, she realized a gain or loss for the difference between the fair market value of the collection of souvenirs and the adjusted basis of the baseball in her hands. As discussed above, under Sec 1015, the basis of the ball in Denise's hands would have been the same as the basis of the ball in the hands of her father before he gave her the ball. Since his basis in the baseball was equal to the amount of income he realized when he picked up the baseball in the picnic area, her basis in the baseball was that same amount. What was the fair market value of the collection of souvenirs Denise received? It is useless to speculate here, but suffice to say that, if the items she received were the typical ones found at the numerous concession stands at Mets stadium, the fair market value of the collection of items she received would have been easily determined. It is reasonable to assume for purposes of this paper, that Denise received, in value, souvenirs with a fair market value significantly less in value than the baseball. Thus, Denise realized a loss on the exchange of the baseball for the collection of souvenirs. Since the baseball was likely a production-of-income asset to Denise, held for long-term appreciation, her loss would have been capital loss and she was entitled to recognize the loss. However, similar to the result reached in the theft analysis above, Denise's recognition of the net capital losses is limited to $3,000 annually, with carryover of amounts not permitted to be recognized by operation of Sec 1212(b).

Denise might be able to rely on Sec. 1031, *Exchange of Property Held for Productive Use or Investment*, to defer
recognition of the loss she likely realized on the exchange of
the Piazza baseball for the memorabilia. Although taxpayers
generally use Sec 1031 to defer the recognition of gain until a
later time, given Denise’s age of six years, she might have
incentives to defer recognition of the loss realized until such
time as she could generate cash flow tax benefits from the
recognition of the loss on her tax returns. Since the baseball
was a production-of-income asset in Denise’s hands, Sec 1031
can be used if the memorabilia received was of the same type –
production of income property. It appears that Denise received
a baseball bat and a variety of other typical ballpark
memorabilia. If Denise holds those items for the production of
income (e.g., waiting for their appreciation in the sports
memorabilia marketplace), she could defer the recognition of
the loss realized until the sale of those items at some future
time.

It would appear that the Mets would again be treated as
taking part in two distinct tax events. First, the club acquired
the baseball from Denise in an acquisition transaction, and,
under Sec. 1012, took a basis in the baseball in an amount
equal to the total fair market value of the items given to
Denise. As part of this transaction, the Mets should also have
recognized a gain on the difference between the cost and fair
market value of the inventory (i.e., the memorabilia transferred
to Denise). Second, since Piazza claimed the baseball, it
appears that the Mets allowed or ordered the transfer of
ownership of the ball to him. Similar to the conclusion reached
above, the transfer of ownership of the baseball generates
additional employee compensation to Piazza, and an amount
equal to the baseball’s fair market value should have been
included in Piazza’s compensation for 2001.

The potential sale, involving a player and a fan, of
another historic home run was reported in the sports media in

2007. On August 4, 2007, Alex Rodriguez hit one of the three
500th home runs of 2007 (the other two were each hit by Frank
Thomas and Jim Thome), and Walter Kowalcyk, a graduate
student attending Rutgers University, caught A-Rod’s historic
hit. Some sports memorabilia commentators estimated the
value of the baseball (and the amount Kowalcyk would be
required to include in his 2007 gross income) at the time of the
historic hit at approximately $500,000, while others suggested
that the value of the ball could change dramatically as a
function of eventual findings as to Bonds’ alleged steroid use.27
Still other reports indicated that the New York Yankees offered
to purchase the baseball for $10,000, but Kowalcyk apparently
refused that offer, expressing an interest to negotiate directly
with A-Rod.28 There have been no further reports of the
disposition of A-Rod’s 500th home run.

The Voluntary Return Scenario

Under this characterization, Vasquez did not transfer
ownership of the baseball to his daughter, simply letting her
hold it for a few minutes, and then, when asked by the Mets
Stadium security guards, returned the baseball to the Mets ball
club. Here, Vasquez should be able to rely on Rev Rul 57-374
to exclude the fair market value of the baseball in income.29
Under Rev. Rul. 57-374, a contestant who immediately
depart should not accept a contest prize may exclude the fair market
value of the prize from income. Vasquez should be successful
making the argument that the revenue ruling should apply to a
baseball caught in the stands, relying on the characterization of
the baseball as a prize in a de facto competition created by the
home ball club. This treatment would appear to align with the
IRS’ view. IR News Release 98-56 (09/08/1998) specifically applies to the ease of a baseball hit into the stands, and
indicates that a fan that catches a home run ball and
immediately returns the baseball would not have taxable
income arising from the catch. It analogizes the baseball fan to the prize contestant who immediately declines to accept a contest prize, although it does not cite Rev. Rul. 57-374. It does go on to indicate that the outcome might be different if the fan decided to sell the ball, rather than return it to the club.

From the perspective of the Mets, the declaration by Vasquez was a non-event for tax purposes. However, the transfer of ownership of the baseball to Piazza should, as in the previous characterizations of events, be treated as the payment of additional employee compensation to Piazza, in an amount equal to the fair market value of the baseball at the time of ownership transfer.

Baseball fans Todd Eisenlohr and Will Stewart will likely both rely upon Rev Rul 57-374 and IR News Release 98-56 when preparing their 2007 personal income tax returns. These fans caught two of the three 500-home run club balls hit in 2007. Eisenlohr caught the 500th home run of Frank Thomas while sitting at the Metrodome, home of the Minnesota Twins. Eisenlohr, in arranging the voluntary return of the historic baseball to Thomas, asked only the opportunity to meet Thomas. Stewart caught the 500th home run of Jim Thome while sitting at U.S. Cellular Field (formerly Comiskey Park), home of the Chicago White Sox. Stewart, from Austin, Texas, and in Chicago on a business trip, voluntarily returned the ball to Thome during a press conference.

"THE GAME BALL"

In Game Four of the 2004 World Series at the St. Louis Cardinals ballpark, Keith Foulke of the Boston Red Sox (the away team) fielded a hit by Edgar Renteria of the St. Louis Cardinals (the home team), and then threw the ball to Doug Mientkiewicz. Mientkiewicz tagged first base for the final out of the inning and the game and the series. Mientkiewicz kept the baseball after the game, had it authenticated by MLB the next day, and during a press conference, announced that the baseball would serve as either his personal retirement fund or a college education for one of his children. Although Mientkiewicz seemed to have no doubt about his ownership of the baseball, media reports included comments by representatives of Boston that seemed to indicate that Boston viewed the historic baseball as its property. In fact, a negotiation ensued between Boston and Mientkiewicz with respect to the use of the baseball in a traveling Red Sox World Series trophy exhibit.

Finkelman (2005) argues that the St. Louis Cardinals Organization was the owner of the Renteria hit, and that the baseball should have been returned to them. This argument is consistent with ownership arguments made in Finkelman’s (2002) analysis of baseballs hit into the stands and caught by fans. The home team owns baseballs used during a game, and under the abandonment theory, allows ownership of a baseball hit into the stands to pass to fans. However, McEvoy (2005) points out that since ball clubs generally do not have stated policies about the passage of ownership of baseballs that remain on the playing field, and St. Louis apparently did not seek return of the baseball from Mientkiewicz, St. Louis can be treated as having abandoned ownership of the historic ball. Since St. Louis abandoned ownership, McEvoy (2005) concludes that Mientkiewicz can claim ownership of it.

From a tax perspective, under the assumption that St. Louis abandoned its ownership of the baseball, Mientkiewicz is in the same position as a fan who catches the ball in the stands; that is, Mientkiewicz is the finder of abandoned property. And like the fan who catches the baseball in the stands, under Sec.
61, Mientkiewicz would be required to include the fair market value of the baseball in gross income in 2004. If Mientkiewicz caught the ball at a home game (at Fenway Park), with Boston abandoning its ownership of the baseball, Mientkiewicz’s tax position would be the same as Piazza’s. Mientkiewicz would be required to include the fair market value of the baseball in gross income as additional wages or compensation, because Boston, Mientkiewicz’s employer, would be treated for tax purposes as effectively paying him additional compensation by allowing him to keep the abandoned baseball. This additional compensation would be subject to the usual withholding tax rules.

CONCLUSION

Because taxpayers’ tax filings are private matters between the taxpayer and the IRS, it is unknown whether the government has used its authority under the tax law to assess and collect income (and other types of taxes) from fans, players and ball clubs, when historic baseballs are caught and kept. Media reports concerning the sale of an historic home run baseball usually mention taxes due at the time of sale, as one tax event, but there seems to be either confusion or disagreement about the tax consequences associated with catching the baseball, a separate tax event. For example, Matt Murphy, the Mets fan who caught Barry Bonds’ 756th home run, said he is too poor to keep the baseball, and expected to pay taxes of $175,000 when the ball is sold.\(^{37}\) The report correctly suggests that income taxes arise from catching the baseball, but the estimates of taxes due at the sale seem to imply that Murphy will be taxed on the full sales price of the baseball, without credit for his tax basis in the baseball. A recent news report recalled that when an IRS spokesperson suggested, in the summer of 1998, that a fan who gave Mark McGwire’s single season home run record baseball back to McGwire would incur a gift tax, a “tax tempest” ensued.\(^{38}\) This report further suggests that while tax expert consensus was that a tax liability arises when a valuable baseball is caught, it was unlikely the IRS would be willing to make a public argument for taxing fans when they catch an historic baseball.\(^{39}\)

The only direct guidance on the income tax effects of catching an historic baseball is IRS News Release 98-56 (09/08/1998), which addresses only the situation of a fan immediately throwing back a baseball hit into the stands. Then-IRS Commissioner Rossotti issued the news release in the wake of the “tax tempest” surrounding the return by a fan of a home run baseball to Mark McGwire. The lack of IRS official guidance on this issue, coupled with the public nature of the issue, obliges the IRS to do more to clarify the tax rules. Taxpayer compliance with income tax laws is predicated on the understanding that the system is fair. The perception that baseball fans who catch historic home runs are treated more favorably than talk show fans who receive automobiles could do much to undermine confidence in the IRS’ ability to administer tax laws fairly. Media reports of Oprah Winfrey’s September 2004 give away of cars to each of the 276 members of her audience seemed to have no question that the recipients were subject to income tax on the value of the cars received (sticker price of $28,500).\(^{40}\) If the IRS perceives a difference between a baseball fan catching an historic home run and a talk show fan receiving a car, it should articulate it. Perhaps the IRS is beginning to turn its attention on the transfer of valuable sports related items. In early 2005, several sportswriters reported that the IRS had notified the National Basketball Association, Major League Baseball, National Hockey League and National Football League that the value of complimentary tickets given to players should be included in their income and
that the teams should withhold income taxes on this additional income.41

From a tax planning perspective, should fans throw historic baseballs back onto the field or should players pass an historic baseball around the field like the proverbial “hot potato” as a tax planning strategy? As much as recent efforts might signal IRS willingness to venture into controversy in order to provide clarification, it appears that more could be done by the IRS, at least with respect to the tax treatment of historic baseballs, to increase the public’s confidence in the IRS ability to administer our tax laws in a fair manner.

ENDNOTES


2 It should be noted that there is also a healthy sports memorabilia market for baseballs that have never been in play, but have been autographed by players for special occasions.

3 For example, the Seattle Mariners website contains the following statement: “Foul Balls & Home Run Balls: We encourage you to keep any balls that are hit into the stands.” <http://seattle.mariners.mlb.com/sea/ballpark/sea_ballpark_guide.jsp>.


5 Finkelman (2002) essentially makes this same argument when he analogizes a ticket to a baseball game to a lottery ticket.


7 See, for example, the July 27, 2007 MLBBlog of Zack Hample, also known as “The Baseball Collector,” <http://www.snaggingbaseballs.mlbblogs.com/the_baseball_collector/2007/07/not_chasing.aah.html>.


11 2d AFTR 2d 69-997

12 This scenario is similar, but not identical to the events surrounding Sammy Sosa’s 62nd home run in 1998 at Chicago’s Wrigley Field. Sosa’s home run actually landed outside the stadium on a local street, and was reputedly picked up by a delivery driver named Gary Mullins, a regular outside the stadium during games. During a melee involving other fans on the street, the ball somehow ended up in the hands of another individual, and Mullins filed suit for return of the baseball. Mullins eventually dropped his suit due to the legal expense of the suit. See Sheldon I. Banoff and Richard M. Lipton, Contested Historic Homers: What Are the Tax Consequences?, 98-3 Journal of Taxation 189 (2003).

13 Technically speaking, Popov argued in court that he had possession of the baseball and that Hayashi took it from him. Hayashi argued in court that Popov’s actions were merely attempts to gain possession by Popov. Hayashi argued that when he picked up the baseball as it rolled from under the crowd, his actions allowed him to possess the baseball.

14 11 AFTR 16, 52 S Ct 613, 3 USTC ¶ 943


Supra, note 14.

Supra, note 15.

Ibid. Popov’s attorney filed a petition with the San Francisco Superior Court to freeze payment of Popov’s share of the sale proceeds until Popov settled his $473,530 bill for legal services.

Supra, note 14.

See Finkelman (2002) 1624, and in particular, footnotes 46, 61, 62 and 63.


The IRC contains a provision, Sec. 1033, Involuntary Conversions, which allows taxpayers to defer recognition of gains realized via involuntary conversions (e.g., theft, seizure, condemnation) until a later time. One of the requirements is that the property be either used in a trade or business or held for the production of income. Although the Piazza baseball was a production-of-income asset in the hands of Denise, Sec. 1033 was not applicable, since Denise realized a loss on the sale or exchange. Sec. 1033 applies only to defer the recognition of gains.

7 AFTR 2d 1361, 366 US 213, 61-1 USTC ¶ 9449 (1961, S. Ct.)

T.C. Memo 1997-21

Ted Sherman, Is Barry Bonds’ 756 Home Run Ball worth $500,000, Helium Sports & Recreation, Sept. 5, 2007 at

When asked, in this 2007 interview about the correct income tax treatment of an historic catch, Don Korb of the IRS replied to the reporter, “Please, whatever you do, don’t ask me that question.”
