THE SADDLE RIDGE GOLD COIN DISCOVERY: HOW THE IRS SHOULD TAX U.S. CURRENCY UNDER THE TREASURE TROVE REGULATION

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I. INTRODUCTION

In 2013, an anonymous California couple found a treasure trove of 19th century U.S. gold coins on their property nicknamed Saddle Ridge.[1] The find is claimed to be the greatest buried treasure ever unearthed in the United States.[2] The find includes 1,427 coins dated from 1847 to 1894, all in mint condition.[3] According to the couple's representative,[4] Donald Kagin, president of Kagin's Inc., a numismatic firm that specializes in U.S. gold coins, the treasure trove has a fair market value that could exceed $10 million.[5] The face value of the coins amounts to approximately $28,000, but their high estimated valuation comes from their rarity.[6] In private conversations with one of the authors, Kagin indicated that the 1,400 ounces of coins have a melt value of approximately $2.0 million, an amount first offered to the couple.

While much media attention has been aimed at discovering the details of the find, determining who the previous owners might have been,[7] and how the coins and the income they generate will be used, the couple's find of these gold coins raises tax issues. A major issue for the couple is that the government will likely require payment of taxes on the coins, regardless of whether they have sold all of them. That is because the "treasure trove" case from 1969 considers such windfalls as ordinary income.[8] Thus, as it currently stands, the California couple may not only have to recognize an estimated fair market value of the coins as gross income, but the income would be characterized as ordinary. The tax rate on the ordinary income could be as high as 39.6% for U.S.

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1. Ruben Vives, *California Couple Finds $10 Million in Gold Coins Buried in Backyard*, LOS ANGELES TIMES (Feb. 25, 2014, 9:51 AM), http://www.latimes.com/local/lanow/la-me-ln-gold-coins-california-backyard-20140225,0,2401817.story#axzz2vlfiNP8U [http://perma.cc/S9G7-FGT2].

2. *Id.*

3. David McCormack & Chris White, *Could Newly Discovered Gold Coins Be the Haul Stolen by Disgraced San Francisco Mint Employee in 1901? Treasure Hunting Enthusiasts Weigh In on Origins of Couple's $10 Million Find*, MAIL ONLINE (Feb. 27, 2014, 10:45 PM), http://www.dailymail.co.uk/news/article-2568952/Could-newly-discovered-gold-coins-haul-stolen-disgraced-San-Francisco-Mint-employee-1901-Treasure-hunting-enthusiasts-weigh-origins-couples-10-million-find.html [http://perma.cc/548Z-WGJL].

4. Vives, *supra* note 1.

5. *Id.*

6. *Id.*

7. McCormack & White, *supra* note 3.

8. Cesarini v. United States, 296 F. Supp. 3, 8 (N.D. Ohio 1969), *aff'd*, 428 F.2d 812, 814 (6th Cir. 1970) (per curiam) (holding cash found inside a piano taxable as ordinary income).

federal taxes and 13.3% for taxable income that is over $1 million for California state tax purposes.[9]

In this article, we explore the interesting legal tax issues that arise from the discovery of these gold coins: (1) whether the treasure trove discovery constitutes taxable income; and (2) what the appropriate valuation method and character (ordinary or capital) of the discovery is, if it is taxable income. With respect to the first tax issue, Treasury Regulation section 1.61-14(a)[10]—the treasure trove regulation—clearly identifies the discovery of the U.S. gold coins as taxable income to the couple. The second tax issue raises a more interesting question, however. The amount of taxable income reported by the couple hinges on two primary taxation theories implicated when the finder of gold coins attains undisputed possession: (1) ignore the treasure trove regulation and tax only upon sale; or (2) tax immediately because the coins are an accession to wealth and thus realized income. The article discusses each of these in turn by looking at several variations that could have significantly different tax consequences. Additionally, as the discussion on valuation takes place, we examine whether the U.S. gold coins are legal tender or property upon discovery. The article concludes with a proposed solution: tax the finder immediately on the face value of the coins, then treat the increase in value as unrealized gain and tax the finder on that gain if the finder sells the coins.

II. THE TREASURE TROVE DISCOVERY CONSTITUTES GROSS INCOME

A treasure trove involves several very basic income-tax principles. It is important to keep these principles in the forefront when analyzing the proper tax treatment. Section 61 of the Internal Revenue Code (I.R.C.) defines gross income as: "all income from whatever source derived,"[11] except as otherwise provided. Treasury Regulation section 1.61-1(a) states, "[g]ross income means all income from whatever source derived, unless

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9. The tax rates and the amount of tax assessed will depend on the value of the U.S. gold coins at the time the couple is deemed to have undisputed possession. Ashlea Ebeling, *401(k) Interrupted: Suspend Contributions While You Wait For Trump's Tax Cuts?*, FORBES (Jan. 3, 2016, 7:09 AM), http://www.forbes.com/sites/ashleaebeling/2017/01/03/401k-interrupted-suspend-contributions-while-you-wait-for-trumps-tax-cuts/#dcbf9ba726d9 [http://perma.cc/C9XE-QKV7]; Ashlea Ebeling, *Voters Okay State Income Tax Hikes for the Rich*, FORBES (Nov. 10, 2016, 12:06 PM), http://www.forbes.com/sites/ashleaebeling/2016/11/10/voters-okay-state-income-tax-hikes-for-the-rich/#26ef8c3516d0 [http://perma.cc/XL3Z-W9GH].

10. Treas. Reg. § 1.61-14(a) (2015).

11. I.R.C. § 61 (2012).

excluded by law. Gross income includes income realized in any form, whether in money, property, or services."[12] In *Commissioner v. Glenshaw Glass Co.*,[13] the seminal case interpreting gross income, the Court set forth three requirements for gross income: an accession to wealth, realization, and taxpayer dominion and control.[14] Thus, if a treasure trove satisfies the three *Glenshaw Glass* requirements, the property is gross income.[15]

Section 1.61-1(a) points to Treasury Regulation section 1.61-14 as a source of further illustration.[16] Section 1.61-14 is an inclusive regulation that further illustrates items of income that fall under section 61(a).[17] Section 1.61-14(a) states, "[i]n addition to the items enumerated in section 61(a), there are many other kinds of gross income."[18] Further, "[t]reasure trove, to the extent of its value in United States currency, constitutes gross income for the taxable year in which it is reduced to undisputed possession."[19] Although the phrase "treasure trove," like "reduced to undisputed possession," is not defined by any regulations,[20] most states follow the common law rule that a treasure trove is "gold or silver in coin, plate, or bullion [that] is found concealed in a house or in the earth or other private place, the owner thereof being unknown"[21] and it must have "the thought of antiquity," i.e several decades old.[22]

Since the couple originally found the coins in the spring of 2013, they, along with their attorneys, have researched the original owners of the coins and have found no one to whom the coins belong.[23] Under the treasure trove regulation and section 61, the finder would pay tax on the value of the found property on the

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12. Treas. Reg. § 1.61-1(a) (2016).

13. Comm'r v. Glenshaw Glass Co., 348 U.S. 473 (1955).

14. *Id.* at 477.

15. 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, 45 (2008).

16. *Id.* at 44.

17. In Treas. Reg. section 1.61-14(a), the term "treasure trove" is ambiguously defined and not limited to the regulation's application. For a detailed analysis regarding section 1.61-14, *see* Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 4 FLA. TAX REV. 685, 717–24 (2000).

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

19. *Id.*

20. Dodge, *supra* note 17, at 690.

21. Dodge, *supra* note 17, at 716 (quoting R. Brown, THE LAW OF PERSONAL PROPERTY, 3d ed. W. Rauschenbush, § 3.3 (1975)).

22. John M. Kleeberg, *The Law and Practice Regarding Coin Finds: Treasure Trove Law in the United States*, COMPTE RENDU 13, 16 (2007).

23. McCormack & White, *supra* note 3.

date the finder acquired undisputed possession.[24] Generally, the determination of undisputed possession is not handled through the common law of treasure trove, but through statutory schemes. For the Saddle Ridge couple, California law requires that any found property valued over $100 must be turned over to the police.[25] The property then goes through the lengthy process of waiting 90 days for the owner to claim it, before ownership vests with the person who found the property.[26] If the search were deemed complete in 2013, then the California couple would be considered to have undisputed possession for the 2013 tax year.[27] Thus, the California couple has to report taxable income from the treasure trove discovery in 2013. Upon a determination of undisputed possession, the first logical question to be answered is how much gross income must the couple report. In order to address this question, we turn to two arguments that could be made regarding the U.S. gold coins' value: (1) Because of valuation difficulties at the discovery date, repeal the treasure trove regulation and tax only upon sale; or (2) because the coins are an accession to wealth, and thus realized income, tax them immediately upon undisputed possession.

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24. I.R.C. § 61 (2012); Treas. Reg. § 1.61-14(a) (2015).

25. Cal. Civ. Code § 2080.1 (West 2016).

26. Cal. Civ. Code §§ 2080–2080.3 states:

> Any person who finds a thing lost is . . . a depositary for the owner, with the rights and obligations of a depositary for hire. Any person or any public or private entity that finds and takes possession of any money, goods . . . within a reasonable time, inform the owner, if known, and make restitution without compensation, except a reasonable charge for saving and taking care of the property . . . .
>
> If the owner is unknown or has not claimed the property, the person saving or finding the property shall, if the property is of the value of one hundred dollars ($100) or more, within a reasonable time turn the property over to the police department of the city or city and county, if found therein, or to the sheriff's department of the county if found outside of city limits, and shall make an affidavit, stating when and where he or she found or saved the property, particularly describing it.
>
> If the reported value of the property is two hundred fifty dollars ($250) or more and no owner appears and proves his or her ownership of the property within 90 days, the police department or sheriff's department shall cause notice of the property to be published at least once in a newspaper of general circulation. If, after seven days following the first publication of the notice, no owner appears and proves his or her ownership of the property and the person who found or saved the property pays the cost of the publication, the title shall vest in the person who found or saved the property . . . .

Cal. Civ. Code §§ 2080–2080.3 (West 2016).

27. *See* Cal. Civ. Code § 2080.3 (West 2016).

III. APPROPRIATE METHOD OF VALUATION

A. *Tax Unrealized Gains Upon Sale*

Some have called for a repeal of the treasure trove regulation.[28] If Congress or the IRS were to repeal the regulation, it is likely that any gross income would be deferred until the gold coins were sold or disposed of. We discuss two possibilities for deferral of gross income. One, include the treasure trove as part of the purchase of the Saddle Ridge couple's residence. Two, provide the couple with a zero basis in the coins. Under each approach, the couple would be assessed tax liability only upon disposition of the coins. After discussing these two possibilities, we examine whether the treasure trove regulation should be repealed.

1. Real Property Purchase Included U.S. Currency Treasure Trove

Given that the coins were found on the owners' property, one argument the Saddle Ridge couple could assert is that the coins were one of the assets bought when they purchased the real property. Therefore, the coins should be treated as any other asset left behind by previous owners. For example, if an owner were to find oil on recently purchased land, the oil would not be considered income until it is extracted.[29]

In the case of property already owned by the taxpayer, the meaning of realization is usually straightforward. There must be a sale or disposition of the property.[30] Appreciation is viewed as any excess of value over cost, even if such appreciation existed when the real property was purchased.[31] The appreciation element due to the treasure trove discovery can be said to occur "after" the real property purchase, because the true market value of the gold coins can only be objectively revealed through appraisals or testing the market.[32] Thus, the purchase of the residence is essentially the

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28. *E.g.*, Lawrence A. Zelenak & Martin J. McMahon, *Taxing Baseballs and Other Found Property*, 84 TAX NOTES 1299, 1308 (1999).

29. Aimee Picchi, *Half of $10 Million Gold Trove May Go to the Tax Man,* CBS MONEYWATCH, (Feb. 28, 2014, 12:27 PM), http://www.cbsnews.com/news/taxes-may-take-half-of-10-million-gold-treasure-trove/ (quoting Alan Solarz, a partner with law firm Bryan Cave LLP in New York) [http://perma.cc/8KZU-3FDP].

30. *See, e.g.*, Comm'r v. Tufts, 103 S. Ct. 1826, 1829 (1983).

31. Appreciation is "[a]n increase in an asset's value . . . ." *Appreciation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

32. *See* Daniel N. Shaviro, *The Man Who Lost Too Much: Zarin v. Commissioner and the Measurement of Taxable Consumption,* 45 N.Y.U. TAX L REV. 215, 222–29 (1990). For most arms-length transactions, cost is the most objective and easily ascertainable criterion of value.

same as that of purchasing a speculative investment that turns out to be a jackpot, such as raw land that yields valuable minerals. Put another way, this is no different than Jed Clampett shootin' for some food and up from the ground comes a bubblin' crude![33] In both cases the value is present when purchased, but becomes revealed later. Here the seller is certainly unaware of the item, and the Saddle Ridge couple may also have been unaware at the time of purchase.

This approach would avoid valuation disputes between the taxpayer and the IRS. Since the treasure trove was on their land when they bought it, they would classify the find as a capital gain taxed at the collectible rate of 28%.[34] In addition to the 28% capital gain rate, the 3.8% Net Investment Income Tax[35] would apply.

However, *Cesarini*,[36] the only court case directly relying on the treasure trove regulation to support its inclusion in gross income, may have set judicial precedent with respect to how U.S. legal tender is treated for the purpose of a treasure trove discovery, thus, possibly negating this approach. In *Cesarini*,[37] a husband and wife purchased a used piano at an auction sale in 1957 for $15. In 1964, while cleaning the piano, the couple found $4,467 of old currency in it.[38] The couple exchanged the old currency at face value for new currency at a bank, and reported the sum of $4,467 on their 1964 joint income tax return.[39] This treatment was in keeping with I.R.C. section 61, which requires individuals to report gross income from "whatever source derived."[40] The IRS sought to impose tax on the found cash at face value in the year it was found.[41] Agreeing with the IRS and affirming the District Court's opinion, the Sixth Circuit supported the inclusion in gross income of cash found in an old piano,[42] but disallowed capital gain treatment for the income because the

33. Lyrics from the TV show and movie The Beverly Hillbillies titled "The Ballad of Jed Clampett," written and composed by Paul Henning. Paul Henning, *Ballad of Jed Clampett*, GENIUS LYRICS (Jan. 29, 2017), https://genius.com/Foggy-mountain-boys-ballad-of-jed-clampett-lyrics.

34. I.R.C. § 1(h)(4) (2012).

35. I.R.C. § 1411 (2012) (imposing a 3.8% tax to married filing jointly individuals who have net investment income and modified adjusted gross income that is over $250,000).

36. Cesarini v. United States, 296 F. Supp. 3, 8 (N.D. Ohio 1969), *aff'd* 428 F.2d 812, 814 (6th Cir. 1970) (per curiam) (holding cash found inside a piano taxable in the year of discovery).

37. *Cesarini*, 296 F. Supp. at 4.

38. *Id.*

39. *Id.*

40. I.R.C. § 61 (2012).

41. *Cesarini,* 296 F. Supp. at 4.

42. *Cesarini,* 428 F. Supp. at 813–814.

treasure trove was not sold. In light of *Cesarini*, courts would likely deem that the entire purchase price of Saddle Ridge be allocated to the residence making the treasure trove fully taxable. The courts may also view gold coins dissimilar to items such as oil because the coins constitute treasure trove expressly made taxable upon being reduced to undisputed possession.[43]

2. Grant Finders a Zero Basis

Although undisputed possession of a U.S. currency treasure trove confers an economic advantage, the taxpayer does not receive a monetary gain, and thus lacks the wherewithal to pay. At the time of the find, the taxpayer's liquidity position is similar before and immediately upon undisputed possession. The finder who may wish to retain the gold coins could be required to sell the coins to pay any tax liability soon after the find. A rushed sale may result in an unexpectedly large gain and possibly create an inefficient sale price in a declining market. Rather than forcing the finder to sell the gold coins, the taxpayer could be granted nonrecognition treatment upon initial acquisition with a zero cost basis.[44] Additionally, any costs incurred to get the coins in saleable conditions—i.e., cleaning, appraisal, legal, etc.—would either be deductible or capitalizable. Upon the sale of the coins, the taxpayer would recognize capital gain treatment.[45]

Under this zero basis option, the basis in the gold coins shall remain zero and the taxpayer is not initially required to include the estimated market value of the coins in gross income until the taxpayer engages in a recognizable transaction under the income tax laws.[46] Tax avoidance does not occur since, as with other

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43. *See* Treas. Reg. § 1.61-14 (2015).

44. Basis could be zero since the function of basis is to prevent double taxation of previously taxed dollars. For authority favoring a zero basis rule, *see* Timken v. Comm'r, 141 F. 2d 625, 630 (6th Cir. 1944) (no basis for unreported in-kind dividend). *Cf.* Detroit Edison Co. v. Comm'r, 63 S. Ct. 902, 904 (1943) (no basis for property purchased with excluded non-shareholder contributions to capital); Helvering v. Gowran, 58 S. Ct. 154, 158 (1937) (zero basis for non-taxed stock dividend).

45. Whether a zero basis includes capital asset treatment is not clear. In cases where capital asset characterization was allowed, the taxpayer made an investment that was not capitalized. For examples, *see* Metro. Bldg. Co. v. Comm'r, 282 F.2d 592 (9th Cir. 1960) and Ofria v. Comm'r, 77 T.C. 524 (1981). Other cases denying capital asset treatment include: Hort v. Comm'r, 61 S. Ct. 757 (1941) and Comm'r v. Gillette Motor Transp., Inc., 80 S. Ct. 1497 (1960) (both stating no separate basis in "temporal slice" of an asset owned by the taxpayer); Norton v. United States, 551 F.2d 821 (Ct. Cl. 1977), *cert. denied* 434 U.S. 831 (franchise right in which taxpayer had no investment); Vestal v. United States, 498 F.2d 487 (8th Cir. 1974) (contingent right not previously included in income); Foote v. Comm'r, 81 T.C. 930 (1983) (surrender of tenure).

46. *See, e.g.*, I.R.C. § 1012 (2012) (stating that basis shall be the cost basis). According to the statutory definition of basis, except for properly capitalized expenses, found property

nonrecognition provisions, the IRS can still tax the finder upon disposition of the coins.[47] Thus, the owner would not be compelled to sell the coins in order to pay the levied taxes. However, as a matter of principle, allowing the taxpayer to recognize capital gains treatment seems improper.[48] To address this, the IRS could require recognition of ordinary income upon a subsequent sale of the coins to the extent the amount realized exceeds the adjusted basis.[49] The taxpayer will recognize gross income to the extent of the value of the coins, as presumably set by the sales price.[50]

3. Should the Treasure Trove Regulation be Repealed?

If the IRS has overstepped its authority, it is possible that the treasure trove regulation needs to be repealed. An examination of the congressional discussions that occurred during the Sixteenth Amendment's formulation[51] reveals that the creation of the federal income tax was primarily done to shift from a system of taxes "imposed only on amounts spent on personal consumption, not on amounts saved"[52] to a system that includes "all accessions to wealth."[53] Congress' intent in enacting the Sixteenth Amendment was to implement a tax based on one's wherewithal to pay, which equated to one's collected wealth.[54] Therefore, Congress intended to include all accessions to wealth in the meaning of income,

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excluded from income should have a zero basis. Taxpayers who have found property at no expense and who are not taxed on its value, have neither actual cost nor tax cost that gives rise to basis. *See* Treas. Reg. § 1.61-2(d)(2) (2015) (basis of property received as compensation for services is increased by the amount included in gross income).

47. *See, e.g.*, I.R.C. § 723 (2012) (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).

48. Most commentary suggests that for proper capital asset treatment a significant investment should be made by the taxpayers. *See* Jay A. Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 960–62 (1999); William D. Popkin, *The Deep Structure of Capital Gains*, 33 CASE W. RES. L. REV. 153, 196–198 (1983); Calvin H. Johnson, *Seventeen Culls from Capital Gains*, 48 TAX NOTES 1285, 1288 (Sept. 3, 1990). Assuming a zero basis, the gain occurring without a significant investment does not reflect unrealized appreciation and therefore should not obtain capital gains treatment. *Cf.* United States v. Skelly Oil Co., 89 S. Ct. 1379, 1383 (1969) (refund of partially excluded income is deductible only to extent of earlier inclusion); Haverly v. United States, 513 F.2d 224 (7th Cir. 1975) (free samples donated to charity were included in gross income at their acquisition date value).

49. *See* I.R.C. §§ 1001, 1011 (2012).

50. *Id.*

51. Neil M. Mazer, *Homeruns and Taxes: The IRS and Its Treasure Trove Regulation*, 16 SPORTS LAW. J. 139, 150–51 (2009).

52. *Id. See also* Erik M. Jensen, *The Taxing Power, The Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1080 (2001).

53. *Id.*

54. Mazer, *supra* note 51.

because those who possessed wealth had the ability to pay taxes based on their wealth.

Generally, tax law does not include unrealized gains in income until the sale or other disposition of the property has occurred.[55] Section 1.61-14(a) provides the possibility of *deferral* of gross income until realized with respect to a treasure trove, but the circumstances in which such deferral might be allowed are unclear.[56] From this, one could surmise that the regulation itself "indicates that income with respect to treasure trove . . . may conceivably be deferred until realized."[57] Deferred realization of U.S. coin treasure troves might be reasonable given that the value cannot be determined at the moment of undisputed possession. This is because such value can be diminished by subsequent events, whereby the current market value would be significantly discounted. To solve this problem, the IRS could tax the finder on the capital gain upon the sale of the gold coins. Since no estimation value would be required, any valuation issues would be avoided. Also, because the taxpayer would have the wherewithal to pay at the time of disposition to pay the tax on the coins, liquidity problems would be avoided.

Advocates for tax deferral realization for baseballs have argued that the IRS should repeal the treasure trove regulation and treat found property the same as self-obtained property for two reasons.[58] First, very little judicial or administrative attention has been given to the treasure trove regulation[59] and in many instances the regulation has been ignored altogether.[60] *Cesarini*[61] and *Collins*[62] constitute the entire judicial career of the treasure trove regulation. The regulation has only appeared in a 1962 private ruling.[63] However, this lack of attention could suggest that there is no doubt that found property is gross income when

55. *See* I.R.C. § 1001(a) (2012) (gain realized only upon "sale or other disposition" of property).

56. Dodge, *supra* note 17.

57. *Id. See also* Zelenak & McMahon, *supra* note 28, at 1306 ("[F]ound property . . . should be taxed only on disposition if the taxpayer eventually sells it").

58. Zelenak & McMahon, *supra* note 28, at 1306–08.

59. *Id.* at 1301.

60. *Id.*

61. *See* Cesarini v. United States, 296 F. Supp. 3, 7 (N.D. Ohio 1969), *aff'd* 428 F.2d 812, 814 (6th Cir. 1970) (per curiam).

62. Collins v. Comm'r, 64 T.C.M. (CCH) 557 (1992). The tax court cited in dictum that the regulation, supported the proposition that the hypothetical finder of a sweepstake ticket would have gross income from the find, even if the ticket became a loser later in the day.

63. I.R.S. Priv. Ltr. Rul. 6205104610A (May 10, 1962).

received.[64] Therefore, the absence of cases and private letter rulings alone do not give rise to the regulation's demise.

Second, nothing in the treasure trove regulation distinguishes between "stumbled-over and 'searched-for' treasure trove."[65] Also, under *Glenshaw Glass*, "Congress applied no limitations as to the source of taxable receipts,"[66] thus, there should be no difference. As such, the tax treatment of treasure troves under the regulation is fundamentally wrong because found property is more analogous to nontaxable imputed income or unrealized gain than conventional, taxable gross income.[67]

However, the decision of whether to tax U.S. treasure trove coins upon disposition or immediately after undisputed possession rest on the distinction between stumbled over (windfall) property and searched-for property (property obtained in the course of a profit-seeking activity).[68] Searched for property, unlike found property, is "self-obtained" property.[69] Self-obtained property (including items that can be sold in more or less their natural state, such as gold, gems, treasure, and oil) requires "active" investment of capital, labor, or both from the taxpayer in its acquisition.[70] Whereas found property, such as a windfall is "acquired at random and without special effort (i.e., by persons in an "amateur" capacity)"[71] where the taxpayer's role is "passive."[72]

One can further assert that "[i]n general, a 'true windfall gain' is distinguishable from other self-obtained property gains because of the taxpayer's amateur status, a zero or negligible actual cost, a minimal expenditure of labor, and perhaps a negligible opportunity cost."[73] A taxpayer finding windfall property has a tangible accession to wealth, and is thus distinguishable from the imputed income of self-obtained property.[74] Therefore, found objects are a pure windfall (i.e. stumbled over) and thus should be taxed when realized, which usually means immediately. In contrast, the gain on self-obtained property is not realized until the property is sold.[75] Under this assertion, if the finder can prove

64. Dodge, *supra* note 17, at 725.
65. Zelenak & McMahon, *supra* note 28, at 1301.
66. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 429 (1955).
67. Dodge, *supra* note 17, at 697.
68. *Id.*
69. *Id.* at 696.
70. *Id.* at 696–97.
71. *Id.*
72. *Id.*
73. *Id.* at 688 n.7.
74. *Id.* at 693.
75. *Id.* at 694.

that he acquired the treasure trove as a result of a profit-seeking venture in which he invested labor or capital, the gold coins should be treated as self-obtained property and not taxed until sold.

From this analysis, it is apparent that the Saddle Ridge treasure trove is a true windfall. Without any special effort, the couple passively discovered the coins at random, and thus should be taxed immediately upon attaining undisputed possession. Although the couple having to sell some of the gold coins potentially presents them with valuation and liquidity issues, neither liquidity nor valuation concerns provide any policy reason for not taxing the found currency.[76] Also, it is contrary to the legal precedent set in *Cesarini*,[77] the only case that has actually included anything in income based on the treasure trove regulation, and the I.R.C. to require that the tax be deferred until the gold coins were sold. In fact, because the paper money found in *Cesarini*[78] was not sold, the trial court would not allow capital gain treatment. We believe that U.S. gold coin treasure troves, like U.S. paper money treasure troves, are currency and are to be taxable immediately upon the determination of undisputed possession according to I.R.C. section 61 and Treasury Regulation section 1.61-14.

B. *Tax Immediately Upon Undisputed Possession*

One can reasonably take the position that logic dictates that acquiring valuable property without having actively expended labor or capital to acquire such property is an accession to wealth and taxable gross income.[79] Also, tax sense dictates that the IRS should tax found property, such as the Saddle Ridge U.S. gold coin treasure trove, upon undisputed possession as a pure windfall. However, there are two difficulties faced in immediately taxing found property as a pure windfall under the treasure trove regulation: determining undisputed possession and accurately valuing the property.

1. Determining Undisputed Possession

Disputed possession significantly complicates the taxation of treasure trove gold coins. The meaning of the phrase "reduced to undisputed possession" is inherently ambiguous and somewhat speculative, since that phrase is not elaborated upon in either

76. Zelenak & McMahon, *supra* note 28, at 1306.

77. *See* Cesarini v. United States, 296 F. Supp. 3, 4 (N.D. Ohio 1969).

78. *Id.*

79. Appleby, *supra* note 15, at 50.

section 1.61-14 or the rulings that precede it.[80] Determining undisputed possession raises timing and basis issues regarding the taxation of the coins.[81]

First, when should the IRS determine the coins' value in cases involving disputed possession? As stated earlier, the couple may have had undisputed possession in 2013, prior to releasing the media reports of the gold coin discovery. However, the IRS may try to delay the taxation of the treasure trove find by claiming that the couple obtained undisputed possession in 2014. Since the news went public through media outlets in February 2014, several additional parties have tried to claim ownership of the treasure trove.[82] Shortly after the public was notified of the gold coin discovery, media outlets suggested that the U.S. government might be able to lay claim to the treasure trove.[83] Specifically, the media noted that coins similar in total value and circulation date had been stolen from the San Francisco branch of the U.S. Mint.[84] After additional research, however, the U.S. Mint and the government concluded that there was no connection to the stolen coins and the Saddle Ridge find.[85] The IRS may be able to use these additional claims of ownership to delay the recognition of undisputed possession until 2014, yielding a higher taxable income.

The IRS needs to postpone taxing the coins until the dispute is resolved since the owner is undetermined. When the owner is determined, the IRS must decide whether to retroactively value the coins in the tax year of the find, or assess value in the year the dispute is resolved.[86] In the case of a disputed treasure trove find, the IRS would likely value the gold coins only after the dispute has been resolved. The IRS's deferred valuation could likely be much different from the coins' initial valuation upon discovery. Moreover, if the finders were individuals, as is the case in Saddle Ridge, and a subsequent loss occurred, they would only be able to recognize the loss to the extent of the difference between their basis in the coins, based on the deferred value, and the sale price.[87]

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80. Dodge, *supra* note 17, at 717.

81. Appleby, *supra* note 15, at 58 n.116.

82. Katy Steinmetz, *Couple Who Found $10 Million in Gold Coins Will Likely Keep the Loot,* TIME (March 5, 2014), http://time.com/13071/saddle-ridge-hoard-gold-coins/.

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* discussion *supra* Part III.A.2 (discussing how the IRS could only tax when the coins are sold, thus giving the owners zero basis in the coins).

87. *See infra* Part III.B.4 (discussing how this could still result in a capital gain, especially under the face value valuation method).

The finders would be subject to the timing limitations under section 1211[88] and it could take years before the couple eventually deducted the entire loss.[89]

Second, the IRS also needs to determine the appropriate holding period, because after valuation the gold coins are likely capital assets. If the IRS determines the holding period begins on the date of discovery, the couple would have incentive to extend the dispute for at least twelve months to achieve a favorable long-term capital-gain treatment upon sale of the coins.[90] Additionally, the lengthy legal process further complicates any estimate of the coins' worth. For example, soon after the find, the couple was told the gold coins had an estimated worth ranging from $2 million to in excess of $10 million.[91] However, the couple ended up selling some of the coins for an amount far less than $10 million.[92]

Undisputed possession alone does not necessarily make something taxable as income. In *United States v. Rochelle*[93] the court held that a gain "constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it."[94] The phrase, "readily realizable economic value," leaves room to argue for the deferral of income tax on U.S. gold coins.[95] While the individual may clearly have complete control over the coins, the taxable income is not readily realizable. Rather, in order to derive ready realizable economic value of the Saddle Ridge discovery beyond the face value of U.S. currency, the individuals must place the coins on the market and wait for a buyer to emerge or establish valuation by some other means.

2. Basis: Difficulties in Valuation

Determining how to value the U.S. gold coin treasure trove is unclear. In its 2014 tax guide, the Internal Revenue Service states, "[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

88. *See* I.R.C. § 165(f) (2012); I.R.C. § 1211(b) (2012) (setting the limitations for individuals on I.R.C. section 165(f) capital loss deductions).

89. *See infra* Part III.B.3.

90. Appleby, *supra* note 15, at 58–59.

91. Steinmetz, *supra* note 82.

92. *California Couple Auctions Off $11 Million Worth of Gold Coins They Found Buried in Yard*, DAILY NEWS (May 28, 2014), http://www.nydailynews.com/news/national/calif-couple-finds-11-million-worth-gold-yard-article-1.1808077 [http://perma.cc/QFX4-XY2E].

93. United States v. Rochelle, 384 F.2d 748 (5th Cir. 1967).

94. *Id.* at 751.

95. Mazer, *supra* note 51, at 154.

its fair market value in the first year it is your undisputed possession."[96] However, according to the Treasury Regulation concerning treasure trove, "[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." [97] If the gold coins are to be taxed immediately at the appropriate value, we need to determine whether the gold coins should be: (1) valued using an appraisal valuation method which, at one estimated fair market value, exceeds $10 million;[98] or (2) valued at the face value of $28,000. As we will demonstrate, only one of the options is practical. The only clear "value in U.S. currency" for the U.S. gold coin treasure troves until they are actually sold is the face value.

3. Appraisal Method

The most difficult aspect of immediately taxing a U.S. gold coin treasure trove is determining the correct valuation in order to assess the amount realized and thus the taxable gross income, given that rare gold coins are hard to appraise. In a proper appraisal, rare coins are authenticated, graded, and slabbed.[99] Knowing how well a coin has been preserved is absolutely essential in determining its value. Coin grading is a process used by collectors, investors, dealers, etc., to determine a coin's value based on how much or how little wear (i.e. how much rubbing) a coin has sustained.[100] Coin grading is more of an art, as opposed to a science, and is highly subjective.[101] Questionably, sometimes coin dealers make up their own standard of coin grading criteria to base an estimated fair market value.[102] Therein lies a big problem.

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96. IRS Publication 17, 2016 Tax Guide for Individuals (2016), https://www.irs.gov/pub/irs-pdf/p17.pdf [http://perma.cc/E9RQ-WAPM].

97. Mazer, *supra* note 51, at 143–44 (emphasis added).

98. For coins made from precious metals (i.e. gold, silver, etc.), the melt or intrinsic value of the metal contained within the coins can be a major factor in determining their value and price. In some instances, well-worn coins are worth more for their metal content than for their numismatic or collector value. However, as in this case, when coins have some historic or aesthetic value (i.e. collectible coins) a coin's numismatic value may be higher than its melt value. Ross Baldwin, *Determining the Value of Your Rare Coin Collection*, NATIONAL COIN BROKER, (last visited March 4, 2017), https://nationalcoinbroker.com/determining-the-value-of-your-rare-coin-collection/.

99. Slabbed coins, in coin-collecting terminology, refers to coins sealed in clear plastic containers bearing the opinions of professionals working at a coin-grading service relating to authenticity and condition. 95 AM. JUR. 3D *Proof of Facts* § 51 (2017).

100. *Id.* § 18.

101. *Id.*

102. *See id.* § 21.

To ascertain the gold coins' value, an appraiser should consider all future contingencies to determine an estimated fair market value. Essentially, this attempts to discount the maximum potential value of the coins for contingencies that would reduce its value, such as a decline in the value of the coins upon fluctuating gold prices. An appraisal can result in a replacement value or a bid value of coins.[103] Replacement value is what it would cost to replace the coins if damaged or lost due to natural disasters or burglary.[104] Bid value is the price that a coin dealer would offer to buy the coins—and is usually lower (by 20% or more) than replacement value.[105] Because the Saddle Ridge treasure trove is not easy to value until it is sold, a major dispute with the IRS could arise. "One appraiser could say $10 million; another could say $1 million."[106] Since the volatile and dynamic market conditions for gold coins are rarely steady or static, with an endless number of unforeseen contingencies possible, no one can predict the future. Thus, this type of estimated fair market valuation is not practical for U.S. currency treasure troves because it is too difficult, subjective, and amorphous.

In addition to the practical difficulties of using the appraisal method to value a treasure trove of U.S. currency, there are several policy justifications for not doing so as well. If the IRS used the appraisal method and determined a massive fair market value—and thus amount realized—the finder's anomalous adjusted gross income for that tax year would have detrimental effects. There are scores of deductions that are subject to adjusted-gross-income limitations.[107] For instance, if the finder's adjusted gross income is $50,000 without the coins, any medical expenses above 7.5% of adjusted gross income—$3,750 in this example—are deductible.[108] If the finder's adjusted gross income is $10,000,000 with the gold coins, then he can only deduct medical expenses that exceed $750,000.[109]

The adjusted-gross-income limitation would also likely affect the finder's eligibility for gambling-loss deductions, regular and Roth IRAs, and HOPE and lifetime-learning credits as well.[110] Further, the taxpayer is subject to income limitations for

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103. *See id.* §§ 30–32.

104. *Id.* § 18.

105. *Id.*

106. Picchi, *supra* note 29.

107. Kip Dellinger, *Home Run Balls and Nettlesome Tax Problems*, 80 TAX NOTES 1364, 1364 n.2 (1998).

108. *See* I.R.C. § 213 (2012).

109. *See id.*

110. Dellinger, *supra* note 107, at 1364 n.2.

deducting capital losses.[111] If the IRS used the appraisal method and overestimated the value of the coins, the taxpayer would have a capital loss that could take decades to deduct. For instance, if the IRS valued the coins at $10,000,000 and the taxpayer later sells them for $8,000,000, the taxpayer is only able to deduct his $2,000,000 of loss in $3,000 increments to reduce ordinary income each year.[112] In this example, it would take the taxpayer 667 years to offset the loss.

Generally speaking, gross income should be based on cash or readily realizable economic value.[113] Currently, once the gold coins are reduced to undisputed possession, the IRS will levy a tax on the gold coins based on the estimated value that the owner can receive in a hypothetical sale.[114] Essentially, this allows the IRS to make a prediction of what the gold coins would fetch and tax that estimated value. However, this estimated value is neither fixed or known nor is its economic value "readily realizable." It is this portion of the regulation that arguably is outside the scope of what Congress intended to include in "taxes on incomes" based on one's ability to pay, as established by the Sixteenth Amendment.[115]

This seems intrinsically unfair to the taxpayer. Any estimated value that the individual is taxed on has the potential of being higher than the future realized income because there is no foolproof way to value the gold coins. An individual who is taxed on an estimated value likely will be taxed on a much higher value than he will ever be able to realize. Theoretically, the high tax that incurs is often well beyond the means of the individual "lucky" enough to have discovered the treasure trove. The estimated fair market value of the gold coins could place the individual in the highest tax bracket. If the individual already has the means to satisfy the tax liability, they will be able to keep and reap any future economic benefits derived through continued ownership. However, less fortunate individuals would be forced to sell off the gold coins, possibly to someone of wealth, in order to pay the taxes assessed. This outcome penalizes the treasure trove discoverer with insufficient income by unfairly imposing wealth redistribution and forcing them to divest.

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111. I.R.C. § 1211(b) (2012).

112. *Id.* Although the taxpayers can offset any capital gains with their capital losses from the find, it is unlikely that typical taxpayers will have substantial capital gains.

113. United States v. Rochelle, 384 F.2d 748, 751 (5th Cir. 1967).

114. IRS Publication 525, Taxable and Nontaxable Income (2015), https://www.irs.gov/publications/p525/ar02.html#en_US_2015_publink1000229543 [http://perma.cc/HT4B-PTJH].

115. Mazer, *supra* note 51, at 144.

4. Face Value Method

Another option to value U.S. gold coin treasure troves is the face value method.[116] It forgoes the speculation of potential increase and decrease in value of the gold coins and focuses solely on the concrete face value.[117] In addition to being extremely practical, the face value method makes sense in the context of treasure troves consisting of U.S. currency. Under this method, significant future increases in value of the coins will not go forgotten; this appreciation in value will simply be deferred as unrealized gain until the finder sells the coins.[118] In the Saddle Ridge case, the finders would have an initial amount realized of approximately $28,000—the face value of the gold coins—and thus the IRS would tax the finder on $28,000 of ordinary income in the year they obtain undisputed possession. The finders would then have a basis of $28,000 for their capital assets. If they sell the coins for a substantial sum in the future, the couple would recognize a capital gain, likely at the top rate of 28% for collectibles,[119] of the sale price minus the $28,000 basis in the year of the sale.

Some may argue that, although the appraisal method has many drawbacks, gold coins are property, and thus should be taxed based on the appraisal value. We assert that U.S. currency, and specifically gold coin treasure troves, are legal tender. As such, we propose that gross income should be based on face value. What follows is an analysis in support of our assertion by demonstrating that U.S. gold coin treasure troves are: legal tender, as opposed to property; fair to taxpayers; and, most importantly, makes tax sense.

a. Gold Coins as Legal Tender.

The Coinage Act of 1965,[120] enacted on July 23, 1965, reaffirmed earlier acts which made all coins and currency of the United States legal tender regardless of when coined or issued.[121] Specifically, section 102 of the Coinage Act of 1965 states "[a]ll coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and

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116. *Face Value*, INVESTOPEDIA, http://www.investopedia.com/terms/f/facevalue.asp (last visited Mar. 4, 2017) [http://perma.cc/2GNZ-PHAL].

117. *See id.*

118. Whether to tax the coins immediately or defer tax until they are sold is essentially just a timing issue. *See supra* Section III.B.1.

119. I.R.C § 1(h) (2012).

120. Coinage Act of 1965, Pub. L. No. 89-81, 79 Stat. 254.

121. *Id.* § 102. Commencing with The Coinage Act of 1792, 1 Stat. 246, which established U.S. Mint and the regulation of U.S. coins, Congress has determined and defined what constitutes legal tender.

national banking associations), *regardless of when coined or issued*, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues."[122] Therefore, if an individual wanted to satisfy their tax liability with U.S. minted gold or silver coins, the IRS would have to accept the payment at face value, since that is what is required by the Coinage Act of 1965. Thus, the IRS would not treat the coins as property, but instead would recognize the coins as legal tender.

The Coinage Act of 1965, therefore, gives the couple a basis for the position that their taxable income at the time the coins were discovered is the $28,000 face value of the gold coins. This basis would not only reduce the couple's estimated taxable income ranging from $2 million or $10 million, but it also would have the potential to reduce their tax bracket, or even eliminate underpayment penalties the couple may face. Additionally, such a basis also would allow the couple to engage in further tax planning as to when the couple wants to realize any additional taxable income from the gold coin discovery. Under this position, the couple would have to pay tax on the $28,000 at ordinary income rates.

The Saddle Ridge couple faced a similar situation as that demonstrated by the precedent established in *Cesarini*.[123] Both situations deal with U.S. currency and the Cesarinis were taxed only to the extent of the face value of the discovered U.S. currency. The Saddle Ridge couple could be successful in arguing that, based on *Cesarini*[124] and the Coinage Act of 1965, the U.S. gold coin treasure trove discovery should be valued at face value. Should the couple elect to take this position, they should be prepared to litigate since the IRS would attempt to deem the gold coins as property under existing case law.[125] Next, this possibility is examined.

122. *Id.* (emphasis added).

123. Cesarini v. United States, 296 F. Supp. 3 (N.D. Ohio 1969).

124. *Id.*

125. We note that should the couple elect to litigate the matter with the IRS, the couple would need to think about the implications beyond just saving taxes today since they are likely to incur taxes associated with the sales of the gold coins in the near future. For example, if the couple successfully argues that the appropriate taxable value is $28,000, that amount becomes the couple's basis in the 1,427 gold coins. In a subsequent sale or exchange of the gold coins, the couple may be forced to recognize the substantially more taxable income due to the reduced basis. In addition to the tax aspects, litigating this position with the IRS also means that the couple would have to relinquish their anonymity and, of course pay lawyer fees.

b. Gold Coins as Property.

While the IRS has established a precedent of defining gold coins to be property, the definition of property does not automatically identify gold and silver coins as property.[126] Instead, Treasury Regulation section 1.61-2(d)(1) requires you to go to Treasury Regulation section 1.61-2(d)(6)(i), which then directs you to Treasury Regulation section 1.83-3(e) which defines property as "real and personal property other than either *money* or an unfunded and unsecured promise to pay money or property in the future."[127]

So the question becomes, are gold coins money or are they legal tender? In order to evaluate whether the gold coins constitute money or property, one has to refer back to the Coinage Act of 1965, the preceding legislation, and case law surrounding the coinage acts. Specifically, as stated previously, the Coinage Act of 1965 reaffirmed congressional intent to establish an equivalency between U.S. minted currencies. This equivalency would suggest that U.S. minted gold coins are U.S. legal tender, and thus money. For example, if the California couple were to have taken the gold coins to the Treasury, and exchanged them for current legal tender, they would have been exchanged at face value.

Court decisions and the IRS have consistently held that gold coins are property in the hands of the taxpayers.[128] The IRS's establishment that gold coins are property is based on the fact that gold coins are rare and unusual. This is derived from executive orders 6102[129] and 6814[130] issued by President Franklin D. Roosevelt in 1933 and 1934, respectively, that required U.S. citizens to deliver all gold and silver coins to the government. Both executive orders exempted "rare and unusual" coins, which were initially defined as gold and silver coins minted prior to the

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126. *See* William Rabbe, Jr. & David Hazen, *U.S. Silver Coins: A Unique Tax Shelter?*, working paper, 7 (1982) (stating that although the Code defines neither money or property in any general sense, section 1001(b) interprets them as mutually exclusive and the Supreme Court directs "that the language of statutes, including the Internal Revenue Code, should be interpreted . . . in an everyday ordinary sense . . ."). Merriam-Webster Dictionary Online, which defines money as "something generally accepted as a medium of exchange, a measure of value, or a means of payment: as ... officially coined or stamped metal currency." *Money*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/money (last visited Mar. 4, 2017) [http://perma.cc/M7YY-Q&CL].

127. Treas. Reg. § 1.83-3(e) (2016) (emphasis added).

128. *See supra* Section III.B.4.b.

129. Franklin D. Roosevelt, Executive Order 6102—Requiring Gold Coin, Gold Bullion and Gold Certificates to Be Delivered to the Government (Apr. 5, 1933), available at http://www.presidency.ucsb.edu/ws/?pid=14611 [http://perma.cc/BKD7-FYUP].

130. Franklin D. Roosevelt, Executive Order 6814—Requiring Delivery of All Silver to the United States Mint for Coinage (Aug. 9, 1934), available at http://www.presidency.ucsb.edu/ws/?pid=14741 [http://perma.cc/2DY4-2JSN].

issuance of the executive orders.[131] Later, the exemption was extended to include all gold and silver coins that, due to compliance with the executive orders, became "rare and unusual."[132] President Roosevelt issued these executive orders at a time when U.S. citizens were hoarding gold and silver coins and valuing the coins' metal content more than paper currency, even though the exchange value was fairly close.[133]

Several court cases support the notion that gold and silver coins are property simply because they are not the currently circulating medium of exchange.[134] However, unlike *Cesarini*, all of these disputes involve cases where taxpayers received the economic benefit of the gold and silver coins. For example, in *California Federal Life Insurance Co. v. Commissioner*,[135] the taxpayer used the fair market value to exchange Swiss francs for $20 U.S. gold coins. The Ninth Circuit court ruled that, "'money' in [I.R.C.] § 1001(b) refers to the currently circulating medium of exchange, while 'property' includes coins that have, by reason of their value to collectors or the intrinsic worth of their contents, a fair market value in excess of their face value.[136] Because the key element is the excess of market over face value, it is immaterial that such coins may be legal tender at their face value."[137]

In a more recent case, *Cordner v. U.S.*,[138] the taxpayer received gold coins as corporate dividends. For purposes of section 301(b)(1)(A), the Ninth Circuit court stated:

> We have no difficulty in holding that the gold coins here, though legal tender and hence "money" for some purposes, are also "property" to be taxed at fair market value because they have been withdrawn from circulation and have numismatic worth. . . . When legal tender, by reason of its value to collectors or the intrinsic worth of its contents, has a fair market value in excess of its face value or tender, then it should be deemed property other than money . . . .[139]

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131. *Id.*; Exec. Order No. 6102, *supra* note 129.

132. *Government Confiscation of Gold: Understanding the Facts*, U.S. GOLD BUREAU, https://invest.usgoldbureau.com/gold-confiscation (last visited Mar. 4, 2017).

133. *Hoarding of Gold*, N.Y. TIMES (Apr. 06, 1933), http://query.nytimes.com/gst/abstract.html?res=9401E3DC1438E333A25755C0A9629C946294D6CF&legacy=true.

134. *See* cases cited *infra* notes 140 and 142.

135. Cal. Fed. Life Ins. Co. v. Comm'r, 680 F.2d 85 (9th Cir. 1982).

136. *Id.* at 86.

137. *Id.*

138. Cordner v. United States, 671 F.2d 367 (9th Cir. 1982).

139. *Id.* at 368 (citing Cal. Fed. Life Ins. Co. v. Comm'r, 680 F.2d 85 (1981); Joslin v. United States, 666 F.2d 1306 (1981)).

Similar logic was used in *Stoecklin v. Commissioner*[140] to determine that the payments made to the taxpayer for the accounting services in silver dollar coins had an economic benefit beyond face value.

While it seems that the position that gold coins are property conflicts with the treatment of gold coins as legal tender, this dual treatment of gold coins can be reconciled by referencing where taxpayers received readily realizable economic value from the gold coins by way of an economic benefit. In Saddle Ridge, since upon possession the couple had not received a readily realizable economic benefit from the gold coins, the treasure trove find is rightly identified as legal tender. Therefore, it should be valued at the face value of only $28,000 for taxable income purposes.

The importance of the taxpayer receiving an economic benefit cannot be understated with respect to the courts' and the IRS's positions that U.S. gold and silver coins are property, and thus not legal tender. In *Joslin v. U.S.*,[141] the Tenth Circuit recognized that silver coins have dual purposes as both legal tender and property, stating:

> Unquestionably, a silver dollar has both a face value and a separate value reflecting the coin's numismatic worth. To this extent a silver dollar combines the characteristics of cash and property. When a taxpayer bargains for and benefits from the higher market value of silver coins, he or she must include this amount in income. That silver dollars are designated legal tender with a nominal value of one dollar acceptable at the United States Treasury to discharge one dollar of debt, or exchangeable for a one dollar Federal Reserve note, does not require a different result.[142]

Subsequent court decisions involving disputes between taxpayers and the IRS regarding the status of U.S. minted gold coins as property or legal tender all involved the use of gold coins in a manner that yielded the taxpayer the benefit of the fair market value of gold coins. For example, in *Lary v. Commissioner*,[143] John H. Lary owned Precious Objects, a business that traded gold and silver coins, diamonds, jewelry, and oriental rugs.[144] Lary engaged in several transactions involving sales or exchanges of gold and silver coins which he recorded at the face value while simultaneously receiving their numismatic value.[145]

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140. Stoecklin v. Comm'r, 865 F.2d 1221 (11th Cir. 1989).
141. Joslin v. United States, 666 F.2d 1306 (10th Cir. 1981).
142. *Id.* at 1307.
143. Lary v. Comm'r, 842 F.2d 296 (11th Cir. 1988).
144. *Id.* at 298.
145. *Id.*

Citing *Joslin*, the Eleventh Circuit noted that "Lary actually benefited to the extent of their fair market value."[146] In conclusion, the court went on to state, "the Treasury gold and silver coins . . . received by petitioners from sales . . . are 'property' within the meaning of section 1001(b), and are to be valued at their fair market value for purposes of section 1001."[147]

In a more recent case,[148] taxpayer Robert Kahre was paying compensation to his workers using the face value of gold and silver coins. The IRS took the position that gold and silver coins were property and, as such, Kahre had underreported his workers' wages by not accounting for the compensation using the fair market value of the coins.[149] The United States District Court of Nevada stated, and the Ninth Circuit affirmed, that "[c]ourts have consistently held that when the fair market value of legal tender exceeds its face value, such legal tender is property other than money, and thus taxpayers must value that legal tender at its fair market value."[150] By deciding in support of the IRS's position, the court determined that the compensation had to be accounted for using the fair market value of the property, not the face value.[151] The trial court went on to analyze Kahre's compensation scheme under section 1.61-2(d)(1), which deals with compensation paid other than in cash.[152]

The IRS has consistently identified gold and silver coins as property[153] using both the approach that gold and silver coins are "rare and unusual" and that taxpayers are receiving an economic benefit from the fair market value of the gold and silver coins. For example, in Revenue Ruling 68-634,[154] the IRS follows the logic that Franklin D. Roosevelt's 1933 and 1934 executive orders made U.S. minted gold and silver coins "rare and unusual" by specifically identifying silver certificates as part of an extraordinary circumstance, and stating that "silver certificates in

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146. *Id.* at 299.

147. *Id.*

148. United States v. Kahre, 2007 U.S. Dist. LEXIS 37791 (D. Nev. 2007), *aff'd*, 737 F.3d 554 (9th Cir. 2013).

149. *Kahre*, 737 F.3d 554, 559 (9th Cir. 2013).

150. United States v. Kahre, 2007 U.S. Dist. LEXIS 37791, at *6 (citing Cordner v. United States, 671 F.2d 367 (9th Cir. 1982); Joslin v. United States, 666 F.2d 1306 (10th Cir. 1981)). *See also* Smith v. Comm'r, 75 T.C.M. 2173 (1998).

151. *Id.* at *9.

152. *Id.*

153. Raabe & Hazen, *supra* note 126, at 8, noting that only Congress is authorized to make currency legal tender for all purposes. Thus, any attempt by the IRS to value legal tender contrary to Congress is an unconstitutional challenge to its power to define and value money.

154. Rev. Rul. 68-634, 1968-2 C.B. 46.

the hand of the taxpayer [are] property."[155] In Revenue Ruling 76-249,[156] involving an exchange of U.S. silver coins and real property, the IRS stated that silver coins received by a taxpayer are property themselves, following the notion that, if a taxpayer is seeking to benefit from the fair market value of the silver coins, then they should be treated as property.

The common theme with all of these court decisions and the IRS's positions with respect to U.S. gold and silver coins is that the taxpayers in question all benefitted from the fair market value of the gold and silver coins. This establishes precedent in the courts and for the IRS that individuals who hold gold and silver coins and receive a benefit from their economic or fair market value must be taxed to the extent of the economic value received. Arguably, the wording of the treasure trove regulation "should be strictly construed against deferred realization,"[157] however, considering the precedent set forth in most other contexts, tax laws require deferral of taxation until the individual realizes a gain or loss. Realization of income is a common theme in the tax laws and a treasure trove that does not have a "readily realizable economic value" should receive similar treatment. In the absence of any situation in which taxation is not deferred until a realization event occurs, the application of such a strict non-deferral standard to U.S. currency treasure troves is not supported. A failure to require a realization event for such treasure troves while requiring it for nearly all other transfers and accessions to wealth is unreasonable. A tax on income must be based on the gold coins' market created value. Where the gold coins hold potential but unrealized economic value, the holder of the coins should be taxed only upon realization of that economic value. With a face value tax basis, there is no actual gain to the finder unless he or she actually sells it; only after the moment of sale is there income with a clear value that is subject to taxation.

c. Other Policy Benefits.

Finding a treasure trove must rank among the greatest experiences of that person's life . Unfortunately, finding one can upset an honest individual's tax situation. The finder may wish to keep the treasure trove intact, but current tax treatment does not allow it. Even though "[m]ere nonliquidity, difficulty of valuation, or a possibility of forfeiture should not be a bar to current

155. *Id.*

156. Rev. Rul. 76-249, 1976-2 C.B. 21. For additional examples, *see* Raabe & Hazen, *supra* note 126, at 9–10.

157. Dodge, *supra* note 17, at 723.

realization,"[158] finders of U.S. currency treasure troves should not be coerced into selling in order to afford the tax consequences and, accordingly, be forced into accepting potentially decreased real gains. "Although treasure litigants cannot be certain of being awarded the find if they act in good faith, they will be more likely to prevail in court if they do so." [159] This added tax incentive, plus the chance of getting full title to the find and deferring unrealized appreciation, should be enough to encourage finders to report their finds of treasure trove.

Taxing upon possession can avoid a forced sale if the property is valued under the face value method. The face value method avoids the problems of nonliquidity, difficulty of valuation, and forfeiture. Although this treatment may be rather generous, it poses no threat to the integrity of the tax base and it is consistent with both the language of the Code and important case law. Taxing found property upon possession falls perfectly within section 61, Treasury Regulation sections 1.61-1 and 1.61-14, and *Glenshaw Glass*.[160]

The face value method is simple and consistent. Although the face value method requires the IRS to concede that found property might have a higher value, the greatly reduced complexity of the face value method justifies this compromise. Also, any adjusted gross income limitation issues previously discussed are avoided with the face value method, while still allowing the IRS to properly tax upon undisputed possession. Further, the face value method would significantly reduce the uncertainty surrounding the valuation and tax implications of U.S. currency treasure troves.

IV. CONCLUSION

In this article, we cover a number of tax aspects concerning the approximately $10 million estimated market value of the U.S. gold coin treasure trove discovered by an anonymous California couple. We note that the U.S. minted treasure trove gold coins should be treated as legal tender, as opposed to property, because the couple did not receive a benefit from the economic value of the treasure trove discovery. We propose a face value method of taxing found property, specifically treasure troves consisting of U.S. currency. This proposal provides a fair and manageable way to properly tax such found property, specifically U.S currency treasure troves. The IRS should integrate this proposal because it

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158. *Id.* at 688.

159. John M. Kleeburg, *supra* note 22, at 24.

160. *See* discussion *supra* Part II.

is easily implemented, simple, fair to all taxpayers, and makes tax sense.

Under the proposal, once undisputed possession is determined, the IRS should immediately tax the finder of the treasure trove on the face value of the gold coins. If the finder subsequently sells the coins, any increase in value should be taxed as unrealized gain. If possession is disputed, the same overall tax principle should apply and the tax date should relate back to the date undisputed possession is determined. Thus, the Saddle Ridge couple's taxable ordinary income should be based on the face value of $28,000 at the time they are deemed to have undisputed possession. Currently, if the Saddle Ridge couple tried to apply this proposal, a court would have to decide the valuation issue. However, difficult valuation issues are matters of degree and "courts are ill-equipped to sort out cases of this type."[161] Although ad hoc legislation and government concession has been used to settle virtually every contested realization issue, Congress should consider creating an exception to section 61 and the treasure trove.

161. Dodge, *supra* note 17, at 728.