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Challenging the Determination of Another Taxpayer's Status: The Effect of *Eastern Kentucky Welfare Rights Organization*

In *Simon v. Eastern Kentucky Welfare Rights Organization (EK-WRO)*,¹ the Supreme Court successfully avoided answering the question of whether a person whose own tax liability was not affected could challenge the taxpayer status of another.² Instead of resolving the issue, the Court escaped through what has recently become the over-worked trap door, and evaded the problem by declaring that plaintiffs had no standing to sue.³ Surprisingly the standing issue was the only issue consistently won by plaintiffs in the courts below.⁴ The treatment of the claim on the merits had produced opposing results below and the pronouncement of what the "law of the land"⁵ would be was eagerly awaited. Little did anyone know that those great arbiters would confound us once again.⁶ And, if that was not a blow enough, the Justices

1. 426 U.S. 26 (1976).

2. 426 U.S. at 37.

3. *Id.*

4. *Eastern Kentucky Welfare Rights Organization v. Shultz*, 370 F. Supp. 325, 329-33 (D.D.C. 1973); *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974).

5. The "Supremacy Clause," U.S. CONST. art. VI.

6. Actually, total blame should not rest on the shoulders of the Supreme Court Justices for refusing to address this issue since Congress recently passed up their opportunity to resolve it. The Tax Reform Act of 1976 adds § 7428 to the Internal Revenue Code, permitting organizations to obtain declaratory judgments as to their status as charitable, and therefore, tax exempt entities. The statute restricts the bringing of such a suit to the organization itself and explicitly takes no stand on the seemingly permissive attitude of the Supreme Court in allowing third party challenges to I.R.S. treatment of an organization as exempt (citing *Coit v. Green*, 404 U.S. 997 (1971), *aff'g*, *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), a case which is distinguished from *EKWRO* in note 73, *infra*). Rather, the Senate Report states:

The committee's amendment does not deal with this matter. *This amendment constitutes neither an implied endorsement nor an implied criticism of such "third-party suits."* However, the committee does intend that with respect to accepting *amicus curiae* briefs and permitting appearances by third parties in declaratory judgment suits under this amendment, the courts should be as generous as they can be, in light of the need for expeditious decisions in those cases and the general state of the courts' calendars.

S. REP. NO. 94-938, 94th Cong., 2d Sess. 587 n.6 (1976) (emphasis added). However, it is apparent that this procedure would provide very limited opportunities for third parties to air their views since it is not very likely that tax exempt organizations would challenge a more "liberalizing" interpretation of the Code, such as the interpretation of "charitable" in *EKWRO*. Sheldon & Bostwick, *Supreme Court severely limits third party's right to contest exempt status*, 45 J. TAX. 140, 142 (1976). The district court in *EKWRO* recognizes this fact too—that since the contested ruling establishes more favorable criteria, persons affected by it would not test its validity in court. The judge examines the situation in reverse—what would happen if the more liberal standards of Rev. Rul. 69-545 were overruled by the more stringent requirements of Rev. Rul. 56-185? Taxpayers denied deductions and hospitals refused tax exempt status would have the opportunity to challenge the ruling and would be able to make the same sort of arguments *EKWRO* plaintiffs made,

added insult to injury by remolding the amorphous dimensions and prerequisites of the standing requirement,⁷ something they had done far too often in the past few years.⁸

BACKGROUND

By "grace" of Congress,⁹ specific classes of organizations and trusts are declared exempt from federal income tax. These are enumerated in Internal Revenue Code § 501(c)¹⁰ and broadly comprise twenty categories.¹¹ For several reasons, the preferred mode of obtaining tax exempt status is through § 501(c)(3), the section reserved for "religious, charitable, scientific, . . . and educational" organizations.¹² The most important benefit of exemption under § 501(c)(3) is the ability of the organization to henceforth attract tax deductible contributions.¹³ Ad-

i.e., the ruling is contrary to the Code and hence is without effect. The judge concludes that just because Rev. Rul. 69-545 will not produce any "protesting" taxpayers eager to challenge it, is no reason for it to be immunized from attack. This is one of the reasons he does grant plaintiffs standing. 370 F. Supp. at 333.

7. Mr. Justice Brennan, in his dissent from the Court's reasoning on the standing issue, feels that "further obfuscation of the law of standing" was achieved in this case. 426 U.S. at 46. He would have come to the same disposition of this case but on the alternative ground that there was no "ripe controversy." 426 U.S. at 50.

8. For recent Supreme Court expositions on standing requirements, see *Warth v. Seldin*, 422 U.S. 490 (1975), *United States v. SCRAP*, 412 U.S. 669 (1973), *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), *Sierra Club v. Morton*, 405 U.S. 727 (1972), *Barlow v. Collins*, 397 U.S. 159 (1970), *Association of Data Processing Services v. Camp*, 397 U.S. 150 (1970). Mr. Justice Brennan notes that the Court's treatment of a voluminous number of cases dealing with standing serves only to confuse the lower courts as to the proper standards to be applied. He acknowledges that intellectual confusion will continue and quotes an inciteful passage from *Scanwell Laboratories v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970):

The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a "complicated specialty of federal jurisdiction." * * * One cannot help asking why this should be true. 426 U.S. at 66.

9. "[T]ax exemption is a privilege, a matter of grace rather than right." *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

10. The Internal Revenue Code of 1954 comprises 26 U.S.C.

11. Included among these are labor organizations (§ 501(c)(5)), chambers of commerce (§ 501(c)(6)), recreation clubs (§501(c)(7)), fraternal societies (§ 501(c)(8)) cemetery companies (§ 501(c)(13)), and credit unions (§ 501(c)(14)).

12. I.R.C. § 501(c)(3) reads, in part:

(c) List of Exempt Organizations

(3) Corporations, . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster . . . amateur sports competition . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, . . . and which does not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office.

13. See I.R.C. § 170(c)(2).

ditionally, exemption from state and local income tax, property and sales taxes are usually granted by the states to § 501(c)(3) organizations.¹⁴ The federal government also authorizes these organizations to mail at special reduced postal rates.¹⁵

Hospitals are not *per se* tax exempt but rather must come within the Code's definition of charitable to be granted exemption.¹⁶ The income tax regulations state that "charity" is to be construed "in its generally accepted legal sense." This includes "relief of the poor and distressed or of the underprivileged" and "lessening of the burdens of Government"¹⁷ as possible organizational purposes qualifying an organization as charitable. To set forth more concrete guidelines for nonprofit hospitals to meet the requisites for exemption, the I.R.S. issued Revenue Ruling 56-185¹⁸ in 1956. This ruling made the pivotal point of exemption for a hospital that it "be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay."¹⁹ This policy re-

14. McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 523 (1976). The importance and extent of the property tax exemption was underscored by a recent article in the N.Y. Daily News. If tax exempt realty in New York City alone was taxed at current tax rates, the city would draw in revenues of \$2.26 billion. N.Y. Daily News, Sept. 11, 1977, at 33, col 2.

15. McGovern, *supra*, note 14. See 39 U.S.C. §§ 3626-76 (1970). It is estimated that the number of exempt hospitals under § 501(c)(3) is 7,000. Lehrfeld & Webster, *Administration by the IRS of Non-profit Organization Tax Matters*, 21 TAX LAW. 591, 597 (1974).

16. 506 F.2d at 1280; 370 F. Supp. at 327. Congress specifically addressed the issue of whether nonprofit hospitals should be added as separate categories under § 501(c)(3) and § 170(c) in 1969. The American Hospital Association argued that "the mere provision of health care by nonprofit institutions is worthy of tax exempt and tax deduction status *per se*," and that "the requirement that hospitals afford service to the indigent was archaic." Brief for Petitioners in the Supreme Court, at 25. See *Hearing on the Tax Reform Act of 1969*, H.R. 13270, *Before the House Committee on Ways and Means*, 91st Cong., 1st Sess. 1425, 1428 (1969). The House accepted this argument and added "hospitals" to the list of organizations under § 501(c)(3) and § 170(c) (H.R. REP. NO. 413, 91st Cong., 1st Sess. 43 (1969)) but the Senate did not. The Tax Reform Act of 1969, as passed, did not give hospitals separate status apart from the charitable category. Brief for Petitioner in the Supreme Court, at 26. See CONFERENCE REPORT 91-782, 91st Cong., 1st Sess. 289-90 (1969). Interestingly, while the Senate was making its decision, the I.R.S. issued Rev. Rul. 69-545. Brief for Petitioners in the Supreme Court, at 26.

17. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959). The court in *Christian Echoes*, note 9 *supra*, cites Congressional justification for tax exemption: "[T]he Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. H.R. REP. NO. 1860, 75th Cong., 3d Sess. 19 (1939)". 470 F.2d at 854.

18. 1956-1 C.B. 202. I.R.C. § 7805(a) empowers the Commissioner of the I.R.S. to promulgate necessary rules and regulations to implement the statute. For a discussion of the entire rulings program, see Rogovin, *The Four Rs: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756 (1965).

19. 1956-1 C.B. at 203. Other general requirements that a hospital had to meet are set out below:

- 1) It must be organized as a nonprofit charitable organization for the purpose of operating a hospital for the care of the sick. . . .
- 3) It must not restrict the use of its facilities to a particular group of physicians and surgeons, . . . to the exclusion of all other qualified doctors. . . .

mained in effect for 13 years. In 1969, the I.R.S. issued Revenue Ruling 69-545²⁰ which drastically changed the guidelines to be followed by hospitals wishing to be exempt.²¹ No longer did a hospital have to provide free care "to the extent of its ability" in order to be tax exempt. It could now qualify for exemption merely "by operating an emergency room open to all persons and by providing hospital care for all those persons in the community able to pay the cost thereof either directly or through third party reimbursement."²² This revenue ruling explicitly modifies Revenue Ruling 56-185 by "removing therefrom the requirements relating to caring for patients without charge or at rates below cost."²³ This suit was brought by plaintiffs who allege injury as a result of a change in I.R.S. policy.²⁴

- 4) Its net earnings must not inure directly or indirectly to the benefit of any private shareholder or individual. . . .

Id. See generally *Tax Problems of Nonprofit Hospitals*, 47 TAXES 524 (1969).

Denial of exemption to a hospital may be the result of a failure to adhere to any of the above enumerated requisites (or those additionally mentioned in Rev. Rul. 69-545). A frequently seen reason for exemption denial or revocation is a violation of the "inurement" rule. The courts look very carefully at direct and indirect schemes to funnel sums out of the "charitable" hospitals' coffers and into the founding doctors' pockets.

But if a particular individual or limited number of individuals reap commercial benefits from the operation of the instrumentality, though they do not do so by direct acquisition of payment over to them of its earnings, the earnings may nevertheless "inure" to their "benefit" within the intendment of such phrasing so as to destroy the exempt status.

6 MERTENS, LAW OF FEDERAL INCOME TAXATION 63-64, § 34.13 (1968). See *Sonora Community Hosp. v. Comm'r*, 46 T.C. 519 (1966), *aff'd*, 392 F.2d 814 (9th Cir. 1968) (hospital operated for direct monetary benefit of founding doctors); *Harding Hosp., Inc. v. United States*, 358 F. Supp. 805 (S.D. Ohio 1973), *aff'd*, 505 F.2d 1068 (6th Cir. 1975) (psychiatrists formed hospital solely to perform their type of therapy—not exempt because it was operated for their benefit).

20. Rev. Rul. 69-545, 1969-2 C.B. 117. This ruling was written about Hypothetical Hospitals A & B. These anonymous references conform to the I.R.S. practice of omitting identifying details and confidential information contained in private requests for rulings. 426 U.S. at 31 n.4.

21. It should be noted that any organization granted a tax exemption must not only initially meet the Code or Revenue Ruling's guidelines, but must continuously "operate" within their confines. Treas. Reg. §§ 1.501(c)(3)-1(a)(1), -1(c)(1) (1959).

22. Rev. Rul. 69-545, 1969-2 C.B. at 118. This ruling seems to move away from the idea that a charitable purpose must encompass relief "to the poor and distressed or the underprivileged" and towards the idea that care of the sick *in itself* is a charitable purpose. See Brief for Amicus Curiae, American Hospital Association, at 21, for support for this argument. *But see* *Jackson County v. State Tax Comm'n*, 521 S.W.2d 378, 385 (Mo. 1975) (the court rejects the conclusion that "operation of a hospital for the care of the sick and infirm is itself a purely charitable purpose.").

23. Rev. Rul. 69-545, 1969-2 C.B. at 119. See generally Bromberg, *The Charitable Hospital*, 20 CATH. L. REV. 237 (1970); 54 N.C.L. REV. 1195 (1976). Under the regulations in effect when Rev. Rul. 56-185 was issued "corporations organized and operated exclusively for charitable purposes" were said to "comprise, in general, organizations for the relief of the poor." Treas. Reg. 118, § 39.101(6)-(b) (1953). New regulations were issued in 1959, reinterpreting the term "charitable." No longer was its meaning limited to relief of poverty, but instead was broadened to encompass the concept of community benefit or public interest. Bromberg, *Financing Health Care and the Effect of the Tax Law*, 39 L. & CONTEMP. PROB. 156, 164-5 (1975).

24. 426 U.S. at 32-34.

Plaintiffs consisted of organizations and individuals. The organizations included in their membership low income persons, and “represented the interests of all such persons in obtaining hospital care and services.”²⁵ The 12 individual plaintiffs were below government established poverty levels and suffered from medical conditions requiring hospital services.²⁶ Each individual recounted an occasion on which he or a family member had been denied admission to a hospital due to indigency. One person was even denied admission to an emergency room.²⁷ Plaintiffs claimed that each of the hospitals involved was a tax exempt corporation and each received substantial private contributions. The complaint alleged that defendants, the Secretary of the Treasury and the Commissioner of the I.R.S., “by extending tax benefits to such hospitals despite their refusals fully to serve the indigent” were “encouraging” hospitals to deny services to the indigent such as plaintiffs.²⁸ Plaintiffs made two claims:²⁹ 1) that the issuance of Rev. Rul. 69-545 violated the Code, and the treatment of hospitals as charitable that refused to serve indigents, continued the violation,³⁰ and 2) that the issuance of Rev. Rul. 69-545 was without a public hearing and hence no opportunity for examination of public views had occurred, in violation of the Administrative Procedure Act, 5 U.S.C. § 553.³¹ Defendants raised several defenses in their motion to dismiss in the dis-

25. 426 U.S. at 32. These organizations were California Welfare Rights Organization, Eastern Kentucky Welfare Rights Organization, National Tenants Organization, Association of Disabled Miners and Widows, Inc., and Health Education Advisory Team, Inc.. *Id.* at nn. 6 & 7.

26. *Id.* at 32.

27. *Id.* at 33.

28. *Id.*

29. Plaintiffs had originally made several other claims, i.e., that issuance of the Ruling was an abuse of discretion and denied them due process of law. The Supreme Court relegated them to a footnote since they had been treated summarily or not at all by the courts below and were “not pressed in this court.” 426 U.S. at 34 n.9.

30. *Id.* Plaintiffs claimed that legislative history of the Code, I.R.S. regulations, and continuous judicial precedent had established the meaning of “charitable” to be “relief of the poor” and that the challenged ruling departed from that interpretation. *Id.* Plaintiffs’ brief filed in the Supreme Court makes the assertion that “every federal tax court decision on the subject since 1942, and continuing to date, has so held” that “the charitable status of nonprofit hospitals under the Code depends upon the provision of free and below cost care to persons unable to pay.” A five page discussion of cases follows this assertion and supposedly proves the validity of this point. Brief for Petitioners in the Supreme Court, at 20-24.

31. Under the Administrative Procedure Act, 5 U.S.C. § 553 (1970), government agencies are required to give notice to the public of proposed rule making, and allow public views to be expressed before the proposals become finalized. Plaintiffs allege that, as these procedures were not followed in promulgating Rev. Rul. 69-545, the resulting rule is invalid. 426 U.S. at 34. One of the exceptions to the § 553 rule making requirements makes it inapplicable “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” 5 U.S.C. § 553(b)(A). Plaintiffs argue that this Ruling should be considered a “substantive” rule as opposed to an “interpretative” rule that would be excepted from the above procedure. 426 U.S. at 34. *See* Note, 7 U. TOL. L. REV. 278, 828-83 n.15 (1975) for a discussion of the differences between “interpretative” and “legislative” rules under APA § 553.

strict court.³² Specifically, they challenged plaintiffs' standing, and asserted that the action was barred by the Anti-Injunction Act,³³ the tax limitation in the Declaratory Judgment Act,³⁴ and the doctrine of sovereign immunity.

The District Court found for plaintiffs on the merits and concluded that "Rev. Rul. 69-545 was improperly promulgated and is without effect inasmuch as it allows private non-profit hospitals to qualify as charities . . . without requiring the hospitals to offer special financial considerations to persons unable to pay."³⁵ The Court of Appeals reversed on the merits, feeling that Revenue Ruling 69-545 was "founded on a permissible definition of the term 'charitable' and is not contrary to any express Congressional intent."³⁶ In fact, Judge Jameson opined that this new ruling "may be of greater benefit to the poor than its predecessor."³⁷ The Supreme Court never reached the merits because they found that plaintiffs' complaint "failed to establish their standing to sue."³⁸

32. 426 U.S. at 34-35.

33. The Anti-Injunction Act, I.R.C. § 7421(a), states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Supreme Court explained the Act's purpose:

The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner, the United States is assured of prompt collection of its lawful revenue.

Enochs v. Williams Packing and Navigation Co., 370 U.S. 1, 7 (1970). Thus, inferentially, one could conclude that

where the action or provision challenged is not intended to collect revenue, but rather to achieve some other policy based goal through use of the tax laws, the goal of prompt revenue collection would likewise be unaffected by an injunction. In fact, whenever the purpose of the challenged code provision is not revenue collection, the purpose of § 7421(a) would seem inapplicable . . . § 501(c)(3), is not designed to raise money. . . .

73 COLUM. L. REV. 1502, 1512 (1973). The inapplicability of the statute to *EKWRO* should be clear. An injunction obtained by plaintiffs would *not* have decreased federal tax revenues, but rather might have increased revenues as fewer hospitals would have qualified for exempt status (or alternatively, would have made no difference in collected revenues as hospitals changed their procedures back to give free care so that they could continue to be tax exempt). See 48 U. COLO. L. REV. 95, 99 n.16 (1976); Brief for Petitioners in the Supreme Court, at 51.

34. Under the Declaratory Judgment Act, 28 U.S.C. § 2201, federal courts are empowered to grant declaratory relief "except with respect to Federal taxes . . ." However, this language is considered to be coterminous with the Anti-Injunction Act and does not expand the area into which federal courts dare not tread. Tannenbaum, *Public Interest Tax Litigation Challenging Substantive IRS Decisions*, 27 NAT'L TAX J. 373, 377 (1974); Brief for Petitioners in the Supreme Court, at 53. Thus since defendants' claim that the suit was barred by the Anti-Injunction Act was erroneous (see note 33 *supra*) the Declaratory Judgment Act is also inapplicable to this suit.

35. 370 F. Supp. at 338.

36. 506 F.2d at 290.

37. *Id.* at 1289. Judge Jameson also noted that Rev. Rul. 69-545 sets forth a "more definite and specific standard," inferring that it is therefore more workable. *Id.* at n.26.

38. 426 U.S. at 37. What the Supreme Court's decision would have been had they reached the merits can only be guessed at, but a previous case from the Court indicates it may have found for plaintiffs. In *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), the Court recognized

THE STANDING ISSUE

The Supreme Court articulated a new standing rule³⁹ in denying plaintiffs the right to have their claim resolved. The plaintiffs had to show "an injury to themselves that is likely to be redressed by a favorable decision."⁴⁰ Without "such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation"⁴¹ of actual cases and controversies. The Court examined plaintiffs' injury and traced it to the hospitals' denial of services,⁴² but the Court refused to make the inferential jump to the defendants' culpability, albeit indirect, for "encouraging" the hospitals to act in such a manner.⁴³ The Court did not have power to adjudicate "injury at the hands of a hospital"⁴⁴ because no hospital was joined as a defendant;⁴⁵ only treasury officials occupied that lofty position. Rather, the Court termed an inference, as to whether "the denials of service specified in the complaint fairly can be traced" to the defendants' action, as "purely speculative."⁴⁶ The Court apparently thought it in the realm of possibility that the hospitals' decisions were made "without regard to the tax implications."⁴⁷ Despite plaintiffs' allegations that all the hospitals involved received substantial donations deductible by donors, the Court again termed "speculative" the inference that the hospitals "are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit plaintiffs if a court required such admission as a condition to receipt of charitable treatment."⁴⁸ The Court concluded that there was "no likelihood"⁴⁹ that plaintiffs' victory in this suit would bestow upon them

the inadequacy of merely providing emergency treatment to indigents and the necessity for hospital services to be available at the earlier stages of a disease.

To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.

Id. at 261 (footnotes omitted).

39. Or rearticulated an old standard, if you agree with the Court's reasoning. 426 U.S. at 45, quoting *Warth v. Seldin*, 422 U.S. at 505.

40. *Id.* at 38. See also *Gray v. Greyhound Lines, East*, 545 F.2d 169, 175 (D.C. Cir. 1976); *Doe v. Mathews*, 422 F. Supp. 141, 144 (D.D.C. 1976); 8 ST. MARY'S L.J. 588, 589 (1976).

41. 426 U.S. at 38.

42. *Id.* at 40-41.

43. *Id.*

44. *Id.*

45. See note 80, *infra*, where the suit was refiled naming hospitals as defendants.

46. 426 U.S. at 42-43. See 8 ST. MARY'S L.J. 588, 593 (1976).

47. 426 U.S. at 43.

48. *Id.*

49. *Id.* at 45.

"the hospital treatment they desire"⁵⁰ and so remanded to the District Court with instructions to dismiss.

The Court makes several attempts throughout the *EKWRO* opinion to reconcile its new standing rule with previously enunciated standing doctrines. One gets the feeling that this was done more out of a deference to stare decisis and the implied duty flowing therefrom to decide similar cases with a certain degree of consistency, than as an attempt to clarify the standing issue and applicable principles so that students of the subject could comprehend it. The Court took great pains to point out that the *EKWRO* decision was in line with two previous cases that had established that "unadorned speculation will not suffice to invoke the federal judicial power."⁵¹ But the cases cited, *Linda R.S. v. Richard D.*⁵² and *Warth v. Seldin*,⁵³ are so factually different from the present case that application of principles from them is a deceptive act.

Linda R.S. involved an attempt by the mother of an illegitimate child to have the district attorney apply a criminal child support statute, previously applied only to fathers of legitimate children, to the father of her illegitimate child. The Court denied her standing to do so because prosecution of the father had no relation to her inability to secure support payments from him.⁵⁴ *Warth* was concerned with the invalidation of a town's restrictive zoning ordinance. The low income plaintiffs had alleged as their injury the inability to obtain adequate housing within their financial capabilities as a result of the ordinance.⁵⁵ The Court, in a precursor to the *EKWRO* holding, denied plaintiffs standing because they failed "to establish that . . . the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."⁵⁶

In analogizing *EKWRO* to *Linda R.S.* and *Warth*, the Court overlooked a very significant distinction. In *Linda R.S.* and *Warth*, the plaintiffs were attempting to acquire a benefit to which they had not been previously entitled, and were accusing governmental action for their deprivation. If they won their suits, they would end up ahead; if they lost, they were relegated to a position no worse than their starting point. This was not the case in *EKWRO*. Here plaintiffs had previously enjoyed specific economic benefits, i.e., free hospital care. As a result of government action, this benefit was withdrawn.⁵⁷ Clearly, if

50. *Id.* at 46.

51. *Id.* at 44.

52. 410 U.S. 614 (1973).

53. 422 U.S. 490 (1975).

54. 426 U.S. at 44.

55. *Id.*

56. 422 U.S. at 505.

57. *Hospitals, Tax Exemption, and The Poor*, 10 HARV. C.R.-C.L. REV. 653, 660 n.21 (1975).

plaintiffs won their suit, they would be restored to their original position; if they lost, they would be left in a worse position than ever before.

The Court relegates to footnote entries several of their earlier standing cases. In *Association of Data Processing Services v. Camp*,⁵⁸ and its companion case, *Barlow v. Collins*,⁵⁹ the Court had set out a two pronged test which was to be applied to plaintiffs challenging governmental agency action.⁶⁰ First, the plaintiff must meet the Art. III "case or controversy" test and demonstrate that the challenged action has caused him injury in fact.⁶¹ Second, the interest sought to be protected must arguably be within the zone of interests to be protected or regulated by the statute.⁶² The *EKWRO* Court dismisses the "zone of interests" test as a nonconstitutional standing requirement. While the Court does recognize plaintiffs' contentions that they are the intended beneficiaries of the charitable provisions in the Code, they feel that their finding against plaintiffs as to the Art. III requirement, does not necessitate their taking a position on this second, apparently less important, requirement.⁶³ The Court later discusses, again in the footnotes, how its decision in *EKWRO* conforms to the "injury in fact test" in *Data Processing* and *Barlow*.⁶⁴

The District Court based its finding that plaintiffs had standing on the fact that they satisfied the standing test set out in *United States v. SCRAP*.⁶⁵ The District Court deemed that test to have two parts—an "injury in fact" which affects a statutorily protected interest⁶⁶—and the *EKWRO* plaintiffs had met both requisites. However, the Supreme Court felt it was an erroneous finding, for although plaintiffs in *SCRAP* had also alleged an indirect injury, there was "a 'specific and perceptible harm' flowing from the agency action."⁶⁷ Yet anyone who has examined the "attenuated line of causation to the eventual injury"⁶⁸ in *SCRAP* would surely agree that the *EKWRO* plaintiffs

58. 397 U.S. 150 (1970).

59. 397 U.S. 159 (1970).

60. See 69 MICH. L. REV. 540, 551-60 (1971) for discussion of the *Data Processing-Barlow* test.

61. 397 U.S. at 151-52.

62. *Id.* at 153. See 48 U. COLO. L. REV. 95, 101 (1976). See also *Gray v. Greyhound Lines, East*, 545 F.2d 169, 175 (D.C. Cir. 1976).

63. 426 U.S. at 39 n.19.

64. *Id.* at 45 n.25.

65. 412 U.S. 669 (1973).

66. 370 F. Supp. at 329-33.

67. 426 U.S. at 45 n.25. Before the Supreme Court issued its opinion in *EKWRO*, one author postulated that they might require "tighter factual proof of a nexus between plaintiffs' injury . . . and the tax policy change embodied in the revenue ruling." Note, 29 TAX LAW. 361, 371 (1976).

68. 412 U.S. at 688.

demonstrated a more direct link between the treasury's action and their injury.⁶⁹ Justice Brennan, in his separate opinion in *EKWRO*, concurs with this view and states that "the Court's attempted distinction of *SCRAP* will not 'wash'."⁷⁰

The Supreme Court seems to have gone to a lot of trouble to dispose of this case without deciding its merits. Despite the Court's statement in *Data Processing* that "where statutes are concerned, there is a growing trend toward enlargement of the class of people who may protest administrative action" and that "enlarging the category of aggrieved persons is symptomatic of that trend,"⁷¹ in this particular case, the Court made access to the judicial process extremely difficult. Why this sudden change of heart?

Lack of standing is often the conclusion reached by the Court when a "majority wishes neither to render a decision on the merits nor to entertain suits involving what it considers undesirable subject matter."⁷² It should be kept in mind that *EKWRO* is tax litigation, and its being a member of this species may very well have influenced the outcome of the case. Tax cases often come before the courts in the form of refund suits.⁷³ The taxpayer has paid the tax allegedly owed and now sues for a refund and ultimately the resolution of his contention that it was erroneously levied and collected.⁷⁴ In this traditional setting, a court

69. In *SCRAP*, environmental groups attacked a surcharge on railroad freight rates, alleging it would result in harm to their economic, recreational and aesthetic interests. The Court was able to make the necessary inferences from the allegations below that plaintiffs had indeed suffered injury from the challenged agency action.

. . . A general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

412 U.S. at 688. Certainly the plaintiffs in *EKWRO* did not present a more "attenuated line of causation" than that!

70. 426 U.S. at 62. See Note, 30 TAX LAW. 490, 492 (1977).

71. 397 U.S. at 154.

72. Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS U.L.J. 663, 665 (1976).

73. The alternative method under which a suit arises occurs when the taxpayer has not paid the tax and the Government sues the taxpayer in the Tax Court for the deficiency owed.

74. It is by this method of a "refund" suit that the Supreme Court disposed of previous litigation involving exempt organizations. In *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), the government threatened to revoke the university's § 501(c)(3) tax exemption due to its discriminatory policies. The school sued to enjoin such an action, alleging irreparable injury from its loss of contributions. The Court found the Anti-Injunction Act (see note 33 *supra*) blocked the action but pointed out an alternative route the defendants could take to litigate their claim. Once they pay income tax, FUTA or FICA taxes, and exhaust the internal refund procedures of the I.R.S., they can commence a suit for refund. 416 U.S. at 746. The Court recognizes the problems with such a suit:

We do not say that these avenues of review are the best that can be devised. They present serious problems of delay, during which the flow of donations to an organization will be impaired and in some cases perhaps even terminated. But, as the Service notes, some delay

feels comfortable for its has before it the specific parties entitled to an "assemblage of economic benefits"⁷⁵ and it need only determine the rights and obligations of these parties and fashion appropriate monetary relief.⁷⁶ However, when the action before it is an attack on tax policies by third parties whose own tax obligations are not at issue, the interests involved become fuzzy and tend to obscure the concrete adverseness that Art. III requires.⁷⁷ It is under these latter conditions that the Supreme Court seems to throw up its hands in despair, and hoping that we would not notice their avoidance of the issue, embroils us in a discussion of standing once more.

Perhaps one additional item about standing can best sum up the subject. This observation was made by the learned Justices themselves in

may be an inevitable consequence of the fact that disputes between the Service and a party challenging the Service's actions are not susceptible of instant resolution through litigation. And although the Congressional restriction to post enforcement review may place an organization claiming tax exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in the light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference.

416 U.S. at 747. See *Alexander v. "Americans United," Inc.*, 416 U.S. 752 (1974) (an organization's § 501(c)(3) exemption was converted to § 501(c)(4) due to its violation of the statute's lobbying provisions; under § 501(c)(4) the organization is liable for FUTA taxes and can sue for a refund after paying them); *Crenshaw County Private School Foundation v. Connally*, 474 F.2d 1185 (3rd Cir. 1973) (school sought to enjoin withdrawal of tax exempt status and under Anti-Injunction Act, suit was dismissed). But see *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom.*, *Coit v. Green*, 404 U.S. 997 (1971) (Negro parents were allowed to enjoin granting of tax exempt status by Treasury to schools that discriminated).

Justice Blackmun does note in *Bob Jones Univ.* that there may be occasion when a refund suit will not be available. The alternative to be used in that situation is the "friendly donor suit." The organization must find a donor willing to file a refund action claiming a § 170(c)(2) charitable deduction to the organization after the I.R.S. has withdrawn advance assurance of deductibility. The donor chosen would have to withstand the "rigors" of litigation and be able to present the relevant arguments on the organization's behalf. Recognizing the problems attendant with this approach, Justice Blackmun does not rule on its adequacy as a viable alternative. Rather, he "reserve[s] the question for a case that turns upon its resolution." 416 U.S. at 747 n.21.

Before such a case did present itself to the Supreme Court for resolution, the "friendly donor" problem arose and was resolved at the district court level. In *Right to Choose of N.J. v. Simon*, Civil No. 76-1097 (D.C.N.J. 1977), the plaintiff organization, whose stated purpose was to champion the right of free choice regarding abortion, was denied the more favorable § 501(c)(3) status and instead was exempt under § 501(c)(4). Plaintiff alleges that the conferral of the more favorable § 501(c)(3) status on Dover Right to Life Committee, an organization advocating an anti-abortion position, is an unconstitutional application of the statute in that plaintiff is denied equal protection of the laws. After examining the situation, the court concludes that this case falls squarely within the question left unresolved by the *Bob Jones Univ.* Court. The court ultimately decides that one of the plaintiffs, a contributor to the organization, can bring a "friendly donor" suit to resolve the issue, and so grants defendants' motion to dismiss. See also *Investment Annuity, Inc. v. Blumenthal*, 437 F. Supp. 1095 (D.D.C. 1977). The court does note that under the new I.R.C. § 7428 (see note 6 *supra*) *Right to Choose* may be able to bring its own declaratory judgment suit to determine its status.

75. *Hospitals, Tax Exemption, and The Poor*, 10 HARV. C.R.-C.L. L. REV. 653, 660 n.21 (1975).

76. 48 U. COLO. L. REV. 95, 97 (1976).

77. *Id.*

Data Processing, "Generalizations about standing to sue are largely worthless as such."⁷⁸ Never has a truer word been heard from those most trying of men!

THE EFFECT OF *EKWRO* ON FUTURE LITIGATION

The impact this decision will have on future litigation is "speculative". One author takes a rather simplistic view of the holding and believes that to remedy the situation found in *EKWRO*, a more specific pleading with more detailed allegations will suffice.⁷⁹ In fact, after the decision of the Court of Appeals was handed down, plaintiffs refiled the suit,⁸⁰ naming hospitals as defendants, apparently hoping this would remedy the infirmities the Court of Appeals found with regard to their case.

Another author postulates that the *EKWRO* decision will have little effect, as a practical matter, since the class of plaintiffs to which it applies is so small. When a plaintiff sues the government for an injury *directly* inflicted by an agency's action, it is apparent that the new "causation" requirement will be automatically satisfied. It is only in that small group of cases in which "a plaintiff sues the government to complain of an injury suffered as a result of the impact of government action on third parties not before the court" that the "causation/relief" issue will arise.⁸¹ That *EKWRO* appeared to be the first case presenting this unique problem emphasizes the infrequency of such problematic suits.

Perhaps the most alarming view of the *EKWRO* holding is expressed by one writer who takes the position that the Court's holding effectively restricts the ability of the federal courts to review the propriety of the IRS's administration of the Internal Revenue Code through its rulings program. A completely "hands off" attitude by the courts with respect to rulings such as that challenged in *Eastern Kentucky* is unacceptable. The judiciary in the past played an important role in assuring that administrative actions, which may adversely affect the rights and interests of individuals and which may run counter to congressionally mandated goals, are not committed wholly to agency discretion. It must continue to do so; such rulings should not be free from challenge in a judicial forum.⁸²

78. 397 U.S. at 154.

79. Sheldon & Bostonwick, *Supreme Court severely limits third party's right to contest exempt status*, 45 J. TAX.140 (1976).

80. *Chapman v. Berkshire Medical Center*, Civ. No. 74-1954-F (D. Mass. filed 6-6-74); *Lugo v. Simon*, Civ. No. 74-345 (N.D. Ohio filed 8-26-74), reported at 426 F. Supp. 28.

81. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 205, 210 (1976).

82. 48 U. COLO. L. REV. 95, 97 (1976) (footnotes omitted). See also *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 556 F.2d 145, 152 n.2, 153 (D.C. Cir. 1977) (Bazelon, C.J. dissenting).

One hopes that this is not the proposition that the case will stand for. Somewhere between the "faulty pleading" theory and the "agency controls" theory, *EKWRO* will find its place in the law. Whether its application will be important to standing suits or all third-party type actions is hard to predict. The Justices who made the original decision are perhaps the only ones who can decide how it will be applied.

SOLUTIONS TO THE PROBLEM

I would like to posit two ideas that, had they been operative when the *EKWRO* plaintiffs were contemplating this suit, may have more readily and easily resolved their claim than the voluminous litigation that actually occurred and apparently solved nothing. One idea is the inclusion under the APA of I.R.S. Revenue Rulings, and the other involves a bill recently introduced in Congress dealing with this very problem. These two approaches in no way exhaust the possible ways plaintiffs could have sought to command relief.⁸³

1) This situation was plagued by a dearth of relevant information⁸⁴ from the very beginning—the promulgation of Revenue Ruling 69-545. Plaintiffs asserted:

This reversal of a long-held requirement [Rev. Rel. 59-185] was issued without notice to the public or any opportunity to the public and/or interested and affected persons to contest this matter. The ruling on its face, is totally devoid of any consideration of the needs of indigent persons for hospital services or the number of such persons who, by virtue of the ruling, would be stripped of pre-existing rights for services from tax exempt hospitals.⁸⁵

Indeed, had the I.R.S.'s rulings been adjudged "legislative" rather than "interpretative" they would have been covered by the notice and hearing provisions of the APA. Thus before Revenue Ruling 69-545 could have become "law," the I.R.S. would have had to hold hearings and take cognizance of plaintiffs' assertions that the large number of per-

83. In addition to the solutions discussed in the text, the following ideas are thrown out to the reader to ponder:

1) *EKWRO* plaintiffs could have developed their third party beneficiary argument in more depth. Indeed, they may very well have a claim as intended beneficiaries of the contested provision of the Code. *Accord*, 426 U.S. at 33; 506 F.2d at 1281 n.5.

2) Under the Hill-Burton Act (42 U.S.C. § 291 *et seq.* (1970)), hospitals receiving grants from the federal government to aid in their construction are required to provide a reasonable amount of free services to the poor for a twenty year period thereafter. Recent examinations of the enforcement of this requirement by the individual states show it to be very lax. Quite possibly, *EKWRO* plaintiffs could have sued under this provision (if applicable to the hospitals involved) to obtain the required medical services. See Cypen, *Access to Health Care Services for the Poor: Existing Programs and Limitations*, 31 U. MIAMI L. REV. 127 (1976); Cypen, *Access of the Poor to Nonprofit Hospitals*, 49 FLA. B.J. 527 (1975).

84. See, e.g., 426 U.S. at 45 n.25, where even the Supreme Court realizes it does not have at hand all the facts.

85. Plaintiffs' petition for writ of certiorari to the U.S. Court of Appeals, at 4.

sons not covered by any type of medical insurance are left virtually without hospital services if the new ruling takes effect.⁸⁶ It is presumably because the I.R.S. officials were not aware of the magnitude of the problem that such an erroneous policy was allowed to go into effect.

Whether I.R.S. rulings should be covered by the APA is an issue that has been litigated before,⁸⁷ with the resolution being that the I.R.S. issues "interpretative" rulings and hence is free from APA restraint.⁸⁸ The sentiment has been expressed, however, that in issuing rulings such as the one involved here, the I.R.S. gets "to enjoy the best of both worlds" —they have the ability to promulgate rulings affecting an inordinate number of people without the necessity of complying with the APA notice and hearing provisions.⁸⁹ The I.R.S. then enjoys "the luxury of having such rulings, as a practical matter, govern tax administration, free from challenge in a judicial forum, for a time period limited only by the will and discretion of the I.R.S."⁹⁰ By requiring the I.R.S. to comply with the APA, the decisions are still made at the agency level but at least the courts will be assured that they are informed and educated choices.⁹¹ With these precautions, a situation like that in *EKWRO* hopefully would not arise.

2) A bill introduced in the Senate in the summer of 1977 may put a stop to *EKWRO* situations before they have a chance to begin. Senate bill 1939⁹² proposes to amend the I.R.C. to allow the U.S. Tax Court to issue a declaratory judgment with respect to the correctness of a new revenue ruling issued by the I.R.S. that modifies a previous ruling that has been the "law" for at least five years. The bill allows a pleading to be filed by anyone "directly affected by such ruling."⁹³ The Tax Court would be empowered to order the Treasury Secretary to withdraw the ruling if it is found to be "inconsistent with the internal revenue law to which it relates."⁹⁴

The bill was introduced in response to a specific reversal of policy by

86. See *id.* at 37 (where plaintiffs number the persons adversely affected as "36,000,000 poverty level people in the U.S."). Cf. Bromberg, *Financing Health Care and the Effect of the Tax Law*, 39 L. & CONTEMP. PROB. 156, 161 (1975) (where the author acknowledges that there are "still persons for whom no reimbursement is available."). The number of persons actually involved must be somewhere between the plaintiffs' gross exaggeration and Mr. Bromberg's inferentially small estimation.

87. See, e.g., *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C. Cir. 1952).

88. Had the I.R.S. sought to get this ruling through Congress, it is probable that Congress would have held hearings to learn the public's views.

89. 48 U. COLO. L. REV. 95, 121 (1976).

90. *Id.*

91. *Id.*

92. 95th Cong., 1st Sess., 123 CONG. REC. S12883 (1977), introduced by Mr. Gravel, for himself, Mr. Matsunaga, and Mr. Thurmond on July 27 (legislative day, July 19), 1977. [hereinafter cited as S. 1939].

93. S. 1939, § 7478(b)(1).

94. S. 1939, § 7478(c)(2)(A).

the I.R.S. which drastically affected the investment annuity industry.⁹⁵ But Senator Gravel, in his years on the Senate Finance Committee, has seen other examples of I.R.S. "administrative action that has caused difficult and unnecessary problems for taxpayers."⁹⁶ He points out that rulings which have been in effect for a long time take on the "color of law."⁹⁷ Thus, when the I.R.S. goes ahead and changes a long held position, it is only fair that they have the burden of proving the correctness of their new position before it becomes effective.⁹⁸ Since I.R.S. policy decisions affect people in their daily lives,⁹⁹ the Government should not be able to pull the rug out from under reliant taxpayers. This is certainly a viable alternative to the *EKWRO* problem, and one those plaintiffs would have welcomed when confronted with Revenue Ruling 69-545.

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95. 123 CONG. REC. S12884, 7-27-77. See *Investment Annuity, Inc. v. Blumenthal*, 437 F. Supp. 1095 (D.D.C. 1977).

96. 123 CONG. REC. S12883.

97. *Id.* at S12884.

98. *Id.* at S12885.

99. *Id.* at S12883-84.

