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Wm. Schwerdtfeger

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The Burden of Proof in the Tax Court

By Wm. Schwerdtfeger*

It is well known to members of the bar that the number of federal tax cases is greatly increasing, especially during the past two years, and more and more petitions are being filed with the Tax Court of the United States.¹ This means that a growing number of attorneys are taking their tax disputes to court. But whether the litigation is pursued to actual trial, whether only pleadings are filed (and the matter settled out of court), or whether the controversy is disposed of before proceedings are instituted, the burden of proof question is important. Ability to settle a case with representatives of the Internal Revenue Service² often depends, in part at least, upon which of the respective parties must produce the evidence in the event of trial. A taxpayer's representative is at a disadvantage if he does not know the nature and extent of his responsibility, not only at the hearing, but at conferences preceding the hearing. Such knowledge is also important in drafting the pleadings.

It is particularly material that the taxpayer's representative appreciate where the burden of proof lies, since the employees of the Commissioner who have settlement jurisdiction are, for the most part, not lawyers, and not the ones who will assume trial responsibilities.³ As a result, these officers are prone to rely on the difficulty of the taxpayer's burden of proof without themselves knowing whereof they speak.

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¹ See "Taxes on Parade," April 1, 1953, published weekly by Commerce Clearing House.

² The "Bureau of Internal Revenue" is no more. Its name has been officially changed to "Internal Revenue Service." Treas. Dept. Order No. 150-29, 534 CCH, Par. 3581.

³ At the informal conference stage, the revenue agent and his group chief (subject to review) have settlement jurisdiction. Reorganization Order No. 6, 534 CCH, Par. 3557. After the protest has been filed settlement jurisdiction lies with the Appellate Division. Reorganization Order No. 2 (Revised), CCH, Federal Estate and Gift Tax Reporter, Par. 8065. Neither the revenue agents, their group chiefs, nor the technical advisors of the Appellate Division are legal officers or required to be lawyers. In fact, relatively few of them are.

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*A.B., LL.B., University of Cincinnati. Practiced with the Bureau of Internal Revenue, Penal and Appeals Divisions of Chief Counsel's Office. Member of Ohio, Illinois and Kentucky Bars, and of Federal, and Kentucky and Louisville Bar Associations. Address: Attorney-at-law, Kentucky Home Life Building, Louisville 2, Kentucky.
It goes without saying that an understanding of the burden of proof is important in the trial of the case. But the point is that the average attorney, although he will not actually embark upon the trial of a proceeding before the court, will be in a much better position, if fortified with such understanding, to represent his client in pre-trial negotiations.

The Tax Court

Before launching into the ramifications of this subject, it might be well to discuss the Tax Court briefly. It is technically "an independent agency of the Executive Branch of the Government," but functions as a court with much the same formality as a United States district court sitting without a jury. Its jurisdiction is limited to cases in which deficiencies in tax have been asserted by the Commissioner, i.e., it cannot hear suits for refund, and only deficiencies in income (including excess profits), estate and gift taxes. There are sixteen judges, one of whom is selected as the chief judge. From time to time during the year, the chief judge selects one of the other members to hold a hearing calendar in one of the principal cities of the country. In Kentucky the calendars have so far been held only at Louisville. The judges have their offices in Washington and visit the various cities only long enough to hear the cases scheduled on the calendar. This normally takes from one to two weeks.

If a determination made by the judge who hears the case is considered by the chief judge to be of sufficient importance, it is reviewed by the entire court. The litigants are not entitled to trial by jury. The rules of evidence are those applicable in equity proceedings in the courts of the District of Columbia prior to September 16, 1938.

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1 Section 1100, Int. Rev. Code.
2 Stanley A. Anderson, 11 T.C. 841 (1948); Julius Bendheim, 12 TCM 723 (1953).
3 Section 1101, Int. Rev. Code.
4 Section 1102, Int. Rev. Code.
5 Sections 1101 and 1103(b), Int. Rev. Code.
6 Sections 1103(c) and 1105, Int. Rev. Code.
8 Section 1118(b), Int. Rev. Code.
9 Section 1118(a), Int. Rev. Code.
With this background in mind let us examine the facets of this topic.

The Taxpayer's Normal Burden

In the normal case, where the taxpayer is contesting a deficiency determination and where one of the special circumstances discussed below is not involved, it is he who has the burden of proof. If the petitioner (the taxpayer) fails to produce evidence in support of his position, the court will return a decision for the Commissioner. This does not mean, however, that at the hearing of a cause the taxpayer must be the one to produce the evidence. The facts upon which the petitioner relies may be submitted by the government's attorney, or they may be contained in a joint stipulation. So long as there is sufficient material in the record, the taxpayer will be considered to have sustained his burden.

In this same connection it should be noted that the disputed question must first be placed in issue by the pleadings. If error is not assigned in the petition to one of the adjustments proposed in the Commissioner's notice of deficiency, the court will not render a decision favorable to the taxpayer, no matter how much evidence is adduced. It was held in one case, however, that the refusal of the Tax Court to consider an allegation of the statute of limitations, although it had not been pleaded, was error where in their opening statements counsel had indicated that it was an issue.

The rule is the same as to any matters which the petitioner wishes to raise other than the adjustments proposed in the deficiency letter. For example, if insufficient depreciation is claimed on the return, and if in the deficiency notice the amount of sales are said to be understated and no mention is made of the depreciation, the petitioner would have to allege error as to both the depreciation and the sales.

What is the burden of proof? The Board of Tax Appeals (the former name of the Tax Court) held that it "means that he [the

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15 Rule 31(g) of the court's Rules of Practice.
16 See rule 31(b) of the court's Rules of Practice for the provisions relative to a stipulation.
taxpayer] must introduce sufficient evidence to make a *prima facie* showing that the Commissioner committed the errors alleged in the petition and to overcome the proofs submitted on behalf of the Commissioner. Such a showing must cover all the elements necessary to establish the averments of the petition.”

In practical application there appears to be no difference between the burden in the Tax Court and that in other courts where the plaintiff must prevail by a preponderance of the proof.

**Greater Quantum of Proof**

In some instances the petitioner is required to produce a greater quantum of evidence than normally required to overcome the presumption of correctness which attaches to the Commissioner's determination. For example, Congress has provided in section 102 (c) of the Internal Revenue Code that, in ascertaining the applicability of the tax imposed by that section, an accumulation of earnings beyond the reasonable needs of the business shall be determinative of the purpose to avoid surtax upon the shareholders, “unless the corporation by the clear proponderance of the evidence shall prove to the contrary.” In subsection (b) of that section it is further provided that, if the corporation is a mere holding or investment company, that fact “shall be prima facie evidence” of intent to avoid surtax. It is apparent that Congress intended to impose a larger measure of proof in both instances than is usually needed. The Treasury Department has in its regulations interpreted these provisions to mean:

> If the Commissioner determines that the corporation was formed or availed of for the purpose of avoiding the individual surtax through the medium of permitting earnings or profits to accumulate, and the taxpayer contests such determination of fact by litigation; the burden of proving the determination wrong by a preponderance of evidence, together with the corresponding burden of first going forward with evidence, is on the taxpayer under principles applicable to income tax cases generally, and that is so even though the corporation is not a mere holding or investment company and does not have an unreasonable accumulation of earnings or profits. However, if the corporation is a mere

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holding or investment company, then the Internal Revenue Code gives further weight to the presumption of correctness already arising from the Commissioner's determination by expressly providing an additional presumption of the existence of a purpose to avoid surtax upon shareholders, while if earnings or profits are permitted to accumulate beyond the reasonable needs of the business, then the Code adds still more weight to the Commissioner's determination by providing that irrespective of whether or not the corporation is a mere holding or investment company, the existence of such an accumulation is determinative of the purpose to avoid surtax upon shareholders unless the taxpayer proves the contrary by such a clear preponderance of all the evidence that the absence of such a purpose is unmistakable.\(^2\)

In the opinion of two writers, this paragraph of the regulations is invalid,\(^2\) and the statutory provisions have a different meaning:

> In every tax case the mere assessment of a deficiency is presumed to be correct until the taxpayer introduces evidence tending to prove it otherwise. So in a Section 102 case the corporation singled out must first produce some evidence that the accumulated income was not for the interdicted purpose. When the taxpayer has done this, the burden of going forward with the case shifts to the Commissioner, and if he by his evidence is able to prove that the taxpayer permitted its profits to accumulate beyond the reasonable needs of the business, a presumption is then established that the corporation has been "availed of" for the purpose of preventing the imposition of surtaxes on its shareholders. At this point in the trial the burden shifts back to the taxpayer under the provision of Section 102(c) that an unreasonable accumulation is determinative of the purpose, "unless the corporation by the clear preponderance of the evidence shall prove to the contrary."\(^3\)

It seems, however, that this latter interpretation is incorrect. By shifting the burden of going forward to the Commissioner, after the corporation has introduced "some evidence," and requiring him to prove that the profits were accumulated beyond the reasonable needs of the business would place the taxpayer in a more favored position than if Congress had employed no special

\(^1\) Section 39.102-2(b), Regulations 118.
\(^3\) Id. at 326-327.
language. It is quite obvious that the legislature intended the corporation to establish, to a degree greater than would otherwise be required, that it was not being availed of to defeat the surtax. Although pressing the requirement of proof to the point of being "unmistakable" may be going a bit too far, it appears that the regulations approach the question in the correct light.

"In the discretion of the Commissioner" a taxpayer may claim as a deduction a reasonable addition to a reserve for bad debts. Or the Commissioner may allow as a deduction a partially bad debt "when satisfied that [such] debt is recoverable only in part."\(^24\) This has been interpreted to mean that the taxpayer must not only establish that the addition to the reserve is reasonable, but that, if the Commissioner chooses to disallow it, the decision is not an abuse of his statutory discretion.\(^25\) The same rule is applicable to a debt only partly recoverable.\(^26\)

In instances where a decedent made lifetime transfers of a substantial part of his property, other than by bona-fide sale, within three years prior to his death, such conveyance is deemed to have been made in contemplation of death (and hence taxable as part of his estate) "unless shown to the contrary."\(^27\) Hence there is not only the ordinary presumption of correctness that attaches to the Commissioner's determination, but also a "statutory presumption" that must be overcome.\(^28\) It does not appear, however, that any greater degree of proof is necessary to overcome the statutory presumption than would be required in the case of a normal deficiency.\(^29\)

**Rule of the Cohan Case**

It is a well established rule that deductions, including ordinary and necessary expenses, are a matter of legislative grace, and are to be allowed only where there is clear provision therefor in the

\(^{24}\) Section 23(k)(1), Int. Rev. Code.
\(^{25}\) C. P. Ford and Co., 28 B.T.A. 156 (1933); Krim-Ko Corporation, 16 T.C. 31 (1951).
\(^{26}\) Stranahan v. Com., 42 F. 2d 729 (C.A. 6, 1930), cert. den. 283 U.S. 822.
\(^{27}\) Section 811(c) and (1), Int. Rev. Code.
But the strict interpretation of such provisions goes only to the allowability, not to the amount. In the now famous *Cohan* case,\(^{31}\) the well known actor, playwright, and producer claimed large sums on his returns for alleged travel and entertainment. He kept no record of such expenditures and gave no detailed figures at the trial. The only proof presented was his testimony that he traveled and entertained extensively, spending substantial amounts for those purposes. The then Board of Tax Appeals disallowed the claimed deductions on the ground that the taxpayer had not carried his burden of proof. But the Second Circuit reversed on this point saying that so long as there was a clear indication that something was spent, the lower court could not disallow the entire amount claimed. Recognizing that the record presented not even a vague idea of what Cohan's actual expenditures were, Judge Learned Hand in writing the opinion declared that "...the Board should make as close an approximation as it can, bearing heavily, if it chooses, upon the taxpayer whose inexactitude is of his own making, ... if necessary by drawing upon the Board's personal estimates of the minimum of such expenses."

The Tax Court, true to the injunction of the *Cohan* case, has applied the rule in almost innumerable instances. Moreover, the application has not been limited to travel and entertainment expenses, or even to deductions generally, but has been extended to such items as the amount of tips received by a taxi driver,\(^{32}\) the extent of a wife's contribution to a partnership,\(^{33}\) the life of tank cars for depreciation purposes,\(^{34}\) and even the amount of constructive average base period net income.\(^{35}\)

It is the writer's personal view that the substitution of the opinion, or rather the guess, of the Board or the Tax Court for evidence is a violation of the burden of proof requirement. To permit a taxpayer to obtain a large or even a small part of the deductions claimed on his return without requiring that he establish more than that he spent something for these purposes is to abandon entirely one of the basic tests.

\(^{30}\) New Colonial Ice Co. v. Helvering, 292 U.S. 494 (1933); McDonald v. Com., 323 U.S. 57 (1944).

\(^{31}\) Cohan v. Com., 39 F. 2d 540 (C.A. 2, 1930), reversing 11 B.T.A. 743 (1928) on the point under discussion.


\(^{33}\) Max German, 2 T.C. 474 (1949).

\(^{34}\) U.S. Industrial Alcohol Co. v. Helvering, 137 F. 2d 511 (C.A. 2, 1943).

\(^{35}\) National Grinding Wheel Co., 8 T.C. 1278 (1947).
From a practical standpoint, the rule seems to encourage laxity in keeping records and irresponsibility in claiming expenses. The individual who is meticulous in accounting for his outlays is often penalized. He might well do better by using a vague estimate when making out his return and relying upon the Cohan case in the event it is audited by the Internal Revenue Service. Some practitioners engage in the questionable practice of purposely refraining from introducing evidence supporting the dollar amount of a fraction of the claimed expenses. They feel, and with considerable justification, that if they established the expenditure of a relatively small part of the claimed deduction, they would fare worse than if they showed none at all and urged the application of the Cohan rule. The author feels that when it comes to the point where a taxpayer is penalized for keeping records and introducing evidence, the burden of proof rule becomes a nullity.

Theoretically, of course, the Tax Court could choose to "bear heavily upon the taxpayer whose inexactitude is of his own making." And there is no doubt but what, on occasion, the allowed expenditures are less than the actual ones. But too often the taxpayer "makes the inexactitude" because he knows that if he were called upon to prove the deductions he has claimed he would have to concede that they were not as large as reported. The travesty is that the members of the court cannot with even the remotest degree of accuracy approximate the business expenses of another, and most certainly do not have the experience to know the life of tank cars or the amount of the constructive average base period net income of a business.36

Fraud Cases

So far we have examined only those instances in which the burden of proof is on the petitioner. We now turn to the situations in which the Commissioner has the burden.

Probably the most important instance in which the burden is on the respondent is where fraud is in issue. There are two events in which the Commissioner must carry this obligation: first, for the imposition of the fifty percent penalty;37 and, second, for the ex-
ception to the statute of limitations barring assessment. Frequently the government relies upon fraud for both purposes; that is, to impose upon the taxpayer an addition to the tax and to assert the tax even though the three (or sometimes five) year period has elapsed.

It is essential that the fraud be alleged by the respondent in his answer. Failure to do so results in no issue on that point, with the result that the fifty percent penalty will not be imposed and the statute of limitations will not be set aside. If the answer does contain such allegations, or any facts upon which the Commissioner relies for affirmative relief, the petitioner must file a reply. But, if no reply is filed within the time prescribed, the allegations of the answer will not be deemed to be admitted unless the court grants a motion by the respondent to that effect. Before passing on the motion the court will serve a copy on the taxpayer and issue an order to show cause. In practice, the petitioner’s attorney may then file the reply, even though untimely.

Not only is the alleged fraud never to be presumed, but it must be established by clear and convincing evidence, rather than by mere preponderance. But, as in the instance of the taxpayer’s burden in non-fraud cases, the Commissioner is not limited to evidence he has affirmatively introduced, but may discharge his responsibility by reference to the entire record. But fraud cannot be established by mere understatement of income, however large; the Commissioner must show bad faith, intentional wrongdoing and a sinister motive.

The fact that the respondent has the burden on the issue of fraud does not relieve or alter the petitioner’s obligation as to the amount of tax due. This is true for all years, even those barred by the statute of limitations in the absence of fraud. Hence, except in the rather unusual instance where the taxpayer concedes the correctness of the proposed deficiency in tax for all years, both the petitioner and the respondent have an obligation in fraud cases; the taxpayer to rebut the presumption of correctness attaching

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*Section 276(a), Int. Rev. Code.*
*Rule 14 of the court’s Rules of Practice.*
*Rule 15 of the court’s Rules of Practice.*
*Rule 18 of the court’s Rules of Practice.*
*Charles Heiss, 36 B.T.A. 633 (1937).*
*L. Schepp Co., 25 B.T.A. 419 (1932).*
*L. Glenn Switzer, 20 T.C. —, No. 110 (1953).*
to the determination of tax due, the respondent to establish fraud. This dual burden at times raises questions of procedure at the hearing. Each side may insist that the other go first. If the parties cannot agree, the court will have to resolve the conflict.

The burden is on the Commissioner only as to the penalty for fraud. It is incumbent upon the taxpayer to disprove the correctness of other types of penalties, such as those for negligence, delinquency, and understatement of estimated tax.

**Affirmative Issues**

Another instance in which the Commissioner must shoulder the burden of proof is where he sets forth new issues in the answer. The presumption of correctness attaches to only such matters as are contained in the deficiency notice. If the respondent discovers another item omitted from, or incorrectly reported on, the return after the statutory letter has been issued, he may assert it ab initio in the answer, either as originally filed, or upon leave of Court, as amended. The assertion may not be made after the hearing is concluded, and normally leave to amend will not be granted unless the motion is made sufficiently long before the trial to afford the taxpayer an opportunity to meet the new issue. Upon asserting the added matter, the burden of sustaining it is upon the Commissioner. If the new issue results in additional tax liability, it may be asserted at the same time.

**Statute of Limitations**

As already indicated, if the Internal Revenue Service is relying upon fraud as the ground for proposing a deficiency for a year which would otherwise be outlawed by the statute of limitations, the Commissioner must establish the fraud. It is also true that, if the Commissioner is relying upon the so called five year statute, he must allege and demonstrate its applicability. The burden is upon the respondent to show that more than twenty-five percent

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45 Section 293(a), Int. Rev. Code; Gibbs & Hudson, Inc., 35 B.T.A. 205 (1936).
47 Section 294(d), Int. Rev. Code; W. A. Berdine, 15 TCM 324 (1953).
48 Rule 32 of the court's Rules of Practice.
49 Section 272(e), Int. Rev. Code.
50 Section 275(c), Int. Rev. Code.
of the gross income has been omitted in the return filed for the year in question.\textsuperscript{51}

As to the normal three year period for assessing a deficiency in tax,\textsuperscript{52} the taxpayer must in his petition assert the statute. If the Commissioner in his answer admits the dates upon which the return was filed and the deficiency notice issued, and if the intervening period is more than three years, the burden is on the respondent to allege and prove an exception to the statute (e.g., waivers extending the assessment period). The burden is not on the taxpayer to disprove, under such circumstances, the existence of the exceptions to the three year statutory period.\textsuperscript{53} If the petitioner raises the defense of the statute, and if the Commissioner does not admit the correctness of the dates or otherwise concede that more than three years have elapsed between the filing of the return and the issuance of the notice, the taxpayer must establish the expiration of such period. When he does, the burden shifts to the government to disprove the prima facie case. The Commissioner's burden is discharged by the introduction of a waiver, valid on its face, agreeing to the extension of the period to a date beyond the day on which the notice of deficiency was mailed.\textsuperscript{54} It is then incumbent upon the taxpayer to demonstrate, if he can, that such consent is invalid.

**Transferee Liability**

Another instance in which the burden reposes upon the government is in the case of transferee liability. But the burden extends only to the establishment of the obligation of the person receiving property, not to the amount of tax owed by the transferor-taxpayer.\textsuperscript{55} The taxpayer need not be a party to such a proceeding since an action against him may be futile, he no longer having assets subject to distraint.\textsuperscript{56}

If the transferee's defense, in whole or in part, is that the

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\textsuperscript{51}C. A. Reis, 1 T.C. 9 (1942), and the same case on rehearing, 2 TCM 216 (1943), aff'd 142 F. 2d 900 (1944).
\textsuperscript{52}Section 275(a), Int. Rev. Code.
\textsuperscript{53}Farmers Feed Co., 10 B.T.A. 1069 (1928); Bonwit Teller & Co., 10 B.T.A. 1300 (1928); Estate of J. B. Williams, 12 TCM 829 (1953).
\textsuperscript{54}Concrete Engineering Co., 19 B.T.A. 212 (1930), aff'd. 58 F. 2d 566 (C.A. 8, 1932).
\textsuperscript{55}Section 1119(a), Int. Rev. Code.
\textsuperscript{56}Samuel Wilcox, 16 T.C. 572 (1951); Estate of Irving Smith, 16 T.C. 807 (1951).
transferor does not in fact owe the tax, or at least not so much as the Commissioner has asserted, the petitioner-transferee may obtain permission of the court to examine the taxpayer's books, records, and other documents in order to prepare his case.  

In income tax cases, the Commissioner must demonstrate that the petitioner received property from the taxpayer, the value of such property, that the transfer took place after the tax liability arose, that the conveyance was without adequate consideration, that the transferor was insolvent either at the time of the gift or as a result of it, and that the tax has not been paid. In the case of estate or gift taxes, however, the government need establish only a gratuitous transfer, the value of the property conveyed, and that the liability has not already been satisfied.

**Rule of the Taylor Case**

At times the taxpayer attempts to shift his burden of proof in ordinary deficiency cases to the respondent. This can be done successfully if he can demonstrate that the Commissioner's determination is "without rational foundation." The Supreme Court announced in *Helvering v. Taylor* that "we find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing, or, if liable at all, shows the correct amount." This principle is cited in many instances accompanied by vigorous argument that the deficiency should be set aside. But, too often, the contention is not of great merit because petitioner's counsel has overlooked the further requirement of the rule that: "Unquestionably the burden of proof is on the taxpayer to show that the Commissioner's determination is invalid." In other words the petitioner cannot invoke the precedent of that case without demonstrating by proof, and not mere argument, the arbitrary or baseless method of computing additional income used by the Service. But if such proof is intro-

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57 Section 1119(b), Int. Rev. Code.
58 Section 311(a), Int. Rev. Code; Annie Temoyan, et al., 16 B.T.A. 923 (1929); Ludwig Vogelstein, 16 B.T.A. 947 (1929); American Feature Film Co., 24 B.T.A. 18 (1931); Mrs. Lefferts Knox, 2 TCM 653 (1943).
59 Sections 827(b) (estate tax), and 1009 (gift tax), Int. Rev. Code.
60 293 U.S. 507 (1935).
61 *Helvering v. Taylor, supra.*
duced, he can effectively transfer the burden from his shoulders to those of the Commissioner.  

*Rule of the Gowran Case*

It does not necessarily follow from the *Taylor* opinion, however, that the burden shifts to the respondent simply because the Commissioner predetermines his position at the trial or in his brief upon a theory or premise different from that set forth in the deficiency notice. Similarly, the obligation has been held to remain with the taxpayer even though the respondent bases his position throughout upon an unsound foundation. The Supreme Court in *Helvering v. Gowran* declared that: “If the Commissioner was right in his determination, the Board properly affirmed it, even if the reasons which he had assigned were wrong.” This reflects the attitude which the Board had applied in cases prior to the *Gowran* decision.

... the Board has consistently held that the subject matter of the proceeding before it is the tax liability of the petitioner. When a deficiency is determined, the reasons given do not constitute or confine the issues. ... The primary issue is the correctness of the ultimate determination of deficiency, and the ordinary presumption is not destroyed by the reason given, even if it be unsound or badly expressed.

Perhaps we can disregard certain holdings to the contrary as having been decided prior to the *Gowran* case; moreover, other opinions since that time have followed the *Gowran* rule. But even since then, in a sizeable number of cases, the court seems to have deviated from that principle without reference to the *Gowran* case.
decision or to the many opinions which are to the same effect.\textsuperscript{67} In \textit{Vincent C. Campbell},\textsuperscript{68} for example, it was stated without citation of authority:

The Commissioner in his brief attempts to argue matters inconsistent with his own determination as disclosed in the deficiency notices. He may not do that under the rules of the Court without affirmative pleadings on his part. It must be recognized, for the purpose of this proceeding, that the petitioners actually loaned the money to the Campbell Bros. Coal Co. of Akron, in the amounts claimed in their returns and those amounts became worthless during 1944, because those facts are not only consistent with, but are essential to, the determination made by the Commissioner. The petitioners have properly deemed those matters not in dispute.

The court did not specify what the "inconsistent matters" were that respondent argued in his brief, but it is informally understood he was contending that there were no bona fide loans made. If that is true, it would seem that under the Gowran principle, the Commissioner without affirmative pleading or assuming the burden of proof, should not only be allowed to make that claim (even though it should be considered inconsistent), but if correct should be sustained.

In the Gowran case it was stated that, since the taxpayer might be prejudiced by the adoption of the "new issue presented," leave was granted him to apply to the Board for the privilege of introducing new evidence which would affect the result.\textsuperscript{69}

In one case, distinguishable from the Gowran line of decisions, it was held that, where the Commissioner substitutes a larger amount for that originally set forth, employing a different theory and claiming an increased deficiency, he has abandoned his original position, the presumption of correctness attaching to it dissolves, and the burden of proof shifts to him.\textsuperscript{70} In another in-

\textsuperscript{67} Warner G. Baird, 42 B.T.A. 970 (1940); Maltine Co., 5 T.C. 1265 (1945); Wentworth Manufacturing Co., 6 T.C. 1201 (1946); Vincent C. Campbell, 11 T.C. 510 (1948); O.D. Bratton, 12 TCM 747 (1953). The court withdrew the Bratton decision on the Commissioner's motion for reconsideration and has reissued it without reference to the burden of proof question. 12 TCM 747 (1953).
\textsuperscript{68} 11 T.C. 510 (1948).
\textsuperscript{69} Helvering v. Gowran, \textit{supra}. See also Raoul H. Fleischmann, 40 B.T.A. 672 (1939).
\textsuperscript{70} Seaside Improvement Co. v. Com., 105 F. 2d 990 (C.A. 2, 1939), cert. den. 308 U.S. 618.
stance, where the government set forth one interpretation of the statute in its regulations, and adopted that interpretation in its deficiency notice, argument before the Board and circuit court, and its request for certiorari, the Supreme Court refused to consider a contention based upon a wholly contrary and opposite construction.\textsuperscript{71}

It has also been held that, upon rehearing in the Tax Court pursuant to remand from the Circuit Court of Appeals, the burden of proof remains with the taxpayer even though the deficiency in the statutory notice was predicated upon an erroneous application of the law.\textsuperscript{72}

\textit{Conclusion}

In hearings before the Tax Court, the taxpayer-petitioner generally has the burden of disproving, by prima facie evidence, the presumption of correctness which attaches to the Commissioner’s determination. In some instances, such as with regard to the tax imposed by section 102 and an addition to the reserve for bad debts, the quantum of his proof must be greater than in ordinary deficiency cases. In those situations where the taxpayer’s testimony shows that some allowable expenditures have been made, but the amount has not been demonstrated, the court will make as close an approximation as it can.

Where fraud is in issue, either because of an attempt by the government to assert an addition to the tax or an exception to the statute of limitations, or both, the burden not only is upon the Commissioner, but he must discharge that responsibility by clear and convincing evidence. As to types of penalties other than fraud, the petitioner has the burden of proceeding as though the penalties were a part of the tax. The respondent also has the obligation in instances where he raises affirmative issues in his answer which are not contained in the deficiency notice, or in cases of transferee liability. But here he need sustain his position only by the normal preponderance of the proof. The Commissioner has a similar responsibility with regard to the five year statute of limitations, and even with regard to the three year statute, if the pleadings establish that more than three years have elapsed between the time the

\textsuperscript{71} Helvering v. Tex-Penn Oil Co., 300 U.S. 481 (1936).

\textsuperscript{72} Stock Yards Nat. Bk. of South St. Paul v. Com., 169 F. 2d 39 (C.A. 8, 1948).
return was filed and the deficiency notice issued. The petitioner need not prove the exceptions to the statute, but he must prove the invalidity of a consent valid on its face.

A taxpayer may shift his normal burden to the Commissioner if he establishes that the latter's determination is "without rational foundation." In other words, the petitioner need not show the correctness of his own position to transfer the obligation, he need demonstrate only the arbitrary or baseless resolve of his adversary. This does not mean, however, at least according to one line of decisions, that, merely because the respondent adopts or urges a theory or principle different from, or even contrary to, that given as the reason for an adjustment in the deficiency notice, the presumption of correctness no longer attaches to the adjustment. But if the amount of the adjustment were increased on a new theory and a greater deficiency claimed the presumption would disappear.

As the number of tax cases increases, and as more of them are carried to the litigation stage, an understanding of the various aspects of the burden of proof question becomes increasingly important to those who represent the tax-paying public.