HOME RUN BASEBALLS AND TAXATION, AN OPEN STANCE: HOW A H.R. CAN BE I.R.D.

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I. INTRODUCTION

A home run hitter steps to the plate. The pitcher peers into the catcher, who signals for a fastball. The pitcher gets set, winds up, and releases the baseball. Crack! As the baseball sails toward the right field bleachers, a fan sees it coming towards him. Dropping his beer, fighting the crowd, and risking injury, the fan catches the home run baseball. Returning to his seat, the fan imagines how great the baseball will look on his mantle and how this souvenir will become a family heirloom. Unbeknownst to the fan, the baseball may be cognizable as gross income under the Internal Revenue Code (Code)—he may have to pay an uncertain and possibly substantial amount of income tax, even though he has not received any extra cash or other liquid asset with which to do so. And to think, he dropped his $8 beer for this.

In 2007, Matt Murphy faced such an uncertainty when he caught Barry Bonds' 756th career home run. With that home run, Bonds eclipsed Hank Aaron as Major League Baseball's all-time home run leader. Despite his stated desire to keep the baseball as a family heirloom, Murphy auctioned off the baseball for $752,467 to generate liquidity to pay the anticipated income tax liability.[1]

Including the value of home run baseballs in gross income has been the subject of fierce debate.[2] Murphy's experience is only among the most

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1. *See* Demian Bulwa, *Homer No. 756 Headed to Online Auction Block*, S.F. CHRON., Aug. 22, 2007, at B1; Steve Springer, *Bonds Homer No. 762: The Ball Is Still in Play*, L.A. TIMES, Mar. 6 2008, at A1.

2. *See* Bulwa, *supra* note 1, at B1.

recent examples. Alex Rodriguez of the New York Yankees, for instance, became the youngest player to hit 600 home runs during the 2010 Major League Baseball (MLB) season, almost immediately triggering income tax questions.[3] Because it is likely that he and others will continue to hit record setting home runs during the 2011 season and beyond—thereby raising income tax issues in the process—the tax-related debate should be settled.

This article addresses the federal income tax implications of a fan catching a home run baseball and proposes that a fan acquiring such a baseball be initially granted nonrecognition for gross income tax purposes. A grant of nonrecognition will address the concern that it is improper to tax a fan on the fair market value of the baseball at the time of the acquisition, when the taxpayer may not have cash with which to pay the tax liability. The proposal further suggests a framework whereby the tax basis in the baseball remains at zero until the baseball becomes the subject of a sales transaction. This is accomplished, in part, by incorporating income in respect of decedent concepts.[4] The proposal is designed to preserve a zero basis in the baseball until there is a sales transaction to the conclusion that gross income must include receipts such as a home run baseball. The fan is afforded, however, discretion over the timing of the sales transaction and attendant inclusion.

First, this article briefly discusses the relevant income tax law.[5] Next, this article outlines the income tax debate surrounding Mark McGwire's 1998 pursuit of the single-season home run record.[6] Third, this article proposes a framework allowing a fan to retain a home run baseball while preserving a zero basis in the baseball until it is the subject of a sales transaction.[7] This article discusses select transfer tax considerations,[8] but there is not a related proposed modification given the anticipated reinstatement of the estate tax with the applicable exclusion amount at the 2009 level,[9] and the existing annual exclusion[10] and unified credit provisions of the gift tax.[11]

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3. Laura Sanders, *A-Rod's Home Run Ball: A Tax Headache for the Record Books?*, WALL ST. J., Aug. 4, 2010, *available at* http://blogs.wsj.com/metropolis/2010/08/04/a-rods-home-run-ball-a-tax-headache-for-the-record-books/.

4. *See* I.R.C. § 691 (West 2010).

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Part V.

9. *See* I.R.C. § 2010(a) (2010). Prior to January 1, 2010, section 2010(a) provided a unified credit against the imposition of the estate tax. *Id.* The amount of the credit was determined by reference to the applicable credit amount. *Id.* The resultant credit against the estate tax was equal to the estate tax on $3.5 million in calendar year 2009. *Id.* at (c). In 2010, the estate tax was repealed by the Economic Growth and Tax Reconciliation and Relief Act (EGTRRA) of 2001. EGTRRA reinstates the estate tax as of January 1, 2011. It is still unclear what the unified credit will be when the estate tax unified credit is reinstated, but there is support for the expectation of a return to an applicable exclusion amount of $3.5 million.

10. Section 2503(b)(1) provides:

II. HOME RUN BASEBALLS AS GROSS INCOME

Scholars debate what the proper income tax treatment of a fan catching a home run baseball should be. Several approaches have been suggested, among them proposals for nonrecognition.[12] This article also proposes a nonrecognition framework. It has also been argued that the value of such a baseball is not cognizable as gross income to begin with.[13] Although this argument is not without merit, this article accepts the proposition that the baseball is an accession to wealth—the value of which is includible in the fan's gross income. As outlined below, the Code, Treasury Regulations and case law provide support for this conclusion.

Gross income is defined by section 61 of the Code as "all income from whatever source derived" and lists several examples of gross income.[14] Treasury Regulation § 1.61-1 reinforces the definition of "gross income" by providing that gross income is "all income from whatever source derived, *unless excluded by law*," in money or in-kind.[15] Case law has further refined the definition of gross income.

In *Commissioner v. Glenshaw Glass Co.*, the Supreme Court identified the test for determining those taxpayer receipts constituting gross income.[16] The Court identified three elements that render a taxpayer receipt

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> In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year, the first [$13,000] of such gifts to such person shall not, for purposes of [the definition of taxable gifts], be included in the total amount of gifts made during such calendar year . . . .

11. I.R.C. § 2510 (West 2010).

12. *See, e.g.*, Lawrence A. Zelenak & Martin J. McMahon, Jr., *Taxing Baseballs and Other Found Property*, 84 TAX NOTES 1299 (1999) (arguing that the treasure trove regulation and imputed income concepts apply to home run baseballs). *See also* Neil M. Mazer, *Home Runs and Taxes: The IRS and Its Treasure Trove Regulation*, 16 SPORTS LAW. J. 139 (2009) (arguing that the Code was not intended to apply to found property and suggesting alternative means of taxing home run baseballs, including deferral of recognition, characterizing as a lottery win, or treating as a bargain purchase); Andrew D. Appleby, *Ball Busters: How the IRS Should Tax Record-Setting Baseballs and Other Found Property Under the Treasure Trove Regulation*, 33 VT. L. REV. 43 (2008) (discussing some of the difficulties in taxing a home run baseball, including valuation and determining character, and suggesting alternate methods of taxation); Michael Halper, *The Tax Ramifications of Catching Home Run Baseballs*, 59 CASE W. RES. L. REV. 191 (2008) (analyzing the tax results that will occur in different scenarios after a fan catches a home run); Darren Heil, *The Tax Implications of Catching Mark McGwire's 62nd Home Run Ball*, 52 TAX LAW. 871 (1999) (discussing the law of unsolicited merchandise and declined prizes, concluding that the Service's justification for not taxing the fan that caught McGwire's sixty-second home run was erroneous).

13. *See* Mazer, *supra* n.12.

14. I.R.C. § 61(a) (providing fifteen examples of sources of gross income and explicitly providing that income is "not limited to" those particular sources).

15. Treas. Reg. § 1.61-1(a) (1960) (emphasis added).

16. Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955). In *Glenshaw Glass Co.*, the Court was confronted with two similar cases; at issue was whether money damages received as exemplary, punitive or two-thirds of treble damages, or money received in settlement, was taxable as gross income. The Court held that each of the classes of damages and money received in settlement is taxable and must be included in gross income. *Id.*

cognizable as gross income. Specifically, a taxpayer receipt must be recognized as gross income if there is an "undeniable accession to wealth, clearly realized, and over which the taxpayer[] ha[s] complete dominion."[17] In support of its conclusion, the Court noted Congress's intent to exert "the full measure of its taxing power" in adopting the gross income provisions of the Code.[18] To further justify its result in *Glenshaw Glass Co.*, the Court found that the legislative intent behind the Code's gross income provision was to ensure there could be no limitation or restriction as to the source or nature of taxable receipts and that all gains would be taxable unless specifically exempted by statute.[19]

Many commentators agree that when a fan catches a home run baseball, it becomes the property of the fan that caught it.[20] This article accepts the proposition that when a taxpayer catches a home run baseball, the taxpayer receives full and exclusive ownership rights in the baseball.[21] A review of the events that occur when a fan catches a home run baseball at a professional game seems to demonstrate that complete ownership rights in the baseball vest in the fan.[22]

Traditionally, baseballs leaving the field of play during the course of a professional baseball game are treated as abandoned property by the baseball organization or baseball team.[23] This conclusion is supported by the fact that no instances exist of a professional baseball organization or baseball team pursuing a legal action to reclaim a baseball from a fan claiming ownership rights after the baseball has left play. Although no professional team has taken such legal action, fans have pursued legal action against each other to determine legal ownership of a baseball that they fought over in the stands.[24] Instead, any fan that acquires such a baseball is allowed to take that baseball when leaving the stadium.[25] Upon receipt, all interested parties treat a baseball as a fan souvenir, and the fan that acquires the baseball may later possess or transfer it as he or she desires.[26] Either attending or watching any professional baseball game

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17. *Id.* at 431.

18. *Id.* at 429.

19. *Id.* at 429–30.

20. *See* Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609 (2002) (stating that it is generally agreed that a home run baseball becomes the property of the fan when it is caught).

21. *Id.*

22. *Id.* at 1611–18.

23. *Id.* at 1618–21.

24. *See* Dean Murphy, *Solomonic Decree in Dispute Over Bonds Ball*, N.Y. TIMES, Dec. 19, 2002, at A1 (discussing the peculiar judgment of a San Francisco judge requiring two fans fighting over ownership of Barry Bonds' seventy-third home run from the 2001 MLB season to sell the baseball and split the proceeds equally).

25. *See generally* Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239 (1998) (analogizing baseball with the rule of law).

26. *See, e.g.*, Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *5 (Cal. App. Super. Ct. Dec. 18, 2002).

generally provides an opportunity to witness this practice. During the course of any game, a home run baseball, a foul baseball, or any other baseball entering the stands will remain with the fan that acquires it, and no team personnel will attempt to retrieve the baseball or take any action consistent with ownership rights.[27]

The abandonment of the baseball as property is only the first requirement for a fan to receive ownership rights in a home run baseball.[28] The fan acquiring the baseball would also have to exercise some sort of claim of right over the baseball sufficient to bestow ownership rights.[29] In the case of a home run, when a fan catches the home run baseball, the surrounding circumstances are sufficiently clear to establish the fan's intent to claim the baseball and to exclude all others from it.[30] The fan first establishes his intent to claim the baseball by getting in position to catch it.[31] A home run cannot be unintentionally caught, and any fan interested in claiming the baseball must risk injury not only from the baseball but also from other fans in the vicinity attempting to acquire the baseball.[32] After the bloodlust of the other fans has settled and the clawing and grasping subsides, the fan will likely forcefully raise his hard-earned prize into the air for all in the stadium to see.

Treasury Regulation § 1.61-14 bolsters the conclusion that a home run baseball represents gross income because "[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."[33] *Cesarini v. United States* is the seminal case on federal taxation of treasure trove.[34] In *Cesarini*, the taxpayers found approximately $4,500 in old currency in a piano they had purchased several years prior for $15.[35] Among other contentions, the taxpayers argued that if the old currency constituted treasure trove, the value was includible as gross income in the year the piano was purchased, which would have resulted in the running of the statute of limitations.[36] The court ruled against the taxpayers' arguments and held that treasure trove must be included within the taxpayers' gross

27. *See generally* Michael Pastrick, *When a Day at the Ballpark Turns a "Can of Corn" into a Can of Worms: Popov v. Hayashi*, 51 BUFF. L. REV. 905 (2003) (recognizing that there are exceptions).

28. *See Popov*, No. 400545, 2002 WL 31833731, at *3–5.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. Treas. Reg. § 1.61-14(a) (1960); *See* Cesarini v. United States, 296 F. Supp. 3, 7 (N.D. Ohio 1969), *aff'd*, 428 F.2d 812, 813–14 (6th Cir. 1970).

34. Cesarini v. United States, 296 F. Supp. 3, 4 (N.D. Ohio 1969), *aff'd*, 428 F.2d 812, 813–14 (6th Cir. 1970).

35. *Id.*

36. *Id.*

income in the year the taxpayers discovered the old currency and reduced it to their undisputed possession, not the year the piano was purchased.[37]

With the guidance of the *Cesarini* holding and the regulations, attention can be turned to home run baseballs. Accepting that the baseball becomes the property of a fan when it is caught, the baseball arguably constitutes treasure trove income when the fan reduces it to his undisputed possession.[38] Some scholars posit that such baseballs do not constitute gross income because they do not fall in the intended definition of "treasure trove."[39] Further, some scholars suggest the treasure trove concept is an unreliable guide for gross income determinations.[40] Again, for purposes of this article, the inclusion of the value of such baseballs in gross income as a result of a fan reducing such a ball to his undisputed possession is accepted.[41]

If an accession to the baseball represents gross income to the taxpayer, then a determination of the taxpayer's cost basis in the baseball is required.[42] For instance, if the taxpayer is found to have a zero basis in the baseball, the entire value of the baseball is gross income to the taxpayer.[43] If the taxpayer is deemed to have some level of basis in the baseball, the amount of gross income to be included is determined by subtracting said basis from the fair market value of the baseball.[44] If the ticket price to attend the ballgame is considered as the cost basis of the baseball, the level of gross income would be the fair market value of the baseball less the ticket price.[45] This article reflects the position that no cost incurred by the taxpayer prior to the catch establishes a cost basis in the baseball: The acquisition of the baseball is incidental to the ticket contract, and the ticket purchase prices does not constitute an "amount paid in cash or other property" to obtain the baseball.[46] If the taxpayer keeps the baseball and

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37. *Id.* at 7–8.

38. *See, e.g.*, Finkelman, *supra* note 20, at 1631.

39. *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, 687–89 (2000) (analyzing theories behind taxing different types of found property, distinguished as "windfall" and "nonwindfall in-kind receipts.").

40. *See* Mazer, *supra* note 12, at 147–49 (discussing the reasons for the lack of enforcement of the treasure trove regulations).

41. A few non-binding IRS publications have mentioned found property. *See, e.g.*, *Taxable and Nontaxable Income*, I.R.S. Pub. 525, at 33 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p525.pdf (stating that "[i]f you find and keep property that does not belong to you that has been lost or abandoned (treasure-trove), it is taxable to you at its fair market value in the year it is your undisputed possession.").

42. *See* Appleby, *supra* note 12, at 56 (discussing a potential application of basis); *see also* Mazer, *supra* note 12, at 149 (arguing there should be no taxation prior to the creation of basis).

43. I.R.C. § 2031 (West 2010). Generally, for tax purposes, the value of the baseball is the value a willing buyer will pay a willing seller for the item. *See id.*

44. *See* Appleby, *supra* note 12, at 56.

45. *See* Mazer, *supra* note 12, at 156.

46. *See* I.R.C. § 1012 (providing that the cost of property shall constitute its basis); Treas. Reg. § 1.1012-1 (West 2010) (defining "cost" as "the amount paid for such property in cash or other

includes its value in gross income, the taxpayer's basis in the baseball will be the value so included.[47]

III. RECENT HISTORY OF HOME RUN BASEBALL TAXATION

During the 1998 MLB season, Mark McGwire and Sammy Sosa hit home runs at a pace threatening to break the MLB single-season home run record.[48] Prior to the 1998 season, Roger Maris held the MLB record for home runs in a single season.[49] Roger Maris controversially broke Babe Ruth's 1927 record when he hit sixty-one home runs in 1961; according to some standards, Babe Ruth's 1927 record of sixty home runs still stood.[50]

On September 7, 1998, the *New York Times* reported that an Internal Revenue Service spokesperson confirmed that if a fan caught McGwire's record-setting home run and returned the baseball to McGwire, the fan would be liable for gift tax.[51] The fallout from the report was immediate, likely because McGwire hit his sixty-first home run the same day.[52] On September 8th, Congress entered the mix with several senators criticizing the Service for the comments in the *Times* article.[53] For example, Missouri Senator Kit Bond gave a speech discussing the effect of the home run chase in St. Louis (and the country generally); Senator Bond characterized the Service's position as a serious injustice.[54] Following his initial remarks, Senator Bond asked his fellow senators to sign a letter addressed to IRS Commissioner Charles Rossotti, asking for clarification of the tax results of catching a historic baseball.[55]

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property").

47. *See* Leandra Lederman, *"Stranger Than Fiction": Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620, 1649 n.149 (2007).

48. Baseball Almanac, *Year in Review: 1998 American League,* http://www.baseball-almanac.com/yearly/yr1998a.shtml (last visited Sept. 26, 2010).

49. Baseball Almanac, *61 Home Runs by Roger Maris*, http://www.baseball-almanac.com/feats/feats12b.shtml (last visited Sept. 26, 2010).

50. A source of contention is that the 1927 MLB season schedule spanned across 154 games, while the 1961 season covered 162 games. *See* George Vaas, *Records Revolution: Over the Last 50 Seasons, a Number of "Untouchable" Marks Have Been Broken*, BASEBALL DIG., July 1, 2007, at 28 (stating MLB Commissioner Ford Frick informed Maris that if he did not hit sixty home runs within 154 games, Maris would receive an asterisk next to his name in the record book). Roger Maris hit home runs fifty-nine, sixty, and sixty-one in games 155, 159, and 163, respectively. Baseball Almanac, *Roger Maris 1961 Home Run Season*, http://www.baseball-almanac.com/feats/feats12b.shtml (last visited July 15, 2010).

51. Bill Dedman, *Fan Snaring No. 62 Faces Big Tax Bite*, N.Y. TIMES, Sept. 7, 1998, at D1 (suggesting that if a fan gives a record-setting home run baseball back to Mark McGwire, the fan would be subject to gift tax).

52. ESPN SportsCenter, *This Day in Sports: Big Mac Supplants Roger as Baseball's Home Run King*, http://espn.go.com/blog/sportscenter/post/_/id/78677/this-day-in-sports-big-mac-supplants-home-run-king (last visited Sept. 26, 2010).

53. 144 CONG. REC. S9955–56 (daily ed. Sept. 8, 1998) (statement of Sen. Bond).

54. *Id.*

55. *Id.* at S9956.

Later in the day on September 8, the Service issued a press release attempting to ease the tension caused by the *Times* article.[56] In its press release, the Service addressed the situation in which "a baseball fan [] catches a home run ball and immediately returns it."[57] The Service took the following position and provided a statement from the Service's top officer:

> In general, the fan in these circumstances would not have taxable income. This conclusion is based on an analogy to principles of tax law that apply when someone immediately declines a prize or returns unsolicited merchandise. There would likewise be no gift tax in these circumstances. The tax results may be different if the fan decided to sell the ball. Commenting on this situation, IRS Commissioner Charles O. Rossotti said, "Sometimes 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."[58]

Later that same day, McGwire broke the single-season home run record by hitting his sixty-second home run of the season.[59] A member of the Busch Stadium grounds crew retrieved the baseball and immediately returned it to McGwire.[60] Although the Service never released any statements concerning this transfer to McGwire, it was presumably tax free.

A bill addressing the taxation of home run baseballs was introduced into the United States House of Representatives on September 9th.[61] House Bill 4522 sought to "clarify the income and gift tax consequences of catching and returning record home run baseballs."[62] The bill applied only to a "home run ball hit during the 1998 baseball season if the batter of the baseball hit at least 61 home runs during such season."[63] It provided that, for purposes of the income tax, "no amount shall be includible in the gross income of the individual catching (or otherwise recovering) the [home run] baseball by reason of catching (or recovering) the baseball" and that for purposes of the gift tax "the gift of the baseball to the batter by such individual shall not be treated as a gift."[64] The bill also provided that if the taxpayer did avoid inclusion of the historic baseball in gross income, "no deduction shall be allowed . . . for any contribution or gift made directly or

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56. I.R.S. News Release, IR-98-56 (Sept. 8, 1998).

57. *Id.*

58. *Id.*

59. *Magic No. 62*, ST. LOUIS POST-DISPATCH, Sept. 9, 1998, at D8 (provides a list of Mark McGwire's 1998 home runs through his sixty-second, including each home run's date, pitcher, distance, and on-field situation of each home run).

60. Tom Wheatley, *Historic Ball Never Leaves Cards Family*, ST. LOUIS POST-DISPATCH, Sept. 9, 1998, at D12.

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

62. *Id.*

63. *Id.* at § 1(b).

64. *Id.* at § 1(a)(1)–(2).

indirectly by the individual of such baseball."[65] House Bill 4522 was never enacted into law.

Although home runs may have appeared beyond the scope of politics and targeted congressional action, Congress forever changed that view in 1998.[66] Not stopping at the taxation of the baseballs, members of Congress were quick to attach Mark McGwire and Sammy Sosa's records to their partisan agendas.[67] For example, McGwire and Sosa's monumental achievements were praised in Congress, even becoming the subject of congressional resolutions and discussed within the context of the Taxpayer Relief Act and campaign finance reform.[68] However, the debate surrounding the tax results of catching a home run baseball quickly subsided, and the Internal Revenue Service's press release has served as the only source of guidance since. The issue faded into obscurity for some time, even when the MLB single-season home run record fell again three years later.[69]

In 2007, the issue of taxing home runs again entered the national spotlight.[70] During the 2007 MLB season, Barry Bonds of the San Francisco Giants slowly progressed upon Hank Aaron's all-time career home run record. Aaron's career home run record was, and still is, considered among the greatest feats in all of professional sports.[71] The lucky fan that caught Bond's 756th career home run baseball was expected to have an extraordinarily valuable piece of sports memorabilia.[72] The media was quick to raise the issue of taxation that confronted the Service in 1998; however, the media would receive a different response in 2007. When questioned about the fan's tax liability for catching Bond's historic home run, a Service spokesperson responded, "[t]he IRS does not comment about an individual taxpayer's situation, and we don't speculate on a

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65. *Id.* at § 1(c) (stating the deduction is not allowed under Subtitle A of the I.R.C. of 1986).

66. *See* Lederman, *supra* note 47 and accompanying text.

67. *See id.*

68. *See* S. Res. 273, 105th Cong. (1998); 144 CONG. REC. S10,082 (1998) (enacted) (Senate resolution praising Mark McGwire's and Sammy Sosa's race to break Roger Maris's single-season home run record); 144 CONG. REC. S9,955-56 (1998) (Senator Bond discussing the effort invested in the Taxpayer Relief Act and suggesting that the I.R.S. spokesperson's statement in the *Times* article could undermine the progress); *id*. at S10,084 (Senator Lieberman comparing the potential effect of the McCain-Feingold campaign finance reform bill to that of the McGwire-Sosa home run chase).

69. In 2001, Barry Bonds of the San Francisco Giants hit seventy-three home runs in a single season to break Mark McGwire's 1998 record of seventy home runs. *See* Baseball Almanac, Home Runs Single Season Leaders, http://www.baseball-almanac.com/hitting/hihr4.shtml (last visited June 20, 2010).

70. *See* Roy, *Barry Bonds Home Run Ball To Land Matt Murphy With Big Tax Bill*, PR BLOG (Aug. 9, 2007), http://product-reviews.net/2007/08/09/barry-bonds-home-run-ball-to-land-mets-fan-with-big- tax-bill; *The Tax Implications of Bonds' Home Run Balls*, SPORTS L. BLOG (Aug 11, 2007 8:20 a.m.), http://sports-law.blogspot.com/2007/08/tax-implications-of-bonds-home-run.html.

71. *See* Baseball Almanac, Home Runs All Time Leaders, http://www.baseball-almanac.com/hitting/ hihr1.shtml (last visited July 3, 2010).

72. *See* Bulwa, *supra* note 1.

hypothetical."[73] On August 7, 2007, Bonds hit his historic 756th career home run that was caught by Matt Murphy, a 21-year old New York Mets fan attending the game during his layover in San Francisco on his way to Australia.[74] Although he expressed a desire to keep the baseball, Murphy decided to sell it to avoid the possibility of a significant income tax deficiency.[75] Noticeably absent from the entire 2007 taxation debate was Congress, which had rushed to become involved when the issue first arose in 1998.[76]

IV. PROPOSAL—NONRECOGNITION AND IRD

This article suggests Congress address this issue and add certainty to this area of tax law, and not merely wait until the next home run record chase to pontificate on the issue, yet fail to take action. This article accepts that the accession to a home run baseball is cognizable as gross income. Arguably, the Service's ultimate response regarding McGwire's historic home run baseballs indicated the Service does not intend to tax as a matter of prosecutorial discretion.[77] Certainly, for administrative efficiency reasons, the Service is not going to address the taxation of the numerous, inconsequential home run and foul balls entering the stands in any given MLB season.[78] However, given the frequent occurrence of historic baseballs landing in the bleachers in recent seasons, this article suggests more certainty is required. Due to liquidity concerns that may relate to such an accession and the fact that a fan may wish to retain the baseball rather than sell it to pay the attendant tax liability, this article proposes the following framework:

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73. *Id.* (discussing Matt Murphy's decision to auction Barry Bond's 756th career home run baseball to pay expected income taxes despite Murphy's desire to keep the baseball).

74. *Id.*

75. *Id.*

76. Congress was involved in other matters affecting professional baseball during this time. From 2003 until 2005, Congress investigated the use of performance-enhancing drugs in professional baseball. Mark McGwire, Sammy Sosa, and Barry Bonds were notably present and testified during the course of these investigations. *See* Dave Sheinen, *Baseball Has a Day of Reckoning in Congress*, WASH. POST, Mar. 18, 2005, at AO1.

77. *See, e.g.*, Patricia Bryan, *Taxing the Fan Who Catches the Ball: Looking Back on Record-Breakers, the 1998 Season and the IRS's Turn at the Plate*, THE COOPERSTOWN SYMPOSIUM ON BASEBALL AND THE AMERICAN CULTURE, 2007–2008, at 210 (discussing the IRS's use of prosecutorial discretion).

78. *See* Dodge, *supra* note 25, at 690. Indeed, the Service's discretion not to tax found items of minimal value has led some to conclude that there is a *de minimis* exception to the treasure trove provisions, "since the purpose of § 1.61-14(a) is merely to point out the existence of the category of "residual" gross income and to list some examples of it, the concept of "treasure trove" has no special significance, and can be taken to refer to any found object, or collection thereof, having more than *de minimis* market value." *Id.*

1) The baseball is an accession to wealth, but the taxpayer is granted nonrecognition upon initial acquisition;
2) The taxpayer initially acquiring the baseball has a zero cost basis;
3) Upon the sale of the baseball by the initial taxpayer or anyone obtaining the baseball through a gratuitous transfer, the recipient of the sale proceeds recognizes the gain as ordinary income;
4) A taxpayer receiving the baseball gratuitously, prior to any sale of the baseball, receives a transferred basis of zero;
5) The baseball's built-in gain will be deemed income with respect to a decedent and the baseball will not receive a step-up in basis upon the death of any owner of the baseball prior to a sales transaction.

The Code provides various nonrecognition provisions.[79] Nonrecognition provisions represent Congress's conclusion that, although certain transactions are cognizable under the Code, it is not appropriate for various reasons to impose the income tax at the time of the transaction.[80] For instance, section 351 and section 721 provide a taxpayer the possibility of avoiding gain recognition upon formation of a corporation or contribution of property to a partnership, respectively, when transferring appreciated property to the business entity in exchange for stock or a partnership interest.[81] Although the transactions involved (exchanging one form of property for a property interest in the business entity) are otherwise cognizable under the Code, nonrecognition is granted.[82] Nonrecognition is granted to prevent the imposition of the income tax from having a chilling effect on the decision to form businesses and in recognition of the fact that the transaction merely represents a change in the form of the taxpayer's investment, not a monetary gain.[83]

Nonrecognition provisions do not represent tax avoidance because the gain that would otherwise have been recognized is potentially preserved by assigning the property received in the transaction (e.g., the stock in a corporate formation) the basis of the property the taxpayer transferred.[84] The taxpayer maintains the same basis in the new property as she had in the exchanged property.[85]

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79. *See* I.R.C. §§ 1031–45 (West 2010). The Regulations also provide a list of other nonrecognition provisions. *See* Treas. Reg. § 1.61-6(b) (1960).

80. STEPHEN A. LIND ET AL., FUNDAMENTALS OF BUSINESS ENTERPRISE TAXATION 430–31 (4th ed. 2008).

81. I.R.C. § 351(a) provides that "[n]o gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such persons are in control (as defined in section 368(c)) of the corporation." *Id.*

82. *Id.*

83. *See* LIND ET AL., *supra* note 80.

84. *See, e.g.*, I.R.C. § 723 (West 2002).

85. *Id.* (providing that in a section 721(b) transaction, the contributing partner's basis in the partnership interest received is generally the adjusted basis of the contributed property at the time of contribution).

The time of the taxpayer's accession to the baseball is also not an appropriate time for the taxpayer to recognize gross income.[86] The taxpayer is in a similar liquidity position both before and immediately after acquisition.[87] Although ownership of the baseball confers an economic advantage, especially in the case of a historic home run baseball, the taxpayer will not receive a monetary gain upon making the catch.[88] Baseball holds a unique status in the hearts of most Americans, and it is possible that a fan will want to retain the baseball for posterity; however, the taxpayer may be forced to sell the baseball in order to pay the attendant tax liability.[89] The fan is likely to sell the baseball soon after the catch, possibly creating an inefficient market if the sale occurs when the sports memorabilia market is in a decline.[90] A rushed sale may also result in an unexpectedly large gain, particularly for items from popular players like Mark McGwire or Sammy Sosa in 1998.[91] The proposal to not include the caught baseball as part of gross income will allow the taxpayer to retain the baseball or sell the baseball at a time of his choosing.[92]

However, recognition of gross income will be required upon a subsequent sale of the baseball.[93] This proposal provides that the taxpayer who sells the baseball will have ordinary income to the extent the amount realized exceeds the adjusted basis.[94] This proposal sets the cost basis at zero for the taxpayer who initially acquires the baseball, allowing, of course, for an accounting of any expenses associated with the sale.[95] For the taxpayer who wishes to sell the baseball immediately after obtaining the baseball, the result of the proposal will differ little from the posited current treatment of such baseballs; the taxpayer will recognize gross income to the extent of the value of the baseball, as presumably set by the sales price.[96]

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86. *See* H.R. 4522, 105th Cong. (1998) (manifesting this concern).

87. *Id.*

88. *Id.* at § 1(a)(1).

89. *See* Bulwa, *supra* note 1.

90. *See generally* Steve Friess, *For Many Troubled Stars, a Fickle Market for Their Memorabilia*, N.Y. TIMES, Oct. 1, 2007, at A14 (describing the substantial decrease in value of sports memorabilia pertaining to certain professional athletes after unpopular off-field actions); *see also* Tom Van Riper, *Why 756 Will Not Equal Millions*, FORBES, Aug. 8, 2007, *available at* http://www.forbes.com/2007/07/25/sports-baseball-collecting-biz-cx_tvr_0725collectibles.html (reporting that in the following decade after McGwire broke the single-season home run record, the sports memorabilia market has declined substantially since its all-time high—arguably due partially to steroid allegations in baseball and the shorter time periods in which records are now broken).

91. *See, e.g.*, Derrick Goold, *Having a Ball!* ST. LOUIS POST-DISPATCH, Aug. 9, 2007, at DA (discussing how McGwire's seventieth home run baseball sold for $3,000,000 in 1998 prior to allegations of steroid use).

92. For the income tax consequences of selling or retaining a home run baseball, *see supra* Part II.

93. *See* I.R.C. §§ 1001, 1011 (2010).

94. *See id.*

95. *See id.*

96. *See id.*

This proposal also considers other transactions beside sales transactions. If the baseball is transferred as a gift during life, the donee's basis in the baseball will be a carryover basis, thereby preserving the gain inherent in the baseball.[97] If the donee makes a subsequent *inter vivos* transfer of the baseball, then the carryover basis rules will preserve the inherent gain.[98] If the transfer is occasioned by the death of an owner, and no previous owner had acquired the home run baseball in a sales transaction, then the proposal provides that the built-in gain in the baseball will be deemed Income In Respect of Decedent (IRD).[99] As such, the baseball will not receive a step-up in basis to the fair market value of the baseball as of the date of the owner's death, which is normally the case for property passing as the result of death.[100] Section 691 defines IRD, which includes items such as individual retirement accounts (IRA), and a deceased employee's final paycheck.[101] For example, when the owner of a traditional IRA dies, the right to the IRA transfers to a beneficiary. The income in the IRA has never been included in the calculation of the decedent's income tax and is therefore considered IRD. As IRD, the ultimate recipient of distributions from the IRA must include, as gross income, any such funds received in cash.[102] Currently, home run baseballs that are owned at death and are not the subject of a near-complete sales transaction would not

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97. *See* I.R.C. § 1015(a) (West 2010).

98. *Id.*

99. I.R.C. § 691(a)(1) (West 2010). Section 691 provides: "The amount of all items of gross *income in respect of a decedent* which are not properly includible [sic] in respect of the taxable period in which falls the date of death or a prior period . . . shall be included in the gross income, for the taxable year when received, of:

> (A) The estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;
>
> (B) The person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or
>
> (C) The person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right.

I.R.C. § 691(a)(1) (emphasis added).

In effect, this provision addresses this situation: A cash basis taxpayer may have an entitlement to income as of the date of his death which is not required to be included on his final income tax return. *Id.* The entitlement to this income is referred to as income in respect of decedent. *Id.* Under section 691(a), IRD is taxable as income to the ultimate recipient—the decedent's beneficiary—when it is received, not when it is inherited. *Id.*

100. I.R.C. § 1014(a) (West 2010). Section 1014 provides a full step-up in basis to a decedent's property until December 31, 2009. I.R.C. § 1014(a). *Id.* However, this date of death step-up was denied to property deemed IRD under section 1014(c). I.R.C. § 1014(c). As of January 1, 2010, a limited step-up in basis was provided to decedent's property under section 1022. I.R.C. § 1022. Even this limited step-up in basis is denied to property constituting IRD under section 1022(f). I.R.C. § 1022(f).

101. IRA M. BLOOM ET AL., FEDERAL TAXATION OF ESTATES, TRUSTS AND GIFTS 593 (3rd ed. LexisNexis 2003).

102. *Id.*

constitute IRD.[103] Also, currently, if the taxpayer catches such a baseball and then includes its value in gross income, the taxpayer will have a basis in the baseball equal to the value entered in gross income.[104] Under this proposal, however, the taxpayer is granted nonrecognition treatment and is not initially required to include the value of the baseball in gross income. Until the owner of the baseball engages in a recognizable transaction under the income tax laws, the basis in the baseball shall remain zero. Should a taxpayer engage in a recognizable transaction regarding the baseball, this proposal defers to the provisions of the Code as they currently stand.[105]

Furthermore, under this proposal, the taxpayer may not deduct the value of a home run baseball as a charitable contribution if the baseball has not been previously recognized as gross income.[106] The purpose of this proposed provision is to prevent a taxpayer from receiving an unfair benefit by donating the baseball to a charitable organization, including the Baseball Hall of Fame.[107] Because the taxpayer is granted nonrecognition, a charitable deduction would be an unwarranted benefit.[108]

V. TRANSFER TAX CONSIDERATIONS

Much of the consternation surrounding the tax treatment of the McGwire baseballs involved the possible imposition of the gift tax if the fan who acquired the baseball then transferred it to McGwire.[109] This proposal addresses the income tax issues surrounding the fan's acquisition of the baseball, and the transfer tax and other issues involving the transfer of the ball to the player are beyond the scope of this article. Although not addressed in this proposal, however, a few brief observations involving such issues are presented.

The Service analogized the return of a baseball by the fan to a game show contestant rejecting prizes in an attempt to justify the conclusion that the return of the baseball was not subject to transfer tax.[110] It is possible to borrow from the concept of a "qualified disclaimer" when discussing the

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103. *See, e.g.*, Claiborne v. United States, 648 F.2d 448, 452 (6th Cir. 1981) (holding property received from decedent constituted IRD when subsequently sold pursuant to a sales contract that had been near completion at time of deceased owner's death).

104. *See* Lederman, *supra* note 47, at n.149.

105. *See, e.g.*, I.R.C. § 1012 (stating that basis shall be the cost basis).

106. *See, e.g.*, H.R. 4522, 105th Cong. (1998).

107. *See* I.R.C. § 501(c)(3) (West 2010). The Baseball Hall of Fame is a registered § 501(c)(3) not-for-profit educational institution.

108. *See, e.g.*, Haverly v. United States, 513 F.2d 224, 226-27 (7th Cir. 1975); I.R.S. Priv. Ltr. Rul. 201027015 (July 9, 2010) (stating that credit card rebates are adjustment to price, not gross income; contribution of rebates to charity could constitute charitable contributions).

109. Stephen Moore, The Gift Tax: It's Going, Going, Gone (Sept. 16, 1998), http://www.cato.org/pub_display.php?pub_Id=5681.

110. *See* I.R.S., *supra* note 41.

refusal to accept such a baseball.[111] For instance, Chicago Cubs fans routinely throw home run baseballs hit by opposing teams back into the outfield. Like a qualified disclaimer, the baseball has been relinquished without any real direction from the momentary baseball holder as to who is the ultimate taker of the baseball.[112] Such an act may also lead to the determination that the taxpayer never reduced the baseball to his ultimate possession, possibly negating any application of the treasure trove regulations or the *Glenshaw Glass* analysis.[113]

In situations where someone directs the ultimate taker of the property, however, qualified disclaimer treatment is denied.[114] The taxpayer is allowed to transfer the property that is the subject of the disqualified disclaimer, but the transfer potentially gives rise to a taxable gift.[115] For instance, a will beneficiary who refuses his inheritance but directs the personal representative to deliver said inheritance to a third party not mentioned in the will, is treated as having made a taxable gift of such property.[116]

In the case of Forneris, the groundskeeper who corralled the McGwire baseball, he did not just throw it on to the field in an imitation of a disgruntled Cubs fan.[117] Rather, he dramatically returned it to McGwire on live television, declaring, "Mr. McGwire, I think I have something that belongs to you."[118] Whether by the Internal Revenue Service's principles or discretion, the transfer of the baseball to McGwire was presumably transferred tax-free. But the transfer begs the question: did this baseball belong to McGwire or was Forneris exercising dominion over the baseball by transferring the baseball to a person without a property interest—

111. *See* I.R.C. § 2518. Section 2518(b) defines a qualified disclaimer as an irrevocable and unqualified refusal by a person to accept an interest in property but only if:

> (1) Such refusal is in writing;
>
> (2) Such writing is received by the transferor of the interest, his legal representative, or the holder of legal title to the property to which the interest relates not later than the date which is 9 months after the later of (A) the day on which the transfer crating such interest in such person is made, or (B) the day on which such person attains the age of 21;
>
> (3) Such person has not accepted the interest or any of its benefits; and
>
> (4) As a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either (A) to the spouse of the decedent, or (B) to a person other than the person making the disclaimer.

I.R.C. § 2518(b). Section 2518 provides that "if a person makes a qualified disclaimer with respect to any interest in property, the [transfer taxes] shall apply with respect to such interest as if the interest had never been transferred to such person." *Id.*

112. *See* I.R.C. § 2518(b)(4) (providing that disclaiming without such direction is one of the requirements necessary to deem a disclaimer qualified).

113. Murphy, *supra* note 24, at A24.

114. *See, e.g.*, Estate of Bennett v. Comm'r, 100 T.C. 42, 57–58 (1993).

115. *See, e.g.*, Estate of Nix v. Comm'r, No. 4117-93, 1996 WL 98751, at *4 (T.C. Mar. 7, 1996).

116. *See, e.g.*, In re Estate of Lyng, 608 N.W.2d 316, 319 (S.D. 2000).

117. Tom Haudricourt, *Ball Comes Home: Cardinals Worker Gladly Returns It to McGwire*, MILWAUKEE J. SENTINEL, Sept. 9, 1998, at Sports1.

118. *Id.*

McGwire?[119] If the latter, the transfer seems ineligible for qualified disclaimer-like consideration.

However, one could argue that Forneris—an employee of the Cardinals—could not claim the baseball as his own in the first place because the baseball was the property of his employer, the Cardinals. Thus, the employer did not abandon the baseball to Forneris. If so, Forneris did not make a gift to McGwire, the Cardinals by allowing one employee to direct it to another for his possession. The situation is then comparable to the facts of Alex Rodriguez' 600th home run baseball.[120] A security guard retrieved Rodriguez's 600th home run baseball, and the New York Yankees allowed the baseball to become Rodriguez's property.[121] Under section 102(c), a gift to an employee is not excluded from gross income.[122] McGwire and Rodriguez would have gross income from these transactions, not the employees who retrieved the baseball.[123] Again, the topic of this article is the income tax treatment of the fan acquiring a home run baseball, and a further discussion of section 102(c) and related issues stemming from the transfer of the baseball to the player are beyond the scope of this article.

As for the proposal's purpose of fostering a fan's ability to maintain possession of the baseball and pass it to family members *inter vivosly* or as a result of death, modification of the transfer tax is assumed to be unnecessary. The transfer of the baseball could be covered by the annual exclusion and applicable credit amounts currently available in the gift tax, and the anticipated level of the estate tax unified credit as of January 1, 2011.[124] The taxpayer could, of course, rely on the Service's discretion, which appears, in large part, to have forgiven Forneris from both income and transfer tax impositions. Even if that is not forthcoming, these provisions of the estate and gift taxes could ameliorate the imposition of the transfer tax.[125] To graft a provision onto the transfer tax to specifically address baseballs therefore seems unnecessary. In other scenarios, complex provisions have been eliminated from the transfer tax due to the existence of the unified credit.[126]

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119. Finkelman, *supra* note 20, at 1611–12.

120. *A-Rod's 600th Homer Is One for the Ages*, DETROIT FREE PRESS, Aug. 5, 2010, at C5.

121. *Id.*

122. I.R.C. § 102(c) (West 2010) (providing an exception to section 102(a) that would otherwise exclude the ball from gross income).

123. *Id.*; *cf.* Treas. Reg. § 1.102-1(f)(2) (1989).

124. *See supra* n.9, 10 and accompanying text.

125. *Id.*

126. *See* Joseph M. Dodge, *Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System, and Abandoning the Generation-Skipping Tax*, 56 SMU L. REV. 551, 564 n.59 (2003). For instance, in 1981, Congress increased the unified credit, which then allowed the repeal of a complex estate tax exclusion provision pertaining to orphaned beneficiaries. *Id.*

VI. CONCLUSION

Although the result may be unpopular, as evidenced by the hue and cry surrounding the potential application of the tax laws during Mark McGwire's 1998 record-setting home run chase, there is strong support within the Code, Treasury Regulations, and case law for requiring a taxpayer to include the value of a caught home run baseball in gross income in the year acquired. In those instances where a taxpayer is lucky enough to catch a historic home run baseball, the taxpayer's tax concerns may result in an immediate sale, and subsequent inclusion of those proceeds in the taxpayer's gross income. However, with little modification and use of concepts already within the Code, this seemingly inequitable result can be avoided. By implementing a nonrecognition provision for home run baseballs, taxpayers will be able to avoid a sale, keep their mementos for life, and transfer these family heirlooms at death without immediate income tax concerns. To facilitate an eventual tax reckoning, home run baseballs that have not been the subject of a sales transaction during the owner's life may be treated as income in respect of decedent, preserving the inherent gain for eventual inclusion in gross income. With this framework, the Service may also receive a much needed public relations boost after it suffered a public demonizing at the hands of baseball fans, politicians, and tax attorneys in 1998.