BALL BUSTERS: HOW THE IRS SHOULD TAX RECORD-SETTING BASEBALLS AND OTHER FOUND PROPERTY UNDER THE TREASURE TROVE REGULATION

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INTRODUCTION

Currently, a vital debate has the country split in two—a debate that tears at the very fabric of America's tradition and culture: how should the IRS tax the catcher of a record-setting baseball? This question has raised the ire of Congress, confounded the IRS, and riled up tax geeks across the country.[1] There are two prevalent conflicting views on the proper tax treatment when someone catches a record-setting baseball and does not immediately return it. The view that comports with the tax code requires the taxpayer to recognize gain on the record-setting ball, for its fair market value, in the year the taxpayer acquires undisputed possession. The taxpayer-friendly view is to allow the taxpayer to defer tax on the record-setting ball until (and only if) the taxpayer sells it. When asked about the proper tax treatment of record-setting baseballs, IRS chief counsel Don Korb stated, "[p]lease, whatever you do, don't ask me that question."[2]

Aside from the fact that this issue involves taxing America's pastime, taxing record-setting baseballs is important for two reasons. First, the principles behind taxing record-setting baseballs apply to all found property. Second, taxing record-setting baseballs is highly publicized, perhaps more than any other taxation issue. This issue reaches mainstream America and is largely on a level that the average taxpayer can comprehend. Thus, taxing record-setting baseballs is incredibly important for the IRS to maintain and manage taxpayer morale.

This Article begins in Part I with an overview of relevant income-taxation fundamentals, focusing primarily on accession to wealth and realization of income. Part II discusses the potential tax consequences of catching a record-setting baseball. The discussion begins with the

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1. Jeremiah Coder, *IRS Trying to Avoid Second Strikeout*, 116 TAX NOTES 538, 538 (2007). Coder uses the term "tax geeks." *Id.* I adopt the term endearingly in this introduction.

2. Tom Herman, *The Big Catch Could Have a Big Catch*, WALL ST. J., July 25, 2007, at D1, *available at* 2007 WLNR 26129844. Mr. Korb is the IRS resident baseball fanatic. *Id.* He recently gave a speech at the Baseball Hall of Fame, where he discussed "the 10 most significant tax events in the history of baseball." *Id*.

comparatively straightforward scenario whereby the person who catches the record-setting ball (the "catcher") returns it to the club or batter.[3] The discussion then turns to the two primary taxation theories implicated when the catcher does not immediately return the ball: ignore the treasure trove regulation and tax only upon sale, or tax immediately because the ball is an accession to wealth and thus realized income. Additionally, this Part will conclude by looking at several variations that could have significantly different tax consequences. Part III discusses the tax implications of destroying a record-setting ball. Part IV concludes with a proposed solution: tax the catcher of the record-setting ball immediately on the retail price of the baseball, then treat the increase in value as unrealized gain, and tax the catcher on that gain if the catcher sells the ball.

I. BACKGROUND: RELEVANT INCOME-TAXATION FUNDAMENTALS

The most fundamental and basic income-tax principles apply to the case of found property, specifically record-setting baseballs. Although found property implicates very basic income-tax principles, it is important to keep these principles in the forefront when analyzing the proper tax treatment of found property. Section 61 of the Internal Revenue Code (I.R.C.) broadly defines gross income: "[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived."[4] Treasury Regulation section 1.61-1(a) states, "[g]ross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services."[5] Section 1.61-1(a) also points to Treasury Regulation section 1.61-14 as a source of further illustration.[6] Section 1.61-1(a) states that although section 1.61-14 further illustrates examples of miscellaneous items of gross income, gross income is not limited to the items enumerated in section 1.61-14.[7]

Thus, section 1.61-14, the "treasure trove" regulation, is an inclusive regulation that further illustrates items of income that fall under section 61(a).[8] Section 1.61-14(a) states, "[i]n addition to the items enumerated in

3. Throughout this Article, I will refer to the person who catches the record-setting ball as the "catcher." At no point do I use the term "catcher" to describe the player at the catcher position on the field. I would use the term "fan," but it is not always a fan that catches the record-setting ball.

4. I.R.C. § 61 (2000).

5. Treas. Reg. § 1.61-1(a) (1960).

6. *Id*.

7. *Id*.

8. Since Treas. Reg. section 1.61-14(a) is purely illustrative, the term "treasure trove" should not be used to limit the regulation's application. For a detailed analysis regarding the ambiguities in

section 61(a), there are many other kinds of gross income."[9] Further, "[t]reasure trove, to the extent of its value in United States currency, constitutes gross income for the taxable year in which it is reduced to undisputed possession."[10]

The seminal case interpreting gross income is *Commissioner v. Glenshaw Glass Co.*[11] The Court set forth three requirements for gross income in *Glenshaw Glass*.[12] Gross income requires an accession to wealth, realization, and taxpayer dominion and control.[13] Thus, if found property satisfies the three *Glenshaw Glass* requirements, the property is gross income.

II. Record-setting Baseballs

The lucky person who catches a record-setting baseball has two initial choices: give the ball back or keep it. Unsurprisingly, each choice has very different tax implications. Unlike most aspects of found property taxation, the IRS has actually addressed the tax consequences of choosing to immediately return a record-setting ball.

A. The "Simple" Case: Immediately Returning the Ball

The simplest case for tax purposes occurs when the catcher gives the ball back to the hitter or baseball club. The easiest way for the catcher to avoid all tax consequences is to throw the ball back onto the field immediately.[14] By this act, the catcher would be disclaiming the property and would have no income.[15] One would likely apply this principle and make the logical conclusion that the catcher would also avoid tax consequences by returning the ball to the hitter or baseball club instead of

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section 1.61-14, see Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 4 FLA. TAX REV. 685, 717–24 (2000).

9. Treas. Reg. § 1.61-14(a) (as amended in 1993).

10. *Id*.

11. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 427 (1955).

12. *Id*. at 431.

13. *Id*. *See also* Dodge, *supra* note 8, at 687–89 (arguing that dominion and control of a record-setting baseball amounts to realization and is therefore a taxable accession to wealth upon acquisition).

14. Cubs fans traditionally toss the home run balls of opposing teams back onto the field.

15. *See* I.R.C. § 61(a) (2000) (defining gross income); I.R.C. § 74 (2000) (stating that disclaiming prizes and awards excludes them from income). *See also* I.R.S. News Release IR-98-56 (Sept. 8, 1998), *available at* http://www.irs.gov/pub/irs-news/ir-98-56.pdf [hereinafter IR-98-56] (noting the absence of taxable income when someone immediately declines a prize or returns unsolicited merchandise).

simply throwing it back onto the field.[16] However, on the eve of Mark McGwire breaking Roger Maris's single-season home-run record in September 1998, an IRS spokesman stated that the catchers of record-setting balls would face a gift tax if they returned the balls to the hitter or club.[17] The gift tax could potentially equate to $450,000 in federal income tax and $80,000 in gift tax for the unwitting "fourth outfielder."[18] If the lucky catcher were to donate the ball (a capital asset when it is caught) to charity or directly to the Baseball Hall of Fame instead of the batter, the catcher would be eligible for a charitable deduction subject to particularly restrictive deduction limits.[19] Under the most likely scenario, the IRS will treat the ball as capital gain property and limit the charitable deduction in any one year to 30% of adjusted gross income under section 170(b)(1)(C)(i).[20] Thus, the well-intentioned catcher may not be so lucky after all.[21]

Unsurprisingly, the impromptu IRS statement immediately raised the ire of Congress and baseball fans across the nation.[22] Then-IRS Commissioner Charles Rossotti later acknowledged, "[m]ore than innocent-spouse cases, more than small-business owners losing their businesses, more than IRS modernization failures, the prospect of the IRS taxing this hypothetical good-hearted fan unleashed the fury of the American people,

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16. However, under the current tax code and regulations, proper tax treatment may be to tax the catcher of the ball even if he returns it. *See* Darren Heil, Comment, *The Tax Implications of Catching Mark McGwire's 62nd Home Run Ball*, 52 TAX LAW 871, 871 (1999) (suggesting that if the IRS had followed the letter of the tax code, then it would have taxed the catcher of Mark McGwire's sixty-second home-run ball despite the fact that the catcher returned the ball to Mark McGwire).

17. Heidi Glenn, *IRS Hits Foul Ball in Middle of Home Run Race*, TAX NOTES TODAY, Sept. 9, 1998, *available at* LEXIS 98 TNT 174-2; Herman, *supra* note 2.

18. Kip Dellinger, *Home Run Balls and Nettlesome Tax Problems*, TAX NOTES TODAY, Sept. 14, 1998, *available at* LEXIS 98 TNT 177-78. *See also More on Historic Homers: Is There 'Zero Basis' for Avoiding Taxable Income?*, 89 J. TAX'N 318, 318 (1999) [hereinafter *Is There 'Zero Basis' for Avoiding Taxable Income?*] ("It was widely reported that offers of $1 million–$2 million would be made to the fan who caught McGwire's *last* home run of the year (since that home run would establish a new record).").

19. Dellinger, *supra* note 18. Deduction limits apply regardless of whether the donated property is capital gain property; however, special rules further limit the deduction percentage of capital gain property. *See* I.R.C. § 170(b)(1)(C)(i) (2000) (stating that I.R.C. section 170(b)(A) contributions shall not exceed 30% of a taxpayer's contribution base for a year).

20. I.R.C. § 170(b)(1)(C)(i). *See also* Gene Steuerle, *Home Run Kings, Unabombers, and the Taxation of Generosity*, TAX NOTES TODAY, Nov. 2, 1998, *available at* LEXIS 98 TNT 211-73 (proposing a tax code change that would allow windfall "winners" to designate charities as beneficiaries and avoid charitable deduction limits).

21. As it turns out, the catcher of McGwire's record-setting sixty-second home run was not a fan, but rather a home-team groundskeeper. *Is There 'Zero Basis' for Avoiding Taxable Income?*, *supra* note 18, at 318. Tim Forneris caught the ball in the outfield tunnel beyond the left field fence. *Id.* Forneris gave the ball to his supervisor, and the St. Louis Cardinals ultimately gave the ball to McGwire. *Id.*

22. Coder, *supra* note 1; Herman, *supra* note 2; Glenn, *supra* note 17.

not to mention their representatives in Congress."[23] The IRS quickly reversed its position after the immediate and tenacious congressional backlash.[24] In explaining how the IRS "sheepishly recanted"[25] its position, Commissioner Rossotti stated, "[s]ometimes pieces of the tax code can be as hard to understand as the infield fly rule. All I know is that the fan who gives back the home run ball deserves a round of applause, not a big tax bill."[26] Ultimately, the IRS applied the aforementioned disclaimer rules to any fan who immediately returned a baseball, resulting in no tax consequences for the well-intentioned catcher.[27]

Simultaneously, Congress took action to clear up the baseball-taxation quagmire once and for all. Many congressional representatives also used baseball taxation as a rallying cry for simplification of the tax code as a whole. Senate Finance Committee Chair William Roth stated that even the possibility of taxing a record-setting baseball was "a prime example of what is wrong with our current tax code."[28] He continued, "[o]ur tax laws are replete with provisions that defy common sense and are patently unfair. I hope that this event can spur us on to consensus an [sic] reforming the tax code."[29] Senator Christopher "Kit" Bond called the potential taxation "ridiculous" and asserted, "[i]f the IRS wants to know why they are the most hated federal agency in America, they need look no further than this assault on America's baseball fans."[30] Senator Bond aptly recognized that "[t]he IRS needs to lighten up" and "[g]et a life!"[31] House Ways and Means Committee Chair Bill Archer used the potential taxation of record-setting baseballs as "another reason why we

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23. Herman, *supra* note 2.

24. Glenn, *supra* note 17.

25. Dellinger, *supra* note 18.

26. Glenn, *supra* note 17; IR-98-56, *supra* note 15. Judging by the lack of any meaningful IRS guidance on the issue of found-property taxation, maybe that is all Mr. Rossotti knows.

27. Glenn, *supra* note 17.

28. William V. Roth, Jr., *Roth Release on Baseball Gift Tax*, TAX NOTES TODAY, Sept. 8, 1998, *available at* LEXIS 98 TNT 174-25; Glenn, *supra* note 17. Predictably, all the Senators who were outraged at baseball taxation and called for reform were Republicans. However, Sen. Bond called for unification, stating, "while we may be Republicans and Democrats by day, at night and on week-ends we're all just baseball fans!" Christopher S. Bond, *Bond Release Calling on IRS to "Lighten Up,"* TAX NOTES TODAY, Sept. 9, 1998, *available at* LEXIS 98 TNT 174-27.

29. Roth, *supra* note 28.

30. Glenn, *supra* note 17. It is important to note that Sen. Bond represents Missouri. Kit Bond, U.S. Senator—Missouri [I think this is a more appropriate title], http://bond.senate.gov/public/ (last visited Nov. 11, 2008). Since McGwire played for the St. Louis Cardinals, there was a very good chance that the catcher of the record-setting ball would be a Missouri resident and one of Sen. Bond's constituents. ESPN, Mark McGuire, http://sports.espn.go.com/mlb/players/profile?playerId=1738 (last visited Nov. 11, 2008).

31. Bond, *supra* note 28.

should abolish the current tax system, including the income and death/gift tax."[32]

The IRS statement spurred House Ways and Means Committee member William Thomas to introduce a bill "[t]o clarify the income and gift tax consequences of catching and returning record home run baseballs."[33] This very narrow bill only applied to baseballs hit in the 1998 season that exceeded the sixty-one home-run record.[34] However, this bill would have excluded the value of any record-setting ball from the catcher's gross income.[35] Congress wisely did not enact this bill. Congress would have tread a slippery slope had it created this very unfair and narrow income exclusion. Further, Congress did not need to enact a bill addressing the gift-tax implications of returning a record-setting ball after IRS Commissioner Rossotti's clarification.

Although the IRS conceded that it would not tax a catcher who returned a record-setting baseball, it quickly pointed out that the tax implications "may be different" if the catcher were to sell the ball.[36] Former IRS Commissioner Don Alexander reiterated the traditional view that catching a record-setting ball and not *immediately* returning it is an accession to wealth.[37] However, the IRS has not provided any formal guidance on the precise tax treatment of record-setting baseballs. Since many catchers do not return the record-setting balls,[38] this Article will next examine the possible tax implications when the catcher decides not to return the ball.

B. Possibility One: Repeal the Treasure Trove Regulation & Treat Gains on Found Property as Unrealized Until Sold

The first possible solution is for the IRS to ignore the catcher's initial accession to wealth—and necessarily fundamental income-tax principles—and only tax the catcher upon the sale of the record-setting ball. This clean solution would avoid any valuation issues, as the IRS would simply tax the ultimate sales price as a capital gain. This solution would also avoid

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32. Bill Archer, *Archer Release on IRS Threat to "Turn Home Run into Foul Ball,"* TAX NOTES TODAY, Sept. 9, 1998, *available at* LEXIS 98 TNT 174-24; Glenn, *supra* note 17. Representative Archer did not suggest any alternatives to replace the current tax system if we were to abolish income, estate, and gift taxation. Archer is from Texas. *Id.*

33. H.R. 4522, 105th Cong. (1998).

34. *Id*.

35. *Id*.

36. IR-98-56, *supra* note 15.

37. Editorial, *A Tax on Joy*, WALL ST. J., Sept. 9, 1998, at A22.

38. *More on Historic Homers: Do Auction Prices Control?*, 90 J. TAX'N 189, 189 (1999) [hereinafter *Do Auction Prices Control?*].

liquidity problems because the taxpayer would have a cash inflow at the time of sale to pay the tax on the ball. Professors Zelenak and McMahon advocate this tax-deferral position.[39] Zelenak & McMahon argue that only taxing upon sale of the ball is proper for two reasons. First, they claim that the IRS has essentially ignored the treasure trove regulation for over forty years.[40] Second, Zelenak & McMahon argue that the treasure trove regulation is fundamentally wrong because found property is more analogous to nontaxable imputed income or unrealized gain than conventional, taxable gross income.[41] Essentially, Zelenak & McMahon argue that the IRS should treat found property in the same manner as self-created property.[42]

1. The IRS Ignores the Treasure Trove Regulation

Zelenak & McMahon recognize that there has been very little judicial or administrative interpretation of the treasure trove regulation.[43] Only one case directly addressed the treasure trove regulation,[44] and it involved found property in the form of cash.[45] Zelenak & McMahon point out that no court has ever relied on the regulation to include noncash found property in gross income, nor has the IRS genuinely addressed the treasure trove regulation in private or published rulings.[46] Although Zelenak & McMahon appropriately recognize that the finding of valuable property "is not an uncommon event," they incorrectly conclude that the IRS is ignoring the treasure trove regulation because the IRS fails to apply the regulation to commercial fishermen, big-game hunters, miners, and professional treasure hunters.[47] The treasure trove regulation does not apply in these cases because they do not involve found property, but rather self-created property. Further, the lack of judicial or administrative interpretation of the treasure trove regulation supports a more likely inference than that drawn by Zelenak & McMahon. Professor Dodge asserts that the absence of cases and rulings addressing found property "suggests that taxpayers and their

39. Lawrence A. Zelenak & Martin J. McMahon, Jr., *Taxing Baseballs and Other Found Property*, 84 TAX NOTES 1299, 1301 (1999).

40. *Id*. Professors Zelenak and McMahon appropriately limit their argument to found property other than cash.

41. *Id*.

42. *Id.* at 1306–07.

43. *Id.* at 1301.

44. *Id*.

45. *See* Cesarini v. United States, 296 F. Supp. 3, 7 (N.D. Ohio 1969), *aff'd* 428 F.2d 812, 814 (6th Cir. 1970) (per curiam) (holding cash found inside a piano taxable in the year of discovery).

46. Zelenak & McMahon, *supra* note 39, at 1301.

47. *Id*. at 1301–04.

advisors have no doubt that found property is gross income when received."[48] Dodge's conclusion is logical. Common sense would dictate that finding valuable property—while expending no labor or capital—is clearly an accession to wealth and thus taxable gross income.

2. Is a Record-setting Baseball Self-created Property or Pure Windfall?

The two options for taxing record-setting baseballs rest on the distinction between self-created property and pure windfall property. If found property is self-created property, it will be taxed only when any gain is realized, generally upon sale. However, if the property is a pure windfall, gain is realized and taxed immediately. Zelenak & McMahon's argument that the IRS treatment of commercial fishermen, hunters, and miners should apply to catchers of record-setting baseballs relies on one crucial assumption: all found property is "self-created." They do recognize that there is a distinction between the "looked-for" property of fishermen, hunters, and miners, and the pure windfall of record-setting baseball catchers.[49] They also recognize that nothing in the treasure trove regulation distinguishes between "stumbled-over and searched-for treasure trove."[50] However, Zelenak & McMahon incorrectly conclude that the looked-for/pure windfall distinction does not matter.[51]

The distinction between windfall and self-created (or looked-for) property is central to the tax treatment of all found property. Dodge correctly[52] asserts that "there is a meaningful distinction between true windfall gains, where something is received for nothing, and nonwindfall gains resulting from the investment of capital and services."[53] Gains from self-created property and "looked-for" property fall into a separate category from pure windfall gains. Dodge asserts that "[i]n general, a 'true windfall gain' is distinguishable from other self-obtained property situations because of the taxpayer's amateur status, a zero or negligible actual cost, a minimal expenditure of labor, and perhaps a negligible opportunity cost."[54] Catching a record-setting baseball has all the characteristics of a true windfall gain. Thus, a record-setting baseball appears to be much better classified as pure

48. Dodge, *supra* note 8, at 725.
49. Zelenak & McMahon, *supra* note 39, at 1300.
50. *Id*.
51. *Id*.
52. I give Professor Dodge a presumption of correctness over Professors Zelenak & McMahon since Professor Dodge teaches at Florida State University—my undergraduate alma mater—and Professors Zelenak and McMahon teach at Duke University and the University of Florida, respectively.
53. Dodge, *supra* note 8, at 688.
54. *Id*. at 688 n.7.

windfall than "property that is found or taken from nature in the pursuit of a venture involving the investment of the taxpayer's labor and/or capital."[55]

Dodge astutely recognizes that self-created property is not found property at all. Found property is that which is "acquired at random and without special effort . . . as windfalls."[56] Dodge classifies self-created property as "taken" rather than "found" because of the "active" role of the taxpayer in acquiring the former as opposed to the taxpayer's "passive" role in acquiring the latter.[57] Activities such as mining, commercial fishing, and even treasure hunting constitute a "venture, activity, or enterprise" that "requires planning, financing, and implementation."[58] Thus, Dodge correctly refers to self-created and taken property as "self-obtained" property.[59] Self-obtained property requires an investment of capital, labor, or both.[60] The gain on that investment is not realized until the property is sold.[61] In contrast, found objects are a windfall and thus should be taxed immediately. It would make no sense to exclude found objects—such as record-setting baseballs—when the "most common category of . . . windfalls, namely, prizes and awards, is clearly includable."[62]

In advocating tax deferral until sale of found property, Zelenak & McMahon argue that income tax hinges on the receipt of cash.[63] However, Dodge correctly asserts that "the notion that 'income' is basically 'cash' is incoherent."[64] Dodge recognizes that the "dominant paradigm [in income taxation] is 'changes in wealth.'"[65] A taxpayer finding windfall property is a tangible accession to wealth, and is thus distinguishable from the imputed income of self-created property.[66] Dodge recognizes that the "correct distinction is not between 'found' and 'self-created' objects but between windfall property and property obtained in the course of a profit-seeking activity."[67] Thus, record-setting baseballs should be treated as windfall property and taxed immediately.

Zelenak & McMahon cogently suggest that a record-setting baseball may not be a pure windfall to the catcher if that catcher *actively* sought the

55. *Id*. at 688.
56. *Id.* at 696.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*. at 697.
61. *Id*.
62. *Id*. at 705.
63. Zelenak & McMahon, *supra* note 39, at 1304–05.
64. Dodge, *supra* note 8, at 690.
65. *Id*. at 691.
66. *Id*. at 693.
67. *Id*. at 697.

ball.[68] One commentator shared this view and suggested that catchers use their "baseball fan skills" to get the best possible seat in the outfield bleachers and catch or recover the record-setting ball.[69] Dodge argues that a fan catching the ball did not "invest" in the ticket to the game because the ticket price is "exhausted by the entertainment value of the game."[70] Dodge asserts that the ticket is a "personal consumption expense" and not an investment for the remote opportunity to catch a record-setting baseball.[71] Further, a fan catching the ball generally does not expend much labor and has an amateur status. A fan catching a record-setting ball is more akin to someone winning a prize or award than a commercial miner. The IRS treats the prizewinner's gain as an accession to wealth that is realized and taxed immediately.

However, baseball fans often pay above face value for outfield bleacher tickets when there is a possibility of a record being broken. The lucky fan that caught Barry Bonds's record-setting career home run ball paid $100 for a $12 ticket.[72] This catcher has a strong argument that he actively sought the record-setting ball and expended labor and capital in an effort to acquire the ball. If the catcher can prove that he acquired the ball as a result of a profit-seeking venture in which he invested labor or capital, the record-setting ball should be treated as self-obtained property and not taxed until sold. Nevertheless, the IRS could effectively argue that the increased ticket price simply accounted for the added entertainment value of attending a game where a record could be set.

Although the case of an average fan catching a record-setting ball inside the ballpark likely qualifies as a windfall, individuals outside of the ballpark sometimes catch record-setting balls. If someone is simply walking by the ballpark and the record-setting ball lands in his lap, it is clearly a windfall. However, some people spend their "valuable" leisure time actively seeking home run balls. For instance, many individuals kayak in the waters of McCovey Cove just beyond the right-field wall of San Francisco's SBC Park.[73] These individuals very likely engage in a profit-

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68. *See* Zelenak & McMahon, *supra* note 39, at 1300–01 (describing the "unlikely event" that caught balls are a "pure windfall" to the catcher).

69. Dellinger, *supra* note 18.

70. Dodge, *supra* note 8, at 725.

71. *Id.*

72. ESPN, *Bonds' No. 756 Ball Generates More Than Initial Estimates*, Sept. 16, 2007, http://sports.espn.go.com/mlb/news/story?id=3022027.

73. *See, e.g.*, Kayak-Man, http://www.kayak-man.com/ (last visited Nov. 11, 2008). "Gene Pointer has put his outfield skills to work in McCovey Cove, making diving grabs off his kayak to recover home run balls during the Giants baseball season, including Barry Bonds home run splash hit #9. Other splash balls include 21, 25 & 29." *Id.* There is an even more extreme professional-baseball collector roaming the nation's baseball parks. Zack Hample has caught over 3,800 baseballs from forty-four different parks. The Baseball Collector, http://snaggingbaseballs.mlblogs.com/ (last visited Nov. 11,

seeking venture in which they invest labor and capital. Thus, if a San Francisco kayaker—or other similarly situated individual—catches a record-setting ball, the ball should be treated as self-obtained property and not taxed until sold. However, in the most common case of an average fan inside the ballpark who catches the record-setting ball, the IRS should treat the ball as pure windfall property and tax upon possession.

C. Possibility Two: Apply Well-Established Income Taxation Principles and Tax Upon Possession Under Treasure Trove Regulation and Section 61

It makes tax sense for the IRS to tax found property, such as record-setting baseballs, upon possession as a pure windfall. One commentator, Kip Dellinger, asserted that it would be "pure folly for the IRS to suggest that a fan catching the ball owes no tax immediately. Unless, of course, it is making up the law as it goes along."[74] It also makes common sense that acquiring valuable property without actively expending labor or capital to acquire the property should be taxable as an immediate accession to wealth. Dellinger questioned how the receipt of property worth millions could somehow fall outside the realm of section 61.[75] However, there are two difficulties in immediately taxing found property as a pure windfall under the treasure trove regulation: accurately valuing the property and determining undisputed possession.

1. Basis: Difficulties in Valuation

The most difficult aspect of immediately taxing found property is determining the fair market value in order to assess the amount realized and thus the taxable gross income. There are three possible options for valuing the record-setting baseball at the time it comes into the catcher's undisputed possession. However, only one of the options is practical.

The first option is to consider all future contingencies to determine the fair market value.[76] Essentially, this method attempts to discount the

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2008). Mr. Hample can ask for a baseball in thirty-two languages and has written books on the subject. Pat Graham, *3,494 and Counting*, YAHOO! SPORTS, June 28, 2008, http://sports.yahoo.com/mlb/news?slug=yhoo-3494andcounting&prov=yhoo&type=lgns. Further, Mr. Hample has a business where fans pay him to accompany them to a game and he guarantees they get a ball. *Id*. Mr. Hample claims to have never sold a baseball. *Id*.

74. Dellinger, *supra* note 18.

75. *Id*. at n.1. *See also supra* note 4 and accompanying text (quoting I.R.C. § 61).

76. *Do Auction Prices Control?*, *supra* note 38, at 191. *See also*, Dodge, *supra* note 8, at 724–25 (noting that the valuation of a record-setting baseball considers the possibility of that record being broken).

maximum potential value of the record-setting ball for contingencies that would reduce its value, such as the batter hitting another home run that season or someone else breaking that batter's record. For instance, McGwire hit his record-setting seventieth home run in the seventh inning of the Cardinals' last game of the year.[77] There was a substantial chance that McGwire would hit another home run if he got another at-bat, since he had already hit two home runs that day, and five home runs in his past eleven at-bats.[78] Thus, the value of McGwire's seventieth home run ball when Phil Ozersky caught it—and had undisputed possession—was not $1 million, the estimate for the record-setting ball.[79] The IRS would need to discount the $1 million estimate to reflect the possibility of McGwire hitting another home run that game. For instance, McGwire's sixty-eighth home run ball sold for less than 2% of the price of his seventieth home run ball.[80] The IRS would also need to discount the record-setting ball's value to reflect the possibility that another batter could break the record in the future. The value of the ball could also decrease if the batter cheated in breaking the record by using a corked bat or performance-enhancing substances.[81] Since nobody—not even the seemingly omniscient IRS—can predict the future, this type of discount valuation is not practical for record-setting baseballs because it is so difficult, subjective, and amorphous.[82]

The second option is estate-type valuation. This method has the same indeterminacy weaknesses as the discount-valuation method, as well as other limitations. In the estate context, "the price a decedent's estate obtains for certain property at an auction is presumed to be its [fair market value] on the

77. *Do Auction Prices Control?*, *supra* note 38, at 190.

78. *Id*.

79. *Id*.

80. *Id*.

81. *See, e.g.*, ESPN, *Bonds Testifies That Substances Didn't Work*, Dec. 4, 2004, http://sports.espn.go.com/mlb/news/story?id=1937594 [hereinafter *Substances Didn't Work*] (describing testimony by Bonds to a grand jury that he used substances described as "the clear" and "the cream," but that he did not know they were illegal steroids); ESPN, *Sosa is Ejected After Ump Finds Cork in Shattered Bat*, June 4, 2003, http://espn.go.com/mlb/news/2003/0603/1562772.html (describing Sosa's use of an illegal corked bat). A commenter on a tax law blog suggested that "considering what Barry Bonds did to himself to reach the home run record, there is a great likelihood the ball will shrivel to virtually nothing over time, therefore reducing its value as an asset." Posting of Peter Lattman to Wall St. J. Law Blog, *Tax Law Final Exam Question: Barry Bonds's Ball*, July 25, 2007, http://blogs.wsj.com/law/2007/07/25/tax-law-final-exam-question-barry-bondss-ball/.

82. *See generally Do Auction Prices Control?*, *supra* note 38 (discussing tax issues related to historic home-run baseballs). The fact that the possible event did not occur does not matter, as the IRS generally does not use hindsight in valuation. Thus, valuation should be performed "without regard to subsequent illuminating events." *Id.* at 191 (quoting United States v. Diehl, 460 F. Supp. 1282, 1301 (D. Tex. 1978), *aff'd* 586 F.2d 1080, 1080 (5th Cir. 1978) (per curiam)).

auction date."[83] If the auction takes place reasonably soon after the valuation date and there is no substantial change in market conditions, then the IRS deems the sale price as fair market value on the valuation date as well.[84] However, market conditions are rarely steady and static for record-setting baseballs. McGwire's record-setting baseball was estimated at approximately $1 million when Ozersky caught it.[85] However, it sold at auction the following spring for over $3 million.[86] If Ozersky had held the ball until after the 2001 season, it probably would have sold for far less because Barry Bonds broke McGwire's record by hitting seventy-three home runs that season.[87] Thus, estate-type valuation is not a practical option for valuing record-setting baseballs due to volatile and dynamic market conditions.

The third option is fundamentally the same as the discount-valuation method; however, it represents a practical compromise. Essentially, this third option—the retail-price method—forgoes the speculation of potential increase and decrease in value of the record-setting baseball and focuses solely on the concrete retail price to determine fair market value. In addition to being extremely practical, the retail-price method makes sense in the record-setting baseball context. The instant the catcher has undisputed possession, the ball is still only worth the retail price.[88] The ball is not a record-setting home run ball until the batter successfully reaches home plate and the game is officially completed. If the batter tore his Achilles tendon rounding second[89] and could not cross home plate, the injured batter may not get credit for hitting a home run since a pinch runner would officially cross home plate instead of the batter.[90] Another—albeit unlikely—

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83. *Do Auction Prices Control?*, *supra* note 38, at 189.

84. *Id.* at 189.

85. *Id.* at 190.

86. *Id*. at 189.

87. *Id.* As an illustration of diminishing value, in 1999, Sosa's sixty-sixth home run ball sold for $172,000, while McGwire's record-setting seventieth home run ball sold for $3,005,000, with the auction lasting only three minutes. *Id.* I bet the winning bidder of McGwire's seventieth home-run ball was less than happy when Bonds broke McGwire's record in 2001.

88. The ball may actually be worth less since it is no longer new, and is possibly lopsided after being crushed 500 feet by a steroid-powered slugger.

89. *See* ESPN, *Red Sox Outfielder Kapler Ruptures Achilles*, Sept. 15, 2005, http://sports.espn.go.com/mlb/news/story?id=2162043 (describing how Red Sox outfielder Gabe Kapler tore his Achilles tendon rounding second base in September 2005 after Tony Graffanino hit a home run).

90. The rules allow a pinch runner to finish rounding the bases for an injured batter. OFFICIAL BASEBALL R. 5.10(c)(1), *available at* http://mlb.mlb.com/mlb/official_info/ official_rules/foreword.jsp (last visited Nov. 11, 2008). However, it is unclear whether it would be ruled a home run for the injured batter since he never crossed home plate, but a pinch runner did instead. The most likely outcome is that the batter gets credit for the home run and the pinch runner gets credit for a run. In September 2008, such an incident occurred thanks to MLB's newly initiated instant-replay system. Janie McCauley, Giants Beat Dodgers With Help From Instant Replay, YAHOO! SPORTS, Sept. 27, 2008, http://sports.yahoo.com/mlb/recap?gid=280926126&prov=ap.

possibility is that the batter hits the potentially record-setting home run early in the game and then the game is rained out or otherwise called prior to completing four and a half innings.[91] If an umpire calls a game before it is a "regulation game," then Major League Baseball considers it "No Game" and the home run would not count.[92] So, the instant when the catcher catches the potentially record-setting ball and has undisputed possession, the ball is worth the same amount as any other foul ball hit into the stands. Only after the home run is "in the books" does the ball become the record-setting home-run ball and increase in value.

It is important to note that the significant future increase in value of the ball will not go forgotten; this value will simply be deferred as unrealized gain until the catcher sells the record-setting ball.[93] The catcher would have an amount realized of approximately $12.99—the retail price of an official Major League Baseball—and thus the IRS would tax the catcher on $12.99 of ordinary income in the year he catches the ball.[94] The catcher would then have a basis of $12.99 for his new capital asset. If the catcher sells the ball for a substantial sum in the future, he will recognize a capital gain—likely at the top rate of 28% for collectibles[95]—of the sale price minus the $12.99 basis in the year of the sale.

2. Determining Undisputed Possession

The undisputed-possession requirement will normally be relatively clear and easily satisfied with a record-setting baseball.[96] However, there are exceptions where multiple parties fervently dispute possession of the

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91. OFFICIAL BASEBALL R. 4.10(c), *available at* http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp.

92. OFFICIAL BASEBALL R. 4.10(e), *available at* http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp.

93. Whether to tax the record-setting ball immediately or defer tax until it is sold is essentially just a timing issue. *See* discussion *infra* Part IV.C.

94. *See* MLB.com Shop, http://shop.mlb.com/family/index.jsp?categoryId=693723&cp=1739120.1787200 (last visited Nov. 9, 2008) (listing official major league baseball prices).

95. I.R.C § 1(h) (West 2008).

96. The record-setting at-bat is heavily televised. The video footage, quick response of stadium personnel, and eyewitness testimony generally easily corroborate possession and identification of the record-setting ball. *See, e.g.*, Pat Graham, *Bonds Last Homer Ball Brings More Than $376K on Final Day of Auction*, NEWSER, Apr. 12, 2008, http://newser.com/article/d900k6do0/bonds-last-homer-ball-brings-more-than-376k-on-final-day-of-auction.html (mentioning the process for authenticating the catcher's claim to the ball). Major League Baseball recently implemented a cogent plan whereby the umpire substitutes a specially marked ball when a potentially record-setting at-bat takes place. The markings reduced uncertainty when Manny Ramirez hit his 500th career home run in May 2008 (which he will donate to charity). ESPN, *Manny Takes First Pitch to Right-Center, Becomes 24th Player to Hit 500*, June 1, 2008, http://sports.espn.go.com/mlb/news/story?id=3420725.

ball.[97] There are two recent high-profile examples of disputed possession of a record-setting baseball.

When Sammy Sosa tied McGwire's record-setting sixty-second home run, Sosa literally hit the ball out of the park.[98] On Waveland Avenue outside of Wrigley Field in Chicago, Gary "Moe" Mullins claimed he caught the record-setting ball, but then Brendon Cunningham wrenched it from his grasp amidst a massive fan pile-up.[99] Mullins filed suit against Cunningham, claiming rightful ownership of the ball, but eventually the middle-aged delivery driver could not financially sustain the lawsuit.[100] Cunningham told newspapers that he intended to return the ball to Sosa.[101] This factual scenario raises two important issues.

First, when should the IRS determine the ball's fair market value? Strictly speaking, the IRS should determine the ball's fair market value at the instant of undisputed possession. In the case of Sosa's disputed home run ball, the IRS would likely value the ball only after the lawsuit had been resolved. The IRS's deferred valuation will likely be much different from its initial valuation. After considerable time has passed, the ball will certainly have greater value than when it was first caught and the home run was not yet official. It is also likely that the ball will have diminished from its peak value if another batter broke the relevant record. Sosa's disputed sixty-second home run ball quickly diminished in value as Sosa went on to hit sixty-six home runs in 1998, and McGwire hit a record-setting seventy home runs.[102] This Article proposes a better solution to the valuation dilemma in Part IV below.

Second, since Cunningham did not immediately give the ball back to Sosa, would he face gift-tax consequences? Cunningham did not comply with the terms of Commissioner Rossotti's amnesty proposal since he did not "immediately" return the ball.[103] Commissioner Rossotti does not define "immediately."[104] Some commentators suggest that "immediately" can be a substantial duration so long as the value of the ball does not materially

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97. In virtually all cases, physical possession is held by one party, but legal title is actually disputed. Dodge, *supra* note 8, at 717.

98. *Is There 'Zero Basis' for Avoiding Taxable Income?*, *supra* note 18, at 318.

99. *Id*.

100. *Id*.

101. *Id*.

102. Baseball Almanac, Single Season Leaders for Home Runs, http://www.baseball-almanac.com/hitting/hihr4.shtml (last visited Nov. 11, 2008). Barry Bonds broke McGwire's record in 2001, hitting seventy-three home runs. *Id.*

103. *See supra* text accompanying note 27 (mentioning that the IRS does not tax a ball "immediately" returned).

104. *Is There 'Zero Basis' for Avoiding Taxable Income?*, *supra* note 18, at 319.

change.[105] In this case, the value of the ball certainly changed during the lawsuit as both Sosa and McGwire were busy hitting dingers.[106] However, because Cunningham did not have undisputed possession of the record-setting ball while the lawsuit was pending, the IRS would likely refrain from taxing Cunningham if he promptly returned the ball to Sosa after the lawsuit was dropped.[107] Given the backlash that the IRS has endured on this matter, a catcher will likely avoid any income or gift tax as long as he returns the ball within a reasonable time.[108]

The second example of disputed possession arose when Barry Bonds hit his record-setting seventy-third home run on October 7, 2001, breaking McGwire's record.[109] Alex Popov caught the ball, and video showed him with possession for about half a second before fans mobbed him.[110] After the melee, Patrick Hayashi ended up with the ball.[111] Popov sued Hayashi over what constituted possession: Popov's half-second catch or Hayashi's pig-pile victory.[112] Ultimately, the court held that this dispute fell into a grey area and both parties were entitled to possession.[113] The court—reminiscent of King Solomon—ordered Popov and Hayashi to split the ball.[114] Practically, this meant that the parties had to sell the ball and split the proceeds evenly.[115]

The court's decision raises timing and basis issues regarding the taxation of this record-setting ball.[116] The IRS necessarily needs to postpone taxing the ball until the dispute is resolved since the owner is undetermined. When the owner is determined, the IRS needs to decide to retroactively recognize ordinary income in the tax year of the catch, or to recognize only

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105. *Id*.

106. In addition to being busy hitting dingers, there is proof that Sosa and McGwire were also busy cheating by using banned substances and corked bats. *See supra* note 81.

107. *Is There 'Zero Basis' for Avoiding Taxable Income?*, *supra* note 18, at 318–19.

108. It is interesting to note that the catcher of McGwire's record-setting seventieth home-run ball did not immediately return it. *Id.* Instead, Phil Ozersky loaned the ball to the St. Louis Cardinals Hall of Fame while he decided what to do with it. If he ultimately chose to return or donate the ball, he would likely face gift-tax liability. *Id*. at 319.

109. *Contested Historic Homers: What Are the Tax Consequences?*, 98 J. TAX'N 189, 190 (2003).

110. *Id*.

111. *Id*.

112. *Id*.; Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *3 (Cal. Super. Ct., Dec. 18, 2002).

113. *Popov*, 2002 WL 31833731, at *7–8.

114. *Id.*

115. *Id.*

116. There are also issues of expense deductibility. Advertising and other costs associated with the court-ordered sale of the ball are potentially tax-deductible. *See id*. (ordering parties to sell ball and split the proceeds).

ordinary income in the year the parties resolved their dispute.[117] The IRS also needs to determine the appropriate holding period since the ball is likely a capital asset. If the IRS determines the holding period begins on the date of the catch, the parties would have incentive to extend the dispute for at least twelve months to achieve favorable long-term capital-gain treatment upon sale of the ball.

Additionally, the lengthy legal process further obfuscates any estimate of the ball's worth. Soon after the catch, some estimated the ball was worth around $1.5 million. However, it sold at a highly publicized auction in 2003 for only $450,000.[118] Thus, the discount-valuation method is not practical in the case of delayed undisputed possession. The auction took place more than six months after the court's ruling and thus the undisputed possession for Popov and Hayashi. If the auction took place immediately, the IRS could use the estate-type valuation method to set the fair market value at the sales price. However, the estate-type valuation is not workable under these circumstances since the delay leaves the value of the ball open to any number of contingencies.

The IRS could contort the retail-price valuation method into a form that it could use to value the ball in the delayed-possession scenario. Arguably, both Popov and Hayashi independently had undisputed possession for at least a fraction of a second shortly after Bonds hit the home run. In the half-second that Popov had the ball in his glove before fans mobbed him, he arguably had undisputed possession. In the resulting scrum, Popov lost possession and Hayashi grabbed the ball. Similarly, Hayashi had the ball in his possession for at least a fraction of a second before Popov alerted security and officially disputed Hayashi's possession. Thus, the IRS could split the retail price of the ball between Popov and Hayashi and allocate $6.50 of ordinary income to each in the 2001 tax year. Popov and Hayashi would each have a $6.50 basis in the ball. The IRS could then tax Popov and Hayashi on the $450,000 capital gain ($225,000 each) they received, minus each man's basis of $6.50 for a total capital gain of $224,993.50 each. If the IRS uses this method, the capital gains would be long-term since the undisputed possession would relate back to the 2001 catching of the ball.

As evidenced by the Sosa and Bonds examples, disputed possession significantly complicates the taxation of record-setting baseballs. However, normal income-tax principles and the treasure trove regulation still apply.

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117. The IRS could also adopt the approach in Part III.B and only tax when the ball is sold, thus giving the owners zero basis in the ball.

118. Matt Bean, *'Million-Dollar' Bonds Ball Sells for $450,000*, COURTTVNEWS, June 25, 2003, http://www.courttv.com/trials/baseball/ballsold_ctv.html.

There is no need to abandon fundamental income-tax principles as Zelenak & McMahon suggest[119] simply because the application of the tax code is slightly complicated.[120]

3. Other Tax Implications of Found Property in Professional Sports

There are many potential applications of the treasure trove regulation in professional sports since found-property souvenirs are often a part of the fan experience. Whereas Major League Baseball has a very fan-friendly policy that allows fans to keep any baseballs that go into the stands, the National Football League and National Basketball Association are much more restrictive.[121] Generally, a fan has to return a football or basketball that goes into the crowd.[122]

A common argument for such a restrictive policy is that footballs and basketballs cost much more than baseballs. Consequently, the respective leagues want to recover the more-expensive balls that make their way into the crowd. However, many more baseballs go into the stands than do footballs or basketballs. In a roundtable discussion, experts estimated that over 100,000 baseballs go into the stands during a Major League season.[123] At a retail value of $12.99, Major League Baseball clubs combine to lose a total of $1,299,000 each year in baseballs that find their way into the stands.[124] These experts estimated that an official National Football League football costs $100.[125] If each team averaged three field goals and three extra points each game, and the NFL eliminated the use of nets to keep footballs from going into the stands,[126] the NFL would lose approximately

119. Zelenak & McMahon, *supra* note 39.

120. When is the application of the tax code not complicated?

121. ESPN, Answer Guy: Why Can Baseball Fans Keep Balls that Go into the Stands, but Football Fans Can't?, http://proxy.espn.go.com/espnmag/story?name=20050912/FOB/AnswerGuy/BallsinStands (last visited Nov. 11, 2008) [hereinafter Answer Guy]. Reuben Berman, a fan at a 1921 Giants game at the Polo Grounds, defied convention and refused to return a ball he had caught. *Id.*

> When the ushers came to get it, [Berman] tossed it farther into the crowd and was thrown out. He sued MLB for $20,000, but was awarded only $100. But with few exceptions like during World War II, when a rubber shortage forced conservation fans have been allowed to keep balls hit into the seats ever since.

Id.

122. *Id.*

123. *Id*.

124. There is a possibility that MLB and NFL can take an abandonment loss on the balls that go into the stands. *See* I.R.C. § 165 (2000) ("There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise."). However, this may be hindered by the obsolescence exception. *See* Treas. Reg. § 1.165-2(b) (1960) (limiting deduction for loss incurred due to obsolescence and permanent discard of property).

125. Answer Guy, *supra* note 121.

126. Most college football games do not use nets to keep footballs from reaching the stands.

$300,000 during the regular season. Thus, economics does not justify the policy distinction between Major League Baseball and the National Football League.

The official justification is that NFL and NBA league officials do not want to create additional crowd-control problems. Is this to say that baseball fans are more civilized than football or basketball fans? Given recent events,[127] the answer is most likely yes.

The other common way that footballs go into the stands is when a player scores a touchdown and throws the ball to a fan. The National Football League allows players to give footballs to fans, but only in the first few rows.[128] The justification is that a player giving a ball to fans in the first few rows will not cause the crowd-control problems that would result if the player threw the ball halfway into the stands. If a player does throw or kick the ball deep into the stands, the NFL fines the player $2,500 for the first offense and $5,000 for the second.[129]

If the lucky fan who acquires an NFL football is just a normal fan, then it makes sense to apply the same found property-tax treatment as a fan catching a record-setting baseball.[130] However, the player often gives a touchdown football to a relative or even his agent in the stands. In the case of a relative, the ball is likely a gift, and thus excludable from gross income under I.R.C. section 102 and Treasury Regulation section 1.102-1.[131] In the case of the player's agent, the transfer may fail the "disinterested generosity" test of *Duberstein*.[132]

Since the NFL appears to allow players to keep touchdown footballs, how should the IRS tax a player when he acquires a record-setting football? The most logical classification for the record-setting football is self-created property. The football player used his skills and labor to convert an ordinary football into a valuable, record-setting football. Although star NFL players

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However, ushers do attempt to retrieve the football. Many fans have been successful in hiding the football and escaping with a valuable souvenir, unbeknownst to the football team and the IRS.

127. *See, e.g.*, ESPN, *Artest, Jackson Charge Palace Stands*, Nov. 21, 2004, http://sports.espn.go.com/nba/news/story?id=1927380 (describing brawl involving players at Pistons-Pacers basketball game); *Cowboy Fans Fight at Redskins Game*, AOL, Jan. 1, 2008, http://sports.aol.com/fanhouse/2008/01/01/video-cowboy-fans-fight-at-redskins-game/ (linking to video of a brawl at a football game).

128. Answer Guy, *supra* note 121.

129. *Id.*

130. It seems the IRS would have an incentive to encourage the NFL to let fans keep the footballs as it would raise tax revenues.

131. I.R.C. § 102(a) (2000); Treas. Reg. § 1.102-1(a) (1960).

132. *See* Comm'r v. Duberstein, 363 U.S. 278, 285–86 (1960) (quoting Comm'r v. LoBue, 351 U.S. 243, 246 (1956)) (holding that the most "critical consideration" in determining whether or not a transfer is a gift is the transferor's intent).

generally have a very high ability to pay taxes, the proper tax treatment is to tax a record-setting football only when (and if) the player sells the ball since it is not found property, but self-created property.

There are some interesting examples that raise other questions, however. For instance, two players for the New England Patriots set three records on one play against the New York Giants in the last regular-season game of the 2007–08 NFL season.[133] Tom Brady connected with Randy Moss for a 65-yard touchdown pass in the fourth quarter.[134] On this one play, Brady set the single-season quarterback touchdown record with fifty, Moss set the single-season receiving touchdown record with twenty-three, and the Patriots set the team season scoring record at 582 points.[135] Moss approached Brady after the game and suggested they "saw the game ball in half," with Moss taking half for his kids and Brady taking half for his new son.[136] In his typical unselfish manner, Brady told Moss, "Nah, you keep it."[137] Moss was not happy with that response, since they had "both earned it."[138] Thus, this record-setting football ownership debate remains unsettled.[139] Although taxing Brady or Moss would make the millions of Patriots-haters happy, whichever player ends up with the ball should not be taxed until (and if) he sells the ball since it is self-created property.

Autographs are also a relevant tax issue in professional sports today.[140] If a fan either buys a ball or catches a game ball and has a player autograph that ball, it will considerably appreciate in value. It seems that autographed memorabilia falls into the category of self-created property. The fan has to invest time, effort, and often skill, to get a player to autograph the fans property. Thus, any gain as a result of the autograph should go unrealized until (and if) the fan sold the autographed property.

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133. ESPN, *Patriots Set Scoring Record, Brady and Moss Set Season Marks*, Dec. 30, 2007, http://sports.espn.go.com/nfl/news/story?id=3173090.

134. *Id.*

135. *Id*. The single-season points record includes a two-point conversion after the Brady–Moss record touchdown. *Id.* Note, the Patriots also set the regular season record by going 16-0, the first team to do so since the NFL expanded to a sixteen game schedule in 1978. *The New England Patriots' Perfect Season*, REUTERS, Dec. 30, 2007, http://www.reuters.com/article/domesticNews/idUSGOR01951620071230.

136. Jane McManus, *Brady-Moss a Perfect Connection for Pats*, USATODAY.COM, Dec. 30, 2007, http://www.usatoday.com/sports/football/nfl/2007-12-30-moss-brady-sidebar_N.htm.

137. *Id*.

138. *Id*.

139. *Id.*

140. For a very detailed and entertaining analysis of the tax implications surrounding baseball autographs, see Joel S. Newman, *Baseball Autographs*, 116 TAX NOTES 1078, 1078 (2007).

III. CONSEQUENCES OF DESTROYING FOUND PROPERTY

Occasionally the finder or owner of valuable property prefers to destroy it rather than keep or sell it. There are myriad reasons behind this decision, including public relations ploys, desire to make a statement, and sheer insanity. The case of the original finder destroying the property is fairly straightforward. Under the treasure trove regulation and section 61, the finder would pay tax on the fair market value of the found property on the date the finder acquired undisputed possession.[141] If the finder were an individual—as is usually the case—he would not likely be able to recognize a loss under section 165(c) when he destroyed the property.[142]

However, the finder would be able to recognize a capital loss if he sold the destroyed property. The finder would recognize a loss of the difference between his basis in the property—the original fair market value—and the sales price.[143] The finder would be subject to the timing limitations under section 1211,[144] but could eventually deduct the entire loss. The tax consequences are not as well settled if the finder sells the property to a business that then destroys the property.

The cases of the "Bartman Ball" and the "Bonds Asterisk Ball" perfectly illustrate the difficulties in assessing the tax implications when a business purchases and then destroys a record-setting—or at least infamous—baseball.

A. The "Bartman Ball"

A Chicago attorney recovered the infamous "Bartman Ball" after Cubs fan Steve Bartman unwittingly deflected a fly ball from Cubs outfielder Moises Alou's glove in game six of the 2003 National League Championship Series.[145] The Cubs lost that series and continued their ninety-five-year World Series Championship drought.[146] While the ball was initially valued at $10,000, Harry Caray's Restaurant paid almost $114,000 for the ball in December 2003.[147] Instead of simply displaying the ball,

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141. I.R.C. § 61 (2000); Treas. Reg § 1.61-14(a) (1960).

142. *See* I.R.C. § 165(c) (2000) (setting the limitations for individuals on I.R.C. section 165(a) loss deductions).

143. This could still result in a capital gain, especially under the retail-price valuation method.

144. I.R.C. § 1211(b) (2000).

145. *Tax Consequences of Buying and Destroying Infamous Baseballs*, 100 J. TAX'N 126, 126 (2004) [hereinafter *Tax Consequences*].

146. *Id.*

147. *Id*. Harry Caray's Restaurant is a Chicago landmark for Cubs fans. Heather Vogell, *City Planners Aim to Keep the Flavor of River North; Landmark Status Eyed for 2 Buildings*, CHI. TRIB., Mar. 4, 2001, at 1, *available at* 2001 WLNR 10643726.

Harry Caray's decided to destroy the ball to erase the "most tangible symbol of [the] pain" suffered by Cubs fans.[148]

The question that arose is whether Harry Caray's could take a tax deduction when it destroyed this infamous and expensive baseball. The answer is likely yes. However, it is difficult to determine whether the deduction is better classified as an ordinary and necessary business expense under section 162, or a short-term capital loss under section 165.[149] This classification is very important because a capital loss requires the sale or disposition of the ball under section 165(b).[150]

The ball is likely an advertising expense under section 162. Harry Caray's destroyed the ball on the same day as its annual worldwide toast to its namesake, the late Cubs announcer Harry Caray.[151] The destruction of the ball brought massive national publicity to the restaurant.[152] Harry Caray's went even further and coordinated this event with a $1 million fundraiser for juvenile diabetes research.[153] Harry Caray's and twenty other corporate sponsors took out a full-page ad to promote the event, and enlisted the support of several celebrity volunteers.[154]

Harry Caray's should be able to deduct the full cost of the ball as an advertising expense in the 2004 tax year because both the event and the destruction of the ball took place in 2004. The major problem with section 162 treatment here is that Harry Caray's general manager publicly stated several times that the restaurant destroyed the ball as a grand tribute to Cubs fans—not to generate public relations.[155] If destroying the ball was simply a noble gesture with no intention to develop business, the ball would not likely qualify under section 162 as an ordinary and necessary business expense.

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148. *Id.* (quoting Michael Sneed, *$113,824 Will Help Put Foul Ball Out of its Misery*, CHI. SUN-TIMES, Dec. 20, 2003, at 3, *available at* 2003 WLNR 13882156).

149. I.R.C. § 162 (2000); *id.* § 165 (2000). *See Tax Consequences*, *supra* note 145, at 126–28 (forecasting the potential tax treatment of the "Bartman Ball" by distinguishing the capital losses from advertising costs and their respective outcomes).

150. I.R.C. § 165(b) (2000). If the ball were completely destroyed, it would likely be an ordinary loss and not a capital loss under I.R.C. § 1222. *Still More on the Tax Consequences of Destroying Infamous Baseballs*, 100 J. TAX'N 318, 318 (2004) [hereinafter *Still More on the Tax Consequences*].

151. *Tax Consequences*, *supra* note 145, at 127.

152. *Still More on the Tax Consequences*, *supra* note 150, at 318.

153. *More on the Tax Consequences of Destroying Infamous Baseballs*, 100 J. TAX'N 251, 252 (2004) [hereinafter *More on the Tax Consequences*]. There is the possibility that the ball could be treated as a charitable-contribution deduction under § 170; however, it is unlikely. *See id*. (suggesting that the destruction of the ball could be construed as a "constructive contribution" to the charity, but the delivery requirement of § 170 is arguably not met).

154. *Id*.

155. *Id*. at 253.

If the IRS determined that the ball was not an ordinary and necessary business expense under section 162, it would easily qualify as a capital asset for purposes of section 165. If Harry Caray's destroyed the ball and then sold it for much less than it paid, the restaurant could take a capital loss of its $114,000 basis in the ball minus the sales price.

However, Harry Caray's did not sell the ball after it destroyed it.[156] Rather, Harry Caray's chose to display the shreds of the destroyed ball indefinitely in the restaurant. Thus, destroying the ball was merely a modification of the form of the asset from "a spherical object made of rubber and horsehide sitting in a glass box to a lump of shredded rubber and horsehide sitting in the same glass box."[157] Since there was no sale or other disposition of the ball, Harry Caray's cannot take a capital loss while it still owns the destroyed ball.

Despite the manager's statements, the "Bartman Ball" is an ordinary and necessary business expense under section 162. After Harry Caray's destroyed the ball, business was 20% higher than its previous record.[158] Customers come to Harry Caray's just to see the destroyed ball, often creating "logjams" at the display case.[159] Thus, the "Bartman Ball" proved to be a very shrewd advertising expense for Harry Caray's.

B. The "Bonds Asterisk Ball"

When Barry Bonds broke Hank Aaron's career home run record,[160] Matt Murphy, a twenty-one-year-old college student and Mets fan, caught the record-setting ball.[161] Murphy sold the ball shortly thereafter for a little over $752,000.[162] Marc Ecko, a clothing designer and entrepreneur, purchased the ball in September 2007.[163] Ecko created a website and let fans vote on the fate of the record-setting ball.[164] Ecko gave the fans three

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156. *Id*. If the ball had been completely destroyed so nothing remained of it, a § 1001 "other disposition" could possibly apply. I.R.C. § 1001 (2000). *See also More on the Tax Consequences*, *supra* note 153, at 253 (concluding that mere modification of the asset precludes § 1001 classification).

157. *Still More on the Tax Consequences*, *supra* note 150, at 318.

158. *Id*.

159. *Id*.

160. Many feel that Bonds cheated in breaking Aaron's record because he—perhaps unwittingly—took performance-enhancing substances. *Substances Didn't Work*, *supra* note 81.

161. ESPN, *Bonds' No. 756 Ball Generates More Than Initial Estimates*, Sept. 16, 2007, http://sports.espn.go.com/mlb/news/story?id=3022027.

162. *Id*.

163. Mark Ecko, *The Public Has Spoken*, http://www.vote756.com/marcecko/ (last visited Nov. 11, 2008). I assume for purposes of this analysis that Mark Ecko Enterprises purchased the ball, and not Ecko personally.

164. *Id*.

choices: "(A) Bestow [the ball] intact to Cooperstown, (B) Permanently brand the ball with an asterisk before sending it to Cooperstown, *or* (C) Launch it into space forever."[165]

The 47% of voters who wanted the ball branded got their wish.[166] Ecko delivered the fate of the ball on NBC's Today Show.[167] After much publicity, Ecko delivered the branded ball to the Baseball Hall of Fame, forever memorializing Americans' doubts surrounding the record.[168]

For the same reasons as the "Bartman Ball" above, Ecko should be able to treat the purchase of the "Bonds Asterisk Ball" as an ordinary and necessary business expense under section 162. Ecko gained massive publicity; over ten million people visited his website and voted in the eight days following his purchase.[169] Thus, Ecko should be able to deduct the full price of the ball for the 2007 tax year under section 162.

If the IRS disallowed the business-expense deduction, Ecko would have a charitable-contribution deduction under section 170.[170] However, Ecko would be subject to an income limitation. Ecko could deduct the contribution in the year that Ecko donates the ball only to the extent that it does not exceed 10% of the corporation's profits for that year.[171] Ecko could carry over the contribution for the next five years, however.[172] If Ecko did not treat the ball as a business expense under section 162, it would be a capital asset and the charitable contribution would likely be in the amount of Ecko's basis in the ball. Ecko's basis would likely be the purchase price of over $742,000 despite the newly branded asterisk.

If Ecko had launched the ball into space, the tax treatment would be a bit different. Ecko would be able to take an abandonment loss under section 165 and Treasury Regulation section 1.165-2.[173] Ecko would be required to

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165. *Id*. I voted to launch it into space forever, but I am happy with the branding outcome as well.

166. *Id*.

167. *Id*. Ecko was also featured on Nightline and received a lot of publicity on YouTube and Myspace. *Id*.

168. *Id*.

169. *Id*.

170. In fact, Ecko may also be able to take a charitable-contribution deduction in addition to the business expense deduction because he actually and permanently delivered the ball to the nonprofit organization. *See supra* note 153 and accompanying text; Ben Walker, *Bonds 756th Homer Ball Lands in Hall, Finally*, ABC NEWS, July 1, 2008, http://abcnews.go.com/Sports/wireStory?id=5285869.

171. I.R.C. § 170(b)(2)(A) (2000).

172. *Id.*

173. *Id.* § 165 (2000); Treas. Reg. § 1.165-2 (1960). *See* FEDERAL TAX BAEDEKER 92 (Robert F. Manning & David F. Winnish, eds. 2002). "A loss may be deductible for abandoning an asset if the owner shows an intent to abandon it and makes an affirmative act of abandonment. The amount of the loss is generally the taxpayer's adjusted basis in the property that has been abandoned." *Id.* (citation omitted).

have the intent to abandon the ball and make an affirmative act of abandonment.[174] Ecko would certainly meet these requirements by launching the ball into space. The amount of the loss is generally the taxpayer's adjusted basis in the property that is abandoned.[175] Thus, Ecko would likely be able to deduct the purchase price of over $742,000.

There is a public-policy argument that the IRS should not allow a loss in Harry Caray's or Ecko's cases because it would encourage wanton destruction and abandonment of property.[176] However, neither case presents wanton destruction.[177] The destruction of the "Bartman Ball" and the possibility of launching the "Bonds Asterisk Ball" into space were both calculated business maneuvers.[178] Each maneuver made a statement, and indirectly, quite a bit of money.

IV. PROPOSAL

This Article proposes a method of taxing found property—specifically record-setting baseballs—that is easily implemented, simple, fair, and generous to taxpayers. Most importantly, this proposal makes tax sense. The IRS should immediately tax the catcher of the baseball on the retail price of the baseball, then treat the increase in value as unrealized gain and tax the catcher on that gain if the catcher sells the ball.[179] If possession is disputed, the same overall tax principle should apply, and the tax date should relate back to the date of the catch.

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174. FEDERAL TAX BAEDEKER, *supra* note 173, at 92.

175. *Id*.

176. *Still More on the Tax Consequences*, *supra* note 150, at 318. *See* Blackman v. Comm'r, 88 T.C. 677, 682 (1987) (denying a loss under § 165 when the taxpayer intentionally set fire to his wife's clothes and accidentally burned his own house down).

177. There is the interesting case of the 2007 World Series ball, where future Hall of Famer Jonathan Papelbon claimed that his dog ate it. ESPN, *Papelbon's Dog Takes a Bite of World Series History*, Dec. 20, 2007, http://sports.espn.go.com/espn/wire?section=mlb&id=3163986. There was a great deal of mystery surrounding the ball, but eventually Papelbon confessed that his dog ate the ball. *Id.* At first, he said that he threw the shreds of the ball away, but later said that he was keeping the destroyed ball. *Id.* Neither the Red Sox nor the Baseball Hall of Fame care about the fate of the ball, unlike the last-out ball from the 2004 World Series that Doug Mientkiewicz kept for a while before loaning it to the team for a year, and then donating it to the Hall of Fame. *Id.* I believe the Red Sox did not want to anger Papelbon, but did not care about Mientkiewicz, as they cut him from the team shortly thereafter. *Id.*

178. *See supra* Part III.A–B.

179. Note that this proposal applies to *all* baseballs caught by fans, not just those that set records. It would be difficult for the IRS to enforce the reporting of income from every ball hit into the stands, but the IRS could enforce the cases that are in the public eye and that involve the most money. Further, the IRS may be able to determine if the catcher did not report the income if the catcher sells the ball within a few years of catching it.

A. Policy Drawbacks to Taxing upon Possession and Using the Discount Valuation Method

In addition to the practical difficulties of using the discount method to value a record-setting ball,[180] there are several policy justifications that favor the retail-price valuation method. If the IRS used the discount method and determined a massive fair market value—and thus amount realized—the catcher's anomalous adjusted gross income for that tax year would have detrimental effects. There are scores of deductions that are subject to adjusted-gross-income limitations.[181] For instance, if the catcher's adjusted gross income is $50,000 without the ball, any medical expenses above 7.5% of adjusted gross income—$3,750 in this example—are deductible.[182] If the catcher's adjusted gross income is $1,000,000 with the ball, then he can only deduct medical expenses that exceed $75,000.

The adjusted-gross-income limitation would also likely affect the catcher's eligibility for gambling-loss deductions, regular and Roth IRAs, and HOPE and lifetime-learning credits as well.[183] Further, the taxpayer is subject to income limitations for deducting capital losses.[184] If the IRS used the discount method and overestimated the value of the ball—or if the ball quickly dropped in value—the taxpayer would have a capital loss that could take decades to deduct. For instance, if the IRS valued the ball at $500,000 and the taxpayer later sells the ball for $300,000, the taxpayer is only able to deduct his $200,000 of loss in $3,000 increments to reduce ordinary income each year.[185] In this example, it would take the taxpayer sixty-seven years to offset the loss. The retail-price valuation method avoids all of these income-limitation issues, while still allowing the IRS to properly tax upon possession of the found property.

B. Convenience: The Importance of Liquidity and Valuation

Convenience is the strongest argument in favor of Zelenak & McMahon's proposal to tax found property only upon sale.[186] The taxpayer would have liquidity after he converts the property to cash in the sale, and the sales price provides the valuation. The question is whether convenience

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180. *See supra* Part II.C.1.
181. Dellinger, *supra* note 18, at n.2.
182. I.R.C. § 213 (2000).
183. Dellinger, *supra* note 18, at n.2.
184. I.R.C. § 1211(b) (2000).
185. *Id.* The taxpayer can offset any capital gains with his capital loss from the ball; however, a typical bleacher-sitting baseball fan will not likely have substantial capital gains.
186. Zelenak & McMahon, *supra* note 39. *See supra* Part II.B.

factors should take priority over well-established tax principles. The answer is a resounding no. If Zelenak & McMahon's proposal were adopted, the "'cash' view of income would elevate convenience over all other policy norms."[187] Dodge recognizes that the tax base may occasionally have to be modified due to practical concerns such as impossibility of valuation or nonliquidity.[188] However, these practical concerns should not automatically trump all other policy justifications.[189] Dodge asserts that there is case law that supports realizing gain even in the face of complete illiquidity and difficulties in valuation.[190] Dodge argues that "there is not even a coherent or persuasive normative basis for an across-the-board exclusion for unrealized appreciation."[191] He recognizes that difficulty of valuation and nonliquidity are "convenience" factors that are matters of degree, which are not even present in many found-property cases.[192] Dodge further argues that economic efficiency requires windfall gains to be taxed more heavily than business and investment gains.[193] He contends that taxing windfall gains when they are acquired accomplishes this economic-efficiency goal.[194]

Overall, Dodge properly asserts that "immediate realization should be the judicial norm, barring extreme circumstances, and exceptions should be left to Congress."[195] Thus, Dodge correctly concludes that "[m]ere nonliquidity, difficulty of valuation, or a possibility of forfeiture should not be a bar to current realization."[196] Fortunately, the retail-price valuation method avoids the problems of nonliquidity, difficulty of valuation, and forfeiture.

C. Economic Impact

Admittedly, taxing found property immediately upon possession—especially using the retail-price valuation method—instead of waiting until sale will not have a significant economic impact on the United States

187. Dodge, *supra* note 8, at 691.

188. *Id.* at 693.

189. *Id*.

190. *Id*. at 711; *accord* Sproull v. Comm'r, 16 T.C. 244, 247–48 (1951); United States v. Drescher, 179 F.2d 863, 865 (2d Cir. 1950); Ward v. Comm'r, 159 F.2d 502, 504–05 (2d Cir. 1947).

191. Dodge, *supra* note 8, at 691.

192. *Id*.

193. *Id.* at 698 (citing RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 277–96 (5th ed. 1989)).

194. Dodge, *supra* note 8, at 698. *See also* MUSGRAVE, *supra* note 193, at 337. "Postponement of the tax until realization gives an unfair advantage to such income. The Treasury in effect grants an interest-free loan on the amount of postponed liability." *Id.*

195. Dodge, *supra* note 8, at 688.

196. *Id*.

economy. However, taxing found property upon possession has a positive influence on taxpayer morale, makes tax sense, and thus could have a significant indirect economic effect. According to Zelenak & McMahon, found property should not be taxed until sale because "the Treasury can afford to wait for the sale—and the resulting disappearance of valuation and liquidity concerns—to impose tax."[197] However, just because the Treasury can afford to wait[198] does not mean it should.

Zelenak & McMahon do raise an important point: the debate surrounding found property, such as record-setting baseballs, is essentially a timing debate. If the IRS applies section 61 and the treasure trove regulation, it both determines fair market value and taxes the found property immediately. If the IRS adopts Zelenak & McMahon's proposal, it values and taxes the found property when it is sold. However, the IRS's timing can significantly affect taxpayers.[199] The IRS's timing is also a central factor in a tax-sense analysis.

D. Tax Sense

The strongest argument in favor of taxing found property upon possession is that this treatment makes the most tax sense: it is consistent with both the language of the code and important case law. Taxing found property upon possession falls perfectly within section 162, Treasury Regulation sections 1.162-1 and 1.162-14, and *Glenshaw Glass*.[200] Found property is clearly an accession to wealth, and thus taxable gross income immediately upon possession.

E. Complexity

Taxing found property upon sale is admittedly the least-complex method. However, taxing found property upon possession is fairer and can be reduced to a fairly simple form, depending upon the valuation method employed. As discussed, found property may be taxed upon possession using the discount-valuation method or the retail-price method.[201] The discount-valuation method is very complex and inherently imprecise, whereas the

197. Zelenak & McMahon, *supra* note 39, at 1307.

198. With a current national deficit of over $10.5 trillion, who is to say the Treasury can wait? *See* U.S. National Debt Clock, http://brillig.com/debt_clock/ (last visited Nov. 4, 2008).

199. *See supra* Part IV.A–B.

200. Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955). *See also supra* notes 11–13 and accompanying text (describing the requirements for gross income).

201. *See Supra* Part II.C.1.

retail-price valuation method is simple and consistent.[202] Although the retail-price valuation method requires the IRS to concede that found property might have a higher value under the discount-valuation method, the greatly reduced complexity of the retail-price valuation method justifies this compromise. Further, if the IRS issued a statement detailing the simple retail price valuation method, it would significantly reduce the uncertainty surrounding the valuation and tax implications of found property.

F. How Taxing Upon Possession Will Impact or Distort Behavior

Another argument in favor of taxing found property upon sale is that this encourages Americans to keep a piece of American history and culture in their family. Under Zelenak & McMahon's proposal, the catcher of a record-setting ball would not need to sell the ball simply to pay the taxes. However, tax deferral could lead to a private individual keeping a piece of baseball history where, if sold instead, a wealthy buyer might donate it to the Hall of Fame or display it publicly. Further, taxing upon possession can also avoid a forced sale if the property is valued under the retail-price method. Using that method, the catcher only owes taxes on the $12.99 retail price of the baseball.

G. Taxpayer Morale

Taxpayer morale is the reason why the seemingly trivial debate about the proper tax treatment of record-setting baseballs is important. Taxing record-setting baseballs is highly publicized, perhaps more than any other taxation issue. This issue reaches mainstream America and is largely on a level that the average taxpayer can comprehend. Thus, taxing record-setting baseballs is incredibly important for the IRS to maintain and manage taxpayer morale. If the IRS wants to send a message, it can do so through its public tax treatment of record-setting baseballs. So far, the IRS has failed to capitalize on this opportunity. By its flip-flopping during the 1998 home-run race, the IRS sent the signal that the "application of tax law depends very much on the individual involved or the public relations fallout from a taxable transaction."[203] The IRS should implement and publicize the proposal elucidated in this Article. It would show American taxpayers that the IRS is decisive, consistent, fair, and compassionate.

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202. *Id.*
203. Dellinger, *supra* note 18.

CONCLUSION

There is only one fair and manageable way to properly tax found property, specifically record-setting baseballs. The IRS should immediately tax the catcher of the baseball on the retail price of the baseball, then treat the increase in value as unrealized gain. The IRS should only tax the catcher on that gain if and when the catcher sells the ball. If possession is disputed, the same overall tax principle should apply and the tax date should relate back to the date of the catch. The IRS should implement and publicize this proposal because it is easily implemented, simple, fair and generous to taxpayers, and most importantly, makes tax sense. Although taxing found property immediately upon possession is required under section 61, Dodge recognizes that Congress can legitimately create a separate deferral rule for record-setting baseballs.[204] Given Congress's extremely hostile view of taxing America's pastime, it is certainly possible that Congress could create an exception to section 61 and the treasure trove regulation that would allow baseball fans to defer tax on baseballs until (and if) they are sold. While taxpayers and baseball fans would likely welcome such an exception, many tax geeks across the country would be devastated if Congress ended the baseball-tax debate.

204. Dodge, *supra* note 8, at 728.