

ATHLETIC SCHOLARSHIPS AND TAXES: OR A TOUCHDOWN IN TAXES

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In the case of an individual, gross income does not include—

(1) *any amount received—*

(A) *as a scholarship at an educational institution . . .*¹

INTRODUCTION

Although athletics at the intercollegiate level are doubtless as American as motherhood and apple pie, a few malcontents suggest, now and again, that intercollegiate sports have become a business venture, performed primarily for the faithful alumni rather than for the benefit of the students. There have even been those who have suggested that athletic scholarships are presently “pay for play” and should be, at the very least, based on need rather than athletic ability.²

The coaching fraternity is hardly ecstatic about the concept of awarding athletic scholarships on a need basis, rather than on an ability basis. Perhaps the most successful college football coach in the country, Nebraska’s Bob Devaney, has stated publicly that this premise would be unacceptable to him.³

Thus, the athletic scholarship game goes on. Faithful alumni contribute to the care and feeding of athletes. In return they receive a certificate that they are members of the booster club, and may receive special parking privileges at home games, and of course they obtain the warm feeling that their contribution may aid in the fielding of a particularly good team this year. They also obtain a tax deduction for their contribution.

At the other end of the contribution chain a hopefully athletically talented individual picks up his monthly stipend (all in accordance with the stringent rules of the NCAA), performs in his particular sport, and reports nary a cent of the grant for tax purposes. This is as it should be, of course, because athletic scholarships are surely scholarships. Or are they?

Athletic scholarships are an outgrowth of the development of

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¹ INT. REV. CODE of 1954, § 117(a).

² New York Times, July 11, 1971, § 5, at 5, col. 7.

³ SPORTS ILLUSTRATED, Sept. 13, 1971, at 57.

college football in the United States. Although direct scholarships were relatively unknown until after World War II, some Southern institutions reportedly granted them as early as the 1930's.⁴ Prior to that time athletes were subsidized in a more haphazard fashion.

Today, however, the grant-in-aid is a common practice throughout the country. It has been identified as the largest single expenditure for football in the typical athletic program.⁵ Aid grants are generally raised by alumni contributions, although the State of Washington now permits the use of gate receipts in the athletic programs of state institutions.⁶ But does this make them taxable to their recipients under the Internal Revenue Code of 1954?

The Internal Revenue Code says yes. The Internal Revenue Service says nothing. The United States Tax Court says no.

THE CODE

Section 117 of the Internal Revenue Code of 1954 quite explicitly provides that amounts which are received as scholarships are not taxable *unless* such amounts are in the nature of payment for "teaching, research, or other services in the nature of part-time employment required as a condition to receiving the . . . grant."⁷ An exception to taxing stipends under these circumstances is provided for in cases where similar services are required of all candidates as a condition of their degrees.⁸ As discussed hereafter, the Treasury's regulations interpreting Section 117 are silent insofar as athletic grants are specifically concerned.⁹

The Congressional history of Section 117 is of little help in determining whether athletic grants are truly tax-free. The Senate Finance Committee report dealing with the 1954 Code indicates that Section 117 was adopted to clear up some confusion that had arisen:

Present law contains no provision regarding treatment of scholarships and fellowship grants. The basic ruling of the Internal Revenue Service which states that the amount of a grant or fellowship is includible in gross income unless it can be established to be a gift has not provided a clear-cut method of determining whether a grant is taxable.¹⁰

⁴ M. Jackson, *College Football Has Become a Losing Business*, SPORT, CULTURE, AND SOCIETY 232, 237-38 (J. Loy & G. Kenyon eds. 1969).

⁵ *Id.* at 241.

⁶ WASH. REV. CODE § 28B.10.704 (1971).

⁷ INT. REV. CODE of 1954, 117(b)(1).

⁸ *Id.*

⁹ Treas. Reg. § 1.117-1 (1956), *as amended*, T.D. 6456, 1960-1 CUM. BULL. 43; § 1.117-2 (1965), *as amended*, T.D. 6782, 1965-1 CUM. BULL. 63; §§ 1.117-3 & 4 (1956).

¹⁰ S. REP. NO. 1622, 83d Cong., 2d Sess. 17 (1954).

Interestingly enough, the original Bill as proposed by the House of Representatives would have taxed *all* grants which were conditioned on teaching or research.¹¹ The Senate Finance Committee amended this provision to permit an exclusion where the individual involved was required to perform certain services as a condition to his degree. The Senate Finance Committee *also* extended the potential taxability of such grants to include payments for "other services" as well as the teaching and research services which the House Bill would have reached.¹²

Despite the lack of a specific exclusion for athletic grants and the obvious difficulty of anyone realistically arguing that athletic participation is a condition of a particular degree, the Internal Revenue Service has yet to publicly rule either that such grants are, or are not, taxable. The United States Tax Court has considered the problem in one instance, and promptly side stepped the question with all of the agility of the athlete whose tax problem it was they were considering.¹³

James Heidel, gifted defensive halfback and occasional quarterback for the University of Mississippi in 1963, 1964 and 1965, had received a substantial bonus in 1965 to officially become a professional football player. The Internal Revenue Service and Heidel's attorney agreed that the employment payment in 1965 was attributable in substantial part to his performance with "Ole Miss" during his collegiate years. Heidel reported his \$50,000.00 bonus on his 1965 income tax return and computed his income tax return and computed his liability under the income-averaging method then allowed by Sections 1301-1305 of the Internal Revenue Code. The Internal Revenue Service disallowed such treatment on the basis that Heidel was not eligible for income averaging under the restrictions imposed by Section 1303.

Under the then-provisions of Section 1303 of the 1954 Code, an individual would be ineligible for income-averaging unless he furnished over one-half of his total support during the "base period years." Heidel took the position that his "Ole Miss" stipend constituted support which he had provided for himself, thus raising his support over the one-half figure. The Tax Court disagreed.

Judge Drennen noted that Heidel had not claimed that the amounts he received from Mississippi were anything other than a scholarship, but was taking the position that because he "performed services as an athlete in order to maintain that scholarship" the

¹¹ H. REP. NO. 1337, 83d Cong., 2d Sess. 16-17 (1954).

¹² S. REP. NO. 1622, 83d Cong., 2d Sess. 18 (1954).

¹³ James B. Heidel, 56 T.C. 95 (1971).

money received constituted support furnished by Heidel.¹⁴ In rejecting this position, Judge Drennen noted that the value of the scholarship which the taxpayer had received "was not subject to United States taxes."¹⁵ Evidently this gave Judge Drennen some concern, for he went on to note:

Thus, if we accept the premise that the grant-in-aid was received by petitioner in return for his services as a football player in order to include it in support furnished by petitioner for himself, it would not qualify as an amount received as a scholarship, and excludable from income

. . . We believe that, even leaving aside the implications inherent in treating the value of the scholarship as received by petitioner in return for playing college football, it is more consistent with the ordinary understanding of athletic scholarships and the spirit and intent of Congress in requiring generally that an individual provide at least 50 percent of his support in the base period years to qualify for income averaging to conclude that the value of the grant-in-aid afforded to petitioner in 1961 cannot be included in the amount of support furnished for himself. . . .¹⁶

It is respectfully submitted that Judge Drennen was wrong and that Mr. Heidel was entitled to include the athletic grants as part of his base period income. Those grants, it seems certain, were payments for services rendered and were not scholarships, just as surely as the payments received by Mr. Richard E. Johnson, Mr. Richard A. Wolfe and Mrs. Martin L. Pomerantz were held, by no less authority than the United States Supreme Court in *Bingler v. Johnson*,¹⁷ to be compensation for services rendered (or to be rendered) rather than nontaxable scholarships.

In *Bingler* the taxpayers had sought to exclude from their respective incomes, amounts that were paid to them by their employer while they attended graduate school enroute to Ph.D. degrees. In upholding the validity of Treasury Regulations Section 1.117-4(c), Justice Stewart commented:

Here, the definitions supplied by the Regulation clearly are prima facie proper, comporting as they do with the ordinary understanding of "scholarships" and "fellowships" as relatively disinterested, "no-strings" educational grants, *with no requirement* of any substantial *quid pro quo* from the recipients.¹⁸

Virtually any athlete who does not appear for practice, or more particularly, for the games in which he is expected to participate,

¹⁴ *Id.* at —, [1971 Transfer Binder] CCH TAX CT. REP. at 2621.

¹⁵ *Id.* at —, [1971 Transfer Binder] CCH TAX CT. REP. at 2623.

¹⁶ *Id.* at —, [1971 Transfer Binder] CCH TAX CT. REP. at 2623.

¹⁷ *Bingler v. Johnson*, 394 U.S. 741 (1969).

¹⁸ *Id.* at 751 (emphasis added).

will find his *quid* and *quo* both gone. In other words, the concept of "this for that" entails athletic performance in return for pay, not educational grants in exchange for study.

Teaching Assistantship Analogy

To a certain extent athletic scholarships and their taxability may be analogized to teaching assistantships. The Tax Court has experienced very little difficulty in holding that teaching assistants who must teach in exchange for their grants, must also pay taxes on the money they receive. Three examples are *Edward A. Jamieson*,¹⁹ *D. R. Di Bona*,²⁰ and *K. J. Kopecky*.²¹ In each of the cited cases the Tax Court determined that the recipients of teaching assistant stipends were performing services in exchange for pay. Accordingly, in the opinion of the court the payments were taxable.

One very important exception has appeared in this line of cases, the fairly recent case of *Robert H. Steiman*.²² Therein, a teaching assistant was granted tax-free status for the stipends he had received, but only because teaching was an express condition of his degree. Teaching, it was held, was a vital part of his educational process.

The touchstone of the teaching assistantship cases decided unfavorably to the taxpayers is best summed up by Judge Dawson in the *Jamieson* opinion:

Unlike a scholarship or a fellowship, the payments to petitioner as a teaching assistant were not based upon her financial need, but were made only for services actually rendered for which no academic credit was given, and were paid to her in her capacity as an employee subject to the same regulations as all other University employees. In addition, teaching assistantships were awarded not upon the basis of the number of qualified graduate students in need of financial assistance but upon the number of unfilled teaching positions at the University

Our decision would be the same even if we were to conclude otherwise as to the nature of the payments. It is clear from this record that the entire amount paid to petitioner represented payment for teaching required as a condition to its receipt within the limitation of Section 117(b)(1).²³

Section 117(b)(1) requires the inclusion of amounts paid as compensation for part-time employment where such employment is a condition of receiving the grant unless similar services were required for all candidates for the particular degree sought.²⁴ In *Jamieson*,

¹⁹ Edward A. Jamieson, 51 T.C. 635 (1969).

²⁰ Donald R. Di Bona, 27 CCH Tax Ct. Mem. 1055 (1968).

²¹ Kenneth J. Kopecky, 27 CCH Tax Ct. Mem. 1061 (1968).

²² Robert Henry Stiemman, 56 T.C. No. 106 (Sept. 23, 1971).

²³ Edward A. Jamieson, 51 T.C. 635, 639.

²⁴ INT. REV. CODE OF 1954, § 117(b)(1).

Judge Dawson specifically found that teaching was not a condition of the particular degree in question and that, therefore, Section 117(b)(1) would require the inclusion of the stipends as income even if the payments might otherwise qualify as scholarships. The author is not aware of any situations where athletic participation is a requirement for a particular degree.

By way of contrast, Judge Featherston ruled in *Steiman* that the stipends which were connected with teaching assistantships, were not taxable, but distinguished *Jamieson* on several very important factors:

The University's general policy toward graduate assistantships was summarized by the Vice President for Graduate Studies and Research when he testified that "the primary function of the graduate assistantship is to enable graduate students to pursue their graduate studies." . . . In other words, both petitioners have shown that, during the year in issue, they were "paid to study" rather than "paid to work." . . .²⁵

Judge Dawson made the distinction between *Jamieson* and *Steiman* quite clear in his summary opinion in *Edith (Henderson) Ruby*,²⁶ an unreported opinion issued under the Tax Court's Small Tax Case procedure, pursuant to Section 7463 of the Internal Revenue Code. In that case a University of Washington student was found to have received a nontaxable scholarship even though she performed as a teaching assistant during the year in question. Of particular interest is Judge Dawson's statement that:

We think the result herein is controlled by our recent opinion in *Robert H. Steiman*, 56 T.C. No. 106 (1971). There, as here, teaching was a condition of the degree sought; there, as here, the teaching experience was considered part of the educational process; and there, as here, students were awarded stipends to attract students, not teachers.²⁷

Small Tax Case opinions are not considered to have precedential value.²⁸ However, the fact that Judge Dawson also wrote the opinion in *Jamieson*, which had formally been relied upon by the Internal Revenue Service as its principal weapon in asserting tax deficiencies against teaching assistants, gives some support to the view that the three factors cited by Judge Dawson above, are of crucial importance in determining whether a nontaxable scholarship exists.

Perhaps of even more interest than Judge Dawson's opinion in *Steiman* is the argument of the respondent in *Ruby*. Therein govern-

²⁵ 56 T.C. at —, [1971 Transfer Binder] CCH TAX CT. REP. at 3414.

²⁶ *Edith (Henderson) Ruby*, No. 2770-71S (T.C. Nov. 30, 1971).

²⁷ *Id.* at 3.

²⁸ INT. REV. CODE of 1954, § 7463(b).

ment counsel sought to distinguish *Heidel* with the following statement:

An athletic scholarship is unique in itself and not comparable to the fact situation here. *Heidel* received official notification of the scholarship and it is common knowledge that an athlete must have a recognized talent to obtain one and perform in athletic events in order to retain it. In that case, the court did not have the year 1961 [the year of receipt of the scholarship] before it and . . . simply allowed petitioner's treatment to stand. The court was not required to and it did not rule on taxability of the \$657.35 value in 1961.²⁹

The Internal Revenue Service has not yet asserted that athletic scholarships are taxable, even though they generally are not based upon need, are not a part of the educational process and are surely not used to attract students rather than athletes. As government counsel in the *Ruby* case observed, "it is common knowledge that an athlete must have a recognized talent to obtain one and perform in athletic events to retain it."³⁰ Why, then, has the government so diligently sought to impose taxation in the typical teaching assistant situation and yet been so loath to apply the same principles to college athletes?³¹

Except for the occasional athlete who is good enough, and fortunate enough, to attain true professional status, athletic endeavors can hardly be placed in the same category as teaching experience so far as educational value is concerned. Character may or may not be built on the athletic field, but surely, just as much character was acquired by the unfortunate Mr. Jamieson in facing college undergraduates as part of his educational process. Mr. Jamieson, of course, found that building character was not the same as obtaining a tax-free scholarship.

The Medical Student and Others

There is similarly no scarcity of decisions holding that residents and interns are not entitled to avoid taxation on the stipends they receive while serving their internships. In *A. J. Proskey*,³² for ex-

²⁹ Mem. Brief for Respondent at 11, *Edith (Henderson) Ruby*, No. 2770-71S (T.C. Nov. 30, 1971). The scholarship in question in *Heidel* was awarded in 1961 but the Tax Court did not have that year's tax records before it.

³⁰ *Id.*

³¹ Even in instances where the stipend is solely in the form of a waiver of tuition, fees, or board and room expenses this is not a valid distinction. Treas. Reg. § 1.117-1 (a) (1956) permits the exclusion of "accommodations" where a true scholarship or fellowship is involved, as does Treas. Reg. § 1.117-3(d) (1956). Payments and allowances for amounts paid as compensation are not excluded. Treas. Reg. § 1.117-4(c) (1956). See also Rev. Rul. 424, 1969-2 CUM. BULL. 15, and *Bingler v. Johnson*, 394 U.S. 741 (1969).

³² *Aloysius J. Proskey*, 51 T.C. 918 (1969).

ample, Dr. Proskey received stipends from the University Hospital in Ann Arbor, Michigan, while in residency there. The Tax Court had little difficulty in determining that the grant was taxable, noting that the University Hospital was primarily concerned with patient care, not doctor-education. A number of similar cases reached the same result.³³

The Internal Revenue Service has displayed no reluctance in ruling as taxable stipends paid to students other than athletes. For example, university students who work as legislative interns and receive grants from a tax-exempt organization for such purpose have been ruled to be receiving taxable compensation.³⁴ Similarly, in a case truly involving "Beauty and the Beast," the beast ruled that the beauty (a beauty contest winner) was expected to pay taxes on a four year scholarship received as her prize for winning a national beauty contest.³⁵ The winner was expected to make appearances and to model for the sponsoring company, and this, evidently, was sufficient to convince the Internal Revenue Service that she was being paid for services, not paid for education.

ATHLETIC SCHOLARSHIPS AND WORKMEN'S COMPENSATION

Interestingly, at least two state courts have already ruled that athletic scholarships may very well be employment contracts. In three cases involving the application of Workmen's Compensation benefits to injured or deceased student-athletes, two of the three decisions agreed with the plaintiff's contention that an employment situation existed.

The Supreme Court of Colorado was presented with the question in *University of Denver v. Nemeth*.³⁶ There the court found that a football player who was injured while engaged in spring football practice for the University of Denver, was entitled to compensation benefits. The evidence established that Nemeth was being paid for work for the university, and that his continued employment was conditioned upon his continued participation on the football squad. A claim for Workmen's Compensation was filed, disputed, and ultimately upheld when the court ruled that his continued employment was conditioned upon his status with the team. The *Nemeth* case is distinguishable from the typical scholarship situation in that Nemeth was hired to care for the university facilities, even though his job was conditioned upon his continued football participation.

³³ See, e.g., Irwin S. Anderson, 54 T.C. 1547 (1970) § O. A. Arnaud, 27 CCH Tax Ct. Mem. 1541 (1968).

³⁴ Rev. Rul. 212, 1964-2 CUM. BULL. 39.

³⁵ Rev. Rul. 20, 1968-1 CUM. BULL. 55.

³⁶ 127 Colo. 385, 257 P.2d 423 (1953).

In the typical scholarship case this would not be the situation, even though the Colorado Supreme Court did agree that Nemeth was acting as an employee when he sustained his injury on the practice field.

While *Nemeth* may be distinguishable from the usual scholarship situation, a case arising out of the tragic California Polytechnic airplane crash cannot.³⁷ In October of 1960, an airplane carrying Cal Poly athletes crashed while returning on a flight from a football game in Ohio. Edward Gary Van Horn, a Cal Poly athlete, was killed in the crash. His widow sought compensation under the California Workmen's Compensation Act. The State Industrial Accident Commission denied the application for death benefits, and Mrs. Van Horn appealed to the California District Court of Appeals. It was held that Van Horn was an employee of Cal Poly, and that he was covered by the Workmen's Compensation Law.

Van Horn was unquestionably a scholarship recipient, although his situation perhaps differed from the situation in *Nemeth*. Scholarship funds were raised by a booster club and were used by Cal Poly for worthy athletes. Continued athletic participation was a condition of the grants. Based upon these facts, the California District Court of Appeals determined that Van Horn was an employee, and that his widow and minor children were therefore covered by the Workmen's Compensation Act then in force in California.

The third case, *State Compensation Insurance Fund v. Industrial Commission*³⁸ is to the contrary. There the Colorado Supreme Court distinguished *Nemeth*, and held that a scholarship recipient was not an employee and thus not entitled to Workmen's Compensation benefits under Colorado law. The court expressly found that the State of Colorado could not be in the football "business."³⁹

The California Appeals Court in *Van Horn* distinguished the latter Colorado case on the basis that no contract of employment existed, thereby obviating an employer-employee relationship.⁴⁰

Admittedly, none of the three cases directly hold that a scholarship recipient is truly an employee for any purpose other than Workmen's Compensation benefits. But *Van Horn* and *Nemeth* both strongly suggest that the *quid pro quo*, which is the basis of the taxability of stipends under *Bingler*, is present in the typical athletic scholarship situation.

³⁷ *Van Horn v. Indus. Accident Comm'n.*, 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963).

³⁸ 135 Colo. 570, 314 P.2d 288 (1957).

³⁹ *Id.* at —, 314 P.2d at 290.

⁴⁰ 219 Cal. App. 2d at —, 33 Cal. Rptr. at 175.

The "Statement of Intent" used in the Pacific Eight Conference presently specifies that a recipient of an athletic scholarship will be considered for renewal (apparently on a yearly basis) if the student remains in good standing, maintains normal progress toward graduation and "is otherwise eligible." The Big Sky Athletic Conference "Agreement for Athletic Grant-in-Aid" specifies that it is on a year to year basis, but that it "may be renewed as long as the recipient maintains satisfactory grades and conducts himself as a good citizen."

Although neither document specifically requires the athlete to continue his participation in athletic events in order to obtain renewal of the award in the succeeding year, it is doubtful that an athlete who drops out of athletics is going to be strongly recommended for further aid when the initial grant runs out. This would seemingly be close enough to the *Bingler* rationale to meet the *quid pro quo* test.

In this respect the comment of the two authors on the general subject of athletic scholarships is in point. Edward J. Shea and Elton Wieman, both active in college athletic matters, make it quite clear what their interpretation of the typical athletic scholarship is:

The term "scholarship" has been loosely applied when associated with students who are also athletes. It has assumed a connotation which is quite different from the literal definition. The generally recognized meaning of the term when applied to an athlete indicates a financial award based largely upon athletic promise or performance.⁴¹

They comment further:

[A]t present an athletic scholarship represents payment in cash or in kind . . . to a student with no special academic qualifications . . . on the condition that he participate in intercollegiate athletics.⁴²

THE BENEFIT TEST

Thus far no attention has been paid in this analysis to what is the second most important test of the nontaxability of scholarships (the most important consideration seems to be the *quid pro quo* concept). There is a long line of cases which consider the question of whether a payment is *primarily for the benefit of the grantor* as the determinative factor in deciding whether a payment is a scholarship.⁴³ Similarly, the Treasury Regulations provide that payments

⁴¹ E. SHEA & E. WIEMAN, ADMINISTRATIVE POLICIES FOR INTERCOLLEGIATE ATHLETICS 129 (1967).

⁴² *Id.* Compare with *Bingler v. Johnson*, 394 U.S. at 757-58.

⁴³ See, e.g., *Reiffen v. United States*, 376 F.2d 883 (Ct. Cl. 1967), *S. L. Zolnay*, 49 T.C. 389 (1968).

made to enable an individual to "pursue studies or research primarily for the benefit of the grantor" are not a scholarship.⁴⁴

A reasonably good argument can be advanced that athletic stipends are not paid *primarily for the benefit of the grantor*, whom-ever that might be. In instances where the university obtains and then provides scholarship funds for deserving and talented athletes the question might very well become one of whether that particular school is truly benefiting from its athletic program. The question might eventually extend to a philosophical examination of whether football is primarily for the entertainment of the students, for the education of the participants, or (perhaps most likely) the gratification of the alumni.

Under the 1971 amendment to Chapter 28 of the Washington Code, funds used to provide financial assistance to students "in return for participation in intercollegiate athletics" shall be limited to contributed amounts and revenues "derived from athletic events."⁴⁵ The amendment suggests a payment for participation, but gives no particular indication of the reason for athletic programs at the collegiate level, insofar as the institutions involved are concerned. In other words, it is certainly not clear who is *primarily benefiting* from the athletic program.

CONCLUSION

Unless the case-by-case approach, which has already been a hallmark of Section 117, is to be extended to individual institutions in determining whether a particular athlete is receiving a nontaxable grant or, in reality, is being paid to play, it is submitted that the *Bingler quid pro quo* criteria is the proper one for the purpose of determining the taxability of athletic stipends. Under this rationale, only those athletes who may play or not by their own choice are receiving nontaxable scholarships. Those whose grants are conditioned on performance or at least willingness to perform must be considered as receiving taxable income.

Where, then, does all of this lead? It seems reasonable to assume that the tax-deductibility of alumni contributions will not be jeopardized even if the money is not used for "scholarships." The majority of athletic grants are administered through the institution making the grant and college athletics are surely a part of the overall collegiate curriculum. Under Section 170, this would be enough to

⁴⁴ Treas. Reg. § 1.117-4(c)(2) (1956).

⁴⁵ WASH. REV. CODE § 28B.10.704 (1971).

establish the deductibility of the contributions.⁴⁶ In addition, the Service has ruled that an organization which operates to subsidize a "training table" for college coaches and athletes was exempt under Section 501(c)(3) of the Code, which establishes the deductibility of contributions to such an organization.⁴⁷

University administrators may face some soul searching as to their responsibility to withhold for income and social security taxes, however. It is doubtful that any institution in the United States is presently so acting, although most are careful to withhold for amounts paid teaching assistants.⁴⁸

And, of course, in the case of someone such as James Heidel, the sizable bonuses paid to recently graduated athletes will be subject to income averaging which should result in fairly sizable tax savings to those fortunate enough to receive such bonuses.

But this is surely not the answer. The battle over teaching assistantships and medical internships or residency payments goes on and on. It would hardly be beneficial to continue the fight with student athletes. The correct answer would seem to be either to award scholarships strictly on the basis of need or scholarship (with no consideration given to athletic participation) or to amend the Internal Revenue Code to square with reality.

Senator Magnuson of Washington has already made such a proposal on behalf of teaching assistants.⁴⁹ Evidently, the requisite political "clout" was lacking, for the Bill died in committee. The proposed amendment was simplicity in action. It would have provided that a maximum monthly payment of \$300.00 would be considered a scholarship where payment is made for teaching, research, or other services in the nature of part time employment as a condition to receiving the scholarship or fellowship grant.⁵⁰

It may be slightly more difficult to bring athletic stipends within the meaning of Section 117, even if Senator Magnuson's amendment were adopted as proposed. It could very well be that specific lan-

⁴⁶ INT. REV. CODE of 1954, § 170(c).

⁴⁷ Rev. Rul. 291, 1967-2 CUM. BULL. 184. However, an organization which raises funds to recruit high school athletes for a particular university has been ruled to be non-exempt for tax purposes. Rev. Rul. 13, 1956-1 CUM. BULL. 198.

⁴⁸ See, e.g., the comments by Judge Pierce concerning the University of Tennessee's action in withholding for income tax purposes on a grant paid to a graduate researcher. Chander P. Bhalla, 35 T.C. 13, 17-18 (1960).

⁴⁹ S. 3073, 91st Cong., 1st Sess. (1969).

⁵⁰ In introducing the Bill, Senator Magnuson noted that "[t]he proposed amendment creates a presumption that minimal amounts are to be excluded from gross income as within the meaning of the terms 'scholarship' or 'fellowship grant' despite the fact that recipients are required to perform certain services." 115 CONG. REC. 31, 483 (1969).

guage exempting athletic grants will have to be added to the amendment to truly insulate such payments from taxability.

On the other hand, college athletics could become completely insulated if the rather radical suggestions of Dr. Bucher and Mr. Dupee in their book *Athletics in Schools and Colleges* were adopted.⁵¹ They suggest among other things, that all forms of financial aid to athletes be administered by the same agency for all students of a college or university, that all recipients be admitted on the same basis and be required to maintain the same standards, that scholarships be based on need or high scholarship, and perhaps, most startling of all, that:

Under no circumstances may a student be deprived of financial aid, once the award has been confirmed in writing, because of failure to participate in intercollegiate athletics.⁵²

While this might seem to be the ideal solution, practicality indicates it is not. Many of the contributions alumni now make so willingly to funds earmarked for athletic scholarships would disappear. Scholarship funds would be reduced and students whose only hope for a higher education is through athletics would lose out. It is perhaps a sad truth that alumni will contribute money for athletics where they would not do so for true scholastic aid.

The answer seems to be to amend the Internal Revenue Code. Although Senator Magnuson's proposal evidently perished from lack of interest, it would be interesting to imagine the interest that would result if the Service should begin asserting tax deficiencies against college athletes.

Regardless of the political rationale behind considering athletic stipends as non-taxable, the Code as it now stands and has been interpreted by the courts requires that they be subject to taxation. The alternative, if practice is to be consistent with the law, is to amend the Code to specifically exclude payments of this nature. To do otherwise is to permit one class of students to obtain tax free what another class, equally as worthy, must pay tax upon. This is contrary to the intent and spirit of our system of law.

⁵¹ C. BUCHER & R. DUPEE, *ATHLETICS IN SCHOOLS AND COLLEGES* (1965).

⁵² *Id.* at 64-65.