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CONFUSION IN TAX LITIGATION*

HARVEY W. PETERS**

Perhaps it is quite unorthodox to start a tax discussion by relating a fable, but that is what I am going to do. In my opinion the particular fable will provide the stage setting for presentation of a paper on the subject of the confusion in tax litigation.

According to the story, many centuries back two expert tailors visited a kingdom to solicit an order for a gold garment for the King. This particular garment was to be made of an unusual fabric in that it was visible only to persons who were good, truthful and honest. To all others, the garment would be non-existent. Though the garment would be very expensive, the tailors got the order. While they were working on the tailoring job, the King visited the workroom, and was shocked to realize that this beautiful cloth was non-existent in his eyes. His couriers who visited the workroom also saw nothing. Now, of course, neither the King nor his entourage could admit that they saw nothing, and publicly announce their moral shortcomings. A far better course was to pretend they saw the cloth, and they showered their praises upon the beautiful fabric and its unusual design. Finally the day arrived for the official showing of the King attired in this unusual gold garment, and a parade was arranged. Once again, as the King passed along the parade avenue, the citizens saw nothing. As with the King and his staff, the citizens could not acknowledge that they were other than honest, pure and good, so they all shouted their huzzahs about the beauty and the intricacies of the King's garment. Unfortunately for the tailors, a little three-year-old child was too young to be carried along with the misrepresentations of his elders. He promptly shouted, "Why the King is naked!" Certainly a three-year old child could not be a dyed-in-the-wool sinner, and the child's forthright statement caused everyone to fess up that each one had been deluding the others. The tailors were promptly run out of town.

I have related the fable because upon reading tax treatises I often get the feeling that when the writer attempts to distinguish the facts in one case from those in another case, he is trying to describe some of the gold cloth in the fable. Upon my reading some court decisions, particularly those in cases where I serve as an attorney, I am even more strongly inclined to the belief that the distinctions made in court cases place full reliance upon some wonderful non-existent fabric of the law. Humorously enough, tax practitioners generally have acted somewhat

*This article is adapted from a speech given on October 26, 1961, at the Marquette University Institute on Taxation, the original of which will appear in the Annual Volume published by the Institute.

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like the citizens in the fable. They accept and even try to interpret the confusing technical distinctions and explanations offered by the courts as if they in fact exist. Tax practitioners are afraid to acknowledge that they do not understand court opinions for fear that this would affect their standing as persons schooled in tax law. So we go merrily on helping to weave a cloth of nothingness, completely oblivious of the gross fraud that we are helping to perpetuate. Our failure to be forthright and honest has helped to reduce the Federal income tax law to a mess of confiscatory and highly discriminatory practices without ground rules. At this stage anyone experienced in tax work cannot honestly pretend to offer any reliable opinion as to the probable tax effect of almost any transaction.

Any explanation as to how hundreds of decisions of the courts in tax cases contradict one another would accomplish little other than to describe the gory mess in minute detail. A better approach is to examine some of the artificial "rules of law" that form the threads in the fabric of nothingness. These so-called rules of law are relied upon by the courts and by Internal Revenue. They are expressed in the form of slogans and labels, because any true analysis would reveal that they are pure fabrication without true substance.

Legislative Grace

For some years now, tax law has proceeded under the philosophy that all income is taxable with the exception only of such deductions as the legislature in the exercise of grace might allow. It should be apparent that any unrestricted application of this philosophy could only represent a seizure of the property of the citizens without due process of law, all provisions in the Fifth Amendment of the United States Constitution to the contrary notwithstanding. Putting the matter bluntly, if Congress in the exercise of legislative grace should determine to tax all income without allowing any deductions, that would be the end of private property. We will now proceed to inquire into the dubious parentage of this catch phrase.

The legislative grace doctrine came into being in 1934 in course of a United States Supreme Court decision in the case of *New Colonial Ice Co., Inc. v. Helvering*.¹ The case presented the simple fact situation where one corporation had losses and was succeeded by another corporation organized by a creditors' committee. The question before the Supreme Court was whether the second corporation could employ the operating losses of its predecessor to offset its own taxable income. The statute specifically indicated that it was only the taxpayer that could use prior losses to offset income for succeeding years. It would have been simple enough for the Supreme Court to have said so, and the Court

¹ 292 U.S. 435, 13 A.F.T.R. 1180 (1934).

did so conclude. Unfortunately, however, the Court did not stop with the answer required. Instead, the Court used the following rather broad language in course of its opinion:

The power to tax income like that of the new corporation is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefore can any particular deduction be allowed.

The legislative grace theory was commented upon in the year 1937 by the Second Circuit Court of Appeals in deciding the case of *Davis v. United States*.² In that case the taxpayer claimed that the Code section which prevented offsetting capital losses against ordinary income was unconstitutional. The Second Circuit Court of Appeals was mindful of the Supreme Court's language in the *New Colonial Ice Co.* case, but the Second Circuit was not going to swallow the Supreme Court's expressions in the raw. Instead, the Second Circuit Court carefully distinguished between expenses incurred in process of getting income as against deductions and losses sustained in unrelated transactions. The language on this point in the Court's opinion is as follows:

While such subtractions are called deductions, as indeed they are, they are not to be confused with deductions of another sort like personal exemptions; deductions for taxes paid; losses sustained in unrelated transactions and other like privileges which Congress has seen fit to accord to income taxpayers under classifications it has established. *While the first kind of deductions are inherently necessary as a matter of computation to arrive at income, the second may be allowed or not in the sound discretion of Congress; the only restriction being that it does not act arbitrarily so as to set up in effect a classification for taxation so unreasonable as to be a violation of the Fifth Amendment.* Such deductions as distinguished from the first kind are allowed by Congress wholly as a matter of grace. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 54 S. Ct. 788, 78 L. Ed. 1348; *Van Vleck v. Commissioner*, 80 F. (2d) 217 (C.C.A. 2); *Gillette v. Commissioner*, 76 F. (2d) 6 (C.C.A. 2). [Italics supplied]

Stated simply, the Second Circuit Court of Appeals recognized that certainly not all deductions from gross income depended upon an exercise of "legislative grace" if income were to be taxed rather than confiscated!

Unfortunately, however, in 1938 the United States Supreme Court had cause to state once again its views on legislative grace in the case of *White, et al, v. United States*.³ In that case the taxpayer had taken issue with the treatment of gains and losses upon corporate liquidation, which the Code provided were to be taxed no differently than gains or

² 87 Fed. 2d 323, 18 A.F.T.R. 767 (1937).

³ 305 U.S. 281, 21 A.F.T.R. 1,000 (1938).

losses upon sale of the shares. Instead of answering the question simply. in process of deciding the case against the taxpayer, the United States Supreme Court restated the illusory concept of legislative grace in the following language:

Moreover, every deduction from gross income is allowed as a matter of legislative grace, and 'only as there is clear provision therefor can any particular deduction be allowed. . . . A taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.' New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440, 54 S. Ct. 788, 790, 78 L. Ed. 1348. [Italics supplied]

I would accord the fiction of legislative grace the dubious distinction of having first place among the doctrines that have started taxation into the current mess of confusion. This doctrine in its application sets the stage for the completely false philosophy that any taxpayer claiming a deduction is somewhat in the position of a beggar requesting a handout to which he is not legally entitled. A Revenue Agent examining a tax return presumes that whatever is allowed a taxpayer by way of deduction is a type of gift to be determined in his discretion, apparently as a representative of Congress.⁴ In like manner, the courts proceed under the theory that the taxpayer is making an extraordinary request in claiming a tax deduction. When this fiction is coupled with other fictions hereinafter explored, the effect upon the taxpayers has been deadly.

Ordinary and Necessary

Another fiction superimposed upon the income tax law by fiction is the undue qualification of business expenditures. Stated technically, expenditures are supposed to be ordinary and necessary before they can qualify as tax deductions. It is true that the Internal Revenue Code itself employs the expression "ordinary and necessary." It is doubted, however, that Congress ever intended that some type of micrometer approach should be used in determining which expenditures were ordinary and necessary. How did this fiction become established?

In 1940 the United States Supreme Court had before it the case of *Deputy et al, v. Du Pont*.⁵ In that case, a member of the Du Pont family had arranged to provide for the purchase of shares by Du Pont Company executives. He had borrowed the shares so as to permit his selling the shares to the executives, and then had to reimburse the true owner of the shares borrowed for any dividends that had been paid on the shares in the interim. He sought to deduct such reimbursement of dividend payments as a business expense for tax purposes. The Supreme Court could have decided, as it incidentally did, that these expenditures

⁴ There is legal substance to the Revenue Agent's belief. He IS a member of the Executive Department that is supposed to execute the laws.

⁵ 308 U.S. 488, 23 A.F.T.R. 808 (1940).

were related to the Du Pont Company, and not to the taxpayer. The Supreme Court could have decided that, at best, these payments were a capital investment on the part of the individual taxpayer made for purpose of assuring better results from his holdings of Du Pont shares. Unfortunately, however, the Supreme Court did not stop with an expression of any simple rules of law, but the Court went on to make history by laying down the fiction that all expenditures must be examined from standpoint of being ordinary and necessary. The language on this particular point reads in part as follows:

We do not doubt the correctness of the District Court's finding that respondent embarked on this program to the end that his beneficial stock ownership in the Du Pont Company might be conserved and enhanced. But that does not make the cost to him an 'ordinary' expense within the meaning of the Act. Ordinary has the connotation of normal, usual, or customary. To be sure, an expense may be ordinary though it happen but once in the taxpayer's lifetime. Cf. *Kornhauser v. United States*, *supra*. Yet the transaction which gives rise to it must be of common or frequent occurrence in the type of business involved. *Welch v. Helvering*, *supra*, 290 U.S. at page 114, 54 S. Ct. at page 9, 78 L. Ed. 212. Hence, the fact that a particular expense would be an ordinary or common one in the course of one business and so deductible under Section 23(a) does not necessarily make it such in connection with another business. . . .

And the fact that the payments might have been necessary in the sense that consummation of the transaction with the Delaware Company was beneficial to respondent's estate is of no aid. For Congress has not decreed that all necessary expenses may be deducted. Though plainly necessary they cannot be allowed unless they are also ordinary. *Welch v. Helvering*, *supra*.

Having first placed the taxpayer in the position of being dependent for his tax deductions upon the exercise of legislative grace by Congress, we now find that he must prove that any deductions allowed by the law must be ordinary and necessary. Once again, the interpretation is not to be made by someone with infallible logic and judgment, but is to be made by some 50,000 employees of Internal Revenue according to their own individual interpretations.⁶ Of course, the taxpayer may resort to the courts for relief, but in our further explorations of legal fictions, we will find that there are many obstacles to this path. Once again resorting to the Constitution, assuming that we still have one, one wonders whether the interpretation that some human being in form of a Revenue Agent may place upon the words "ordinary and necessary" qualifies as a due process of law.

The Cohan Rule

Perhaps one of the greatest fictions injected into the administration of the Internal Revenue Code is provided by the application of the so-

⁶ As members of the Executive Department of Government.

called Cohan Rule. An analysis of the history of this Rule would reveal that the Rule was originally established to give a rather prominent taxpayer a break, and that many years after the Rule was first established, it was exhumed from its burial place in the legal archives and placed into effect to accomplish a result almost diametrically opposed to the original intent of the Court that first promulgated the Rule. It is even technically incorrect to suggest that the Court which actually promulgated the Rule ever intended the distorted version later made applicable. A short story of the establishment of the Cohan Rule will illustrate how generalizations and labels can easily be misapplied to accomplish a weird result.

The celebrated theatrical manager and producer, George M. Cohan, had a case before the United States Board of Tax Appeals decided way back on April 20, 1928, under the title, *George M. Cohan, Petitioner, v. Commissioner*.⁷ Among many issues in said case Mr. Cohan claimed deductions for advertising, entertainment and travel expense. The Board of Tax Appeals stated that it did not doubt that petitioner was required to, and did, spend large sums of money for these purposes, but that the amounts claimed were bare estimates unsupported by any vouchers or bookkeeping entries of any kind, and further, that the Board could not decide what part of these amounts allegedly expended were for personal purposes. The Board's decision was appealed to the Second Circuit Court of Appeals and that Court promulgated its opinion on March 3, 1930 in *Cohan v. Commissioner*.⁸ The Second Circuit Court of Appeals decided that the Board of Tax Appeals had been too harsh with Mr. Cohan, even though he had no records whatsoever to support the deductions claimed. The opinion of the Second Circuit Court of Appeals reads in part as follows:

The question is how far this refusal is justified, in view of the finding that he had spent much and that the sums were allowable expenses. Absolute certainty in such matters is usually impossible and is not necessary; 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. But to allow nothing at all appears to us inconsistent with saying that something was spent.

Emphasis on point that the Cohan decision actually gave a break to a taxpayer who had claimed tax deductions supported by nothing but his general statement.

Anyone checking the historical record of the citations of the Cohan Rule is apt to experience a rude shock. For a period of about 20 years after its promulgation in early 1930 the Cohan case was occasionally

⁷ 11 B.T.A. 743 (1928).

⁸ 39 F. 2d 540, 8 A.F.T.R. 10552 (1930).

cited as support for the philosophy that absolute certainty in tax matters was impossible to attain. Along about 12 to 15 years ago Internal Revenue started a drive to disallow practically all travel and entertainment expense as tax deductions. Such approach recognized what the Cohan decision had emphasized—that there could be no certainty in matters of expenditures of this kind, whether from standpoint of proving amounts expended, or the business purpose for which the amounts were expended. Believe it or not, in application the Cohan Rule has been perverted and distorted in court decision after court decision under a philosophy that can be outlined somewhat as follows:

(a) First of all, it is simple to decide that all available evidence in any case will fall short of actually proving an expenditure, or its qualification as a tax deduction,⁹ even as the Second Circuit Court of Appeals had determined in the Cohan case. Forgotten, however, is the Cohan case conclusion that absolute certainty is not necessary.

(b) The presumption established, it is concluded that some portion of any taxpayer's claimed deductions should be disallowed for failure of proof. Forgotten, however, is the Cohan case restriction of heavy disallowance to situations where the inexactitude is of the taxpayer's own making.

(c) By a supposed application of the Cohan Rule, a small part of the deductions claimed (and often proved within reasonable limits) is then allowed as a type of "booby prize." In one particular instance a Judge during trial called the Government attorney and the writer into chambers to announce that he should not be expected to pass upon a couple of dozen expense disallowance items *all of which were accounted for to the penny*. He suggested a trial recess of several hours to enable counsel to "settle" the expense issues. This could mean only one thing—the taxpayer was expected to yield and accept a partial disallowance of the amounts expended. The expense issues were "settled."

So we find that the Cohan Rule, which was established to benefit a taxpayer that had absolutely no records and no substantiation, is now being applied in reverse to deny deductions to taxpayers even though they have records and substantiations, because in any case the proof must necessarily fall short of establishing this fictional element of absolute proof, which the Cohan case had concluded was not necessary.

The reference to the matter of proof suggests that I relate an experience of some years back. A Revenue Agent was discussing with me the problem of one of my clients and he was quite outspoken on the

⁹ Internal Revenue regularly relies upon this element in "threatening" disallowance of some expense to get taxpayers to concede highly technical issues. This is particularly the case as to individual (non-corporate) returns.

matter of his interpretation as to what constituted proof. The more he talked the more he sounded like he was the Supreme Court. Having become quite annoyed, I said, "Joe, I understand you have just become a father," and Revenue Agent Joe beamingly acknowledged that my information was correct. I went on, "You know, Joe, you could not actually go into court and scientifically prove that you are the father of your child." For the balance of that particular session, he refrained from discussing his ideas as to the matter of proof in court.

The misunderstandings concerning the Cohan case are still in process of exploitation to the extreme disadvantage of the nation's taxpayers. Most recently, the Cohan rule was charged with the parentage of the so-called lavish expense account problem. For example, in *The Chicago Daily Tribune* of May 27, 1961, United States Senator Paul Douglas (D. Ill.) was reported as criticizing the Cohan Rule. The news article reads in part as follows:

That action established the 'Cohan rule,' under which the revenue service must allow a substantial portion of the deductions claimed on the theory that persons in certain professions and businesses will have certain deductible entertainment expenses, Douglas told the Senate.

Now it is possible under the Cohan rule, Douglas said, for lavish spenders to double their claims, accept a disallowance of half under the Cohan rule, and get an actual 100 per cent of what they spent, with or without records.

Since a tax attorney's knowledge is necessarily restricted to the affairs (and experiences) of his own clients, he cannot venture a counter generalization that would express 100% disagreement with the statements of a United States Senator!

The views of the Senator carry more impact in legislative channels than do the experiences of a tax attorney. So we find that the proposed Revenue Act of 1962 contains a provision intended to "abolish" the Cohan rule. In the March 16, 1962 "Report of the Committee on Ways and Means," the provision is described as follows:

After full hearings on the proposal and careful consideration of the problem, your committee has concluded that additional restrictions should be imposed on deductions for entertainment and traveling expenses and business gifts. The committee agrees that abuses in this or any other area of the tax law should not be tolerated, but it does not believe that complete disallowance of such expenses, as recommended by the President, is the proper solution to the problem.

Your committee's bill is designed to eliminate the abuses which have developed in this area. The bill provides new rules which, in general, would: (1) disallow a deduction with respect to entertainment activities, except to the extent that the expense is directly related to the active conduct of a trade or business; (2) disallow a deduction with respect to entertainment facilities, un-

less the facility is used primarily for the furtherance of the taxpayer's trade or business and the expense is directly related to the active conduct of the trade or business; (3) abolish the Cohan rule by requiring the taxpayer to substantiate, by adequate records or by sufficient evidence corroborating his own statement, all expenditures for entertainment and related facilities, and for travel and gifts; and (4) limit the deduction for gifts to \$25 per year per recipient.

Since the Second Circuit Court of Appeals in the case of *Cohan v. Commissioner, supra*, determined that "absolute certainty in such matters is usually impossible," it can be concluded that the effect of the proposed provision in the Revenue Act of 1962 is really to disallow expenses of this kind. It is useless to suggest that a deduction will be allowed upon absolute proof under the condition where a responsible Court of Appeals has decided that such proof is "usually impossible." One factor seems lost in this battle of words—by what process has the method of operating a business been placed so completely under the jurisdiction of the Federal Government?

*The burden of proving the Commissioner's exercise of discretion
as erroneous*

Under the Internal Revenue Code the Commissioner of Internal Revenue has the right to make any determination, and, unless the taxpayer is able to prove the Commissioner wrong, the assessment made by the Commissioner will stick. This places emphasis upon the fact that whatever some 50,000 employees of Internal Revenue might happen to do or to decide, is presumed to represent the action of the Commissioner of Internal Revenue.¹⁰ Perhaps this should suggest to the courts that at least a percentage of the some 50,000 employees might happen to come up with incorrect decisions, all fiction in the law to the contrary notwithstanding. Unless the Federal Courts will carefully analyze, and examine into, the actions of these many employees in each particular case coming before a court for decision, a taxpayer's rights will not be protected.

While on the subject of the authority of the employees of Internal Revenue, a comment should be made as to the actual power vested in these persons. By pure happenstance, the writer in course of reading a court decision, recognized for the first time that there was a United States Code provision which requires that an ordinary citizen approach with extreme care any contact with representatives of any executive agency. Said provision¹¹ reads as follows:

Sect. 1001. *Statements or entries generally.*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and will-

¹⁰ These employees are legally members of the Executive Department.

¹¹ 18 U.S.C. 1001.

fully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Believe it or not, in mentioning this Code provision to several competent attorneys, not a single one expressed knowledge as to such provision in the law!

Getting back to the burden of proof matter, the correct rule respecting the burden of a taxpayer in proving the determination of the Commissioner incorrect was provided by the Ninth Circuit Court of Appeals in *Hemphill Schools, Inc. v. Commissioner*,¹² from which opinion the following quotation is taken:

The burden of proving it incorrect rested on petitioner. Thus, if no evidence had been produced, the Board would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct.

Evidence was produced. Some of the evidence produced by petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. Evidence having been so produced, the presumption ceased, and thenceforth the issue depended "wholly upon the evidence." It thus became the duty of the Board to find from the evidence, and from it alone, whether petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board treated the presumption (which no longer existed) as if it were evidence, weighted it against petitioner's evidence and concluded that petitioner's evidence did not "overcome" it.

The same conclusions were reached in *Crude Oil Corp. of America v. Commissioner*,¹³ *Seaside Improvement Co. v. Commissioner*.¹⁴

Stated simply, once a taxpayer introduces competent evidence he has at least neutralized the presumption as to the correctness of the Commissioner's determination. Thereafter the case should be decided upon the basis of the evidence submitted. Obviously, if the Commissioner should introduce evidence on his own behalf, then and in such case the taxpayer should have the burden of presenting competent evidence sufficient to outweigh any evidence submitted by the Commissioner. Now, as a matter of fact, most tax cases proceed under the condition where only the taxpayer offers evidence at time of trial. Placing reliance upon the true rule of law in the Cohan case, the evidence introduced by the taxpayer should be accepted by the court on the basis that some things are not subject to proof to any superlative degree.

¹² 137 F. 2d 961, 31 A.F.T.R. 610 (1943).

¹³ 161 F. 2d 809, 35 A.F.T.R. 1370 (1947).

¹⁴ 105 F. 2d 990, 23 A.F.T.R. 293 (1939).

The courts have not observed the rule as to taxpayers' evidence so carefully set forth in *Hemphill Schools, Inc.*, *supra*. Nor have the courts paid heed to the understanding expressed by the Second Circuit Court of Appeals in the *George M. Cohan* case, *supra*, that "Absolute certainty in such matters is usually impossible and is not necessary; . . ." Instead, the courts have made the taxpayer's job more difficult by producing some subsidiary fictions under the burden of proof rule so as to render the contest even more unequal for the taxpayer, as a few examples will demonstrate:

(1) The courts have concluded that the Commissioner's determination may be based upon faulty reasoning, or in fact may be supported by no reasoning whatsoever. In the case of *Helvering v. Gowran*,¹⁵ the Supreme Court stated:

It is immaterial whether the Commissioner proceeded upon the wrong theory. The burden is upon the petitioner to show that the assessment is wrong, upon any proper theory; otherwise he must fail.

Compare such treatment with the requirement that a taxpayer in litigating a case must prescribe the specific Code section under which his case falls, or he will lose the case even though there may be some other Code provision under which the identical deduction or loss might have been claimed. Emphasis is also placed on the point that in meeting this requirement, taxpayer's counsel must give full vent to an exercise of imagination as to the possible construction, and the possible Code section, under which the Commissioner's determination might be found "proper."

(2) In the case of *R. J. Reynolds Tobacco Company*,¹⁶ the Fourth Circuit Court of Appeals emphasizes that there is a somewhat greater burden of proof upon a taxpayer in a refund suit than in a Tax Court proceeding contesting a deficiency assessed by the Commissioner. Citing *Taylor v. Commissioner*,¹⁷ affirmed as *Helvering v. Taylor*.¹⁸

The philosophy of this rule would seemingly suggest that a taxpayer going to the trouble of making payment before litigating a tax issue will have a more difficult job, irrespective of the fact that the same issue will be involved, whether the tax is first paid or not.

(3) In the case of *R. J. Reynolds Tobacco Co. v. Commissioner*,¹⁹ the Tax Court decided that in determining whether extra compensation distributed to a large mass of employees was reasonable, it was required that the taxpayer prove that the compensation was reasonable

¹⁵ 302 U.S. 238, 19 A.F.T.R. 1226 (1937).

¹⁶ 260 F. 2d 9, 2 A.F.T.R. 2d 5892 (1958).

¹⁷ 70 F. 2d 619, 13 A.F.T.R. 1042 (1934).

¹⁸ 293 U.S. 507, 14 A.F.T.R. 1194 (1935).

¹⁹ Reported in P-H 1956 T. C. Memorandum Decisions, Paragraph 56, 161.

as to each particular individual employee in the large group. It was not enough for the officers of taxpayer to testify that they had made a general survey to satisfy themselves on the factor of compensation being reasonable. Accordingly, the Tax Court applied the so-called rule of *Cohan v. Commissioner, supra*, and by means of a formula determined the amount of the taxpayer's tax deduction.

(4) Section 166(c) of the 1954 Revenue Code provides that in lieu of a deduction for debts which become worthless, there shall be allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts. Instead of the courts restricting the Commissioner's discretion to the point of his deciding whether or not a particular taxpayer may adopt the bad debt reserve basis, the courts have decided instead that the amount of each year's bad debt reserve addition is allowable solely within the discretion of the Commissioner. For example, in *Holley Office, School Supply & Printing Co.*,²⁰ the Tax Court commented:

The burden which petitioner must assume, in view of respondent's exercise of his statutory discretion, is greater than the usual burden which faces a taxpayer who seeks to overcome the presumption of correctness that attaches to respondent's determination of a deficiency. *Maverick Clarke Litho Co. v. Commissioner*, 180 F. 2d 587 (1950 P-H, Par. 72, 473), affirming 11 T.C. 1087 (No. 129), Par. 11, (129 P-H T.C. 1948), (CA-5, March 11, 1950).

In the case of *American State Bank v. United States of America*,²¹ our own Federal District Court for the Eastern District of Wisconsin, emphasized that this was a "heavy burden." This decision was affirmed by the Court of Appeals for the Seventh Circuit.²²

(5) The ultimate in demonstrating the impossibility of a taxpayer's burden in a bad debt reserve case was provided in the recent decision of the United States Court of Claims in *Edward T. Kirtz v. U.S.*:²³

Certainly the plaintiff has shown that the method it used in determining the amount to be added to its bad debt reserve was reasonable, but this is irrelevant. It does not follow that if the plaintiff was reasonable in its determination the defendant was unreasonable. The burden is on the plaintiff to show that the Commissioner was unreasonable, and absent this showing we will not assume that there has been an abuse of discretion.

(More will be said about bad debt reserve procedures in a later comment respecting the validity of Revenue Rulings and Regulations.)

(6) There is actually the condition where Congress decided that the

²⁰ Tax Court Memorandum Decision, reported in P-H 1950 T. C. Memorandum Decisions, paragraph 50, 153.

²¹ 176 F. Supp. 64, 4 A.F.T.R. 2d 5540 (1959).

²² 279 Fed. 2d 585, 5 A.F.T.R. 2d 1678 (1960).

²³ (decided June 6, 1962).

burden upon certain taxpayers was too great so as to cause Congress to enact a statutory provision providing for a shift of the burden in a case of an assessment of an Undue Accumulation of Earnings Surtax. The statutory provision is Section 534 of the 1954 Revenue Code. In the case of *Pelton Steel Casting Company v. Commissioner*,²⁴ the Tax Court decided that in an Undue Accumulation of Earnings Surtax case the matter of an accumulation of earnings beyond the reasonable business needs was only one factor, and this is the factor as to which the burden of proof might have been shifted. In effect, the Tax Court in that case refused to pass upon the burden of proof issue until there had been a final decision on the matter. Needless to state, at such point the issue of burden of proof was no longer important. The Pelton Steel decision was affirmed by the United States Court of Appeals for the Seventh Circuit in 251 F. 2d 278. To the same effect *Barrow Manufacturing Company, Inc. v. Commissioner*.²⁵

Fortunately for taxpayers, the Second Circuit Court of Appeals in *R. Gsell & Co., Inc. v. Commissioner*,²⁶ held that Congress purposely inserted Section 534 into the 1954 Code, and that the courts have the duty to give the Section its intended effect.

Up to this point, we have found that (1) a taxpayer's deductions depend upon legislative grace as interpreted by Internal Revenue, (2) a taxpayer must prove each specific deduction as ordinary and necessary, (3) even if the taxpayer has proven his case to this point he runs into the hazard of a misapplication of the Cohan rule to take away a good part of his tax deductions, and (4) in the interpretation of the taxpayer's burden of proof element, the courts have been most demanding. On the other hand, we have learned that no matter what the reasoning of the Commissioner of Internal Revenue in making a determination, the taxpayer must prove the determination not only wrong but unreasonable.

The validity of Rules and Regulations of Internal Revenue

Up to this point, we might as well concede that the courts in their decisions have provided very little by way of ground rules and guide lines for any taxpayer to follow in his own transactions. In making such statement, I retain the belief that the United States Constitution, as well as the Internal Revenue Code, presume that a taxpayer should not be completely subject to the whims of the Commissioner of Internal Revenue as exercised by some 50,000 employees.

Someone might suggest that to at least reduce the hazard of being subject to different interpretations by the many Internal Revenue employees, one can rely upon Regulations and Revenue Rulings. In other

²⁴ 28 T.C. 153 (1957).

²⁵ 294 F. 2d 79, 8 A.F.T.R. 2d 5330 (1961).

²⁶ 294 F. 2d 328, 8 A.F.T.R. 2d 5503 (1961).

words, although Rulings and Regulations may merely reflect the opinion of an administrative officer as stated in *Bowers v. West Virginia Pulp & Paper Co.*,²⁷ nevertheless the rulings do at least provide advance notice as to what to expect.

Unfortunately, even reliance upon Revenue Rulings and Regulations may prove quite a delusion as some examples will illustrate.

The best way of illustrating the manner in which the courts can blow hot and cold on a particular Ruling is to turn attention to Mimeograph 6209, C.B. 1947-2, Page 26, which establishes a procedure for computing bad debt reserve additions for banks. Said Mimeograph sets forth the obvious intent that banks will be privileged to establish a bad debt reserve on basis of historical experience as to bad debt losses. The Mimeograph clearly indicates that the additions to the reserve are to be accumulated irrespective of actual bad debt losses in the tax years during which the reserve is being accumulated. Now, let's examine the court decisions in cases involving application of this Mimeograph:

(1) In the case of *The First National Bank at Wilkinsburg v. United States*, the United States Tax Court specifically commented respecting Mimeograph 6209 with the terse statement:

That Mimeograph does not have the force and effect of the law.²⁸

(2) In the case of *First National Bank of LaFeria*,²⁹ the same United States Tax Court completely disregarded its own observations on point that Mimeograph 6209 does not have the force and effect of law by showing that its determination was based upon the Mimeograph:

We think it clear that under paragraph 5 of respondent's ruling, Mim. 6209, supra, a bank is required to use its own experience in determining its 20-year moving average experience factor, unless it is newly organized or does not have a 20-year experience of its own, in which case it may use a substituted experience of another bank to complete the 20-year computation. The record shows that petitioner had been in existence for over 20 years at the time its 1947 and 1948 returns were prepared, that the bad debt ratios for each of the 19 years preceding the taxable year involved were determinable, and that the 20-year moving average ratio could be computed in accordance with the provisions of respondent's ruling.

Somewhat puzzling is the Tax Court's observation in said case, at Page 433, that the bad debt loss reserve is intended to compensate for past losses, viz:

The purpose of the 20-year experience in computing the reserve for bad debts is to equalize between past bad debt experience and future bad debt expectations so that a particular bank

²⁷ 297 F. 225, 4 A.F.T.R. 3883 (1924).

²⁸ (June 25, 1954) published in 1954 T.C. Memorandum Decisions of Prentice-Hall, Page 54-565.

²⁹ 24 T.C. 429 (June 20, 1955).

may be recompensed for past losses by bringing the reserve to a maximum figure, before charging the reserve with current losses, and to provide the bank with a cushion adequate to protect it against anticipated future losses. Once the maximum reserve is reached the charges and the credits should balance out over a period of years.

It is difficult to comprehend as to why a bank that charged off (and presumably deducted) bad debt losses when incurred during the Depression 1930's should be considered as being compensated once again for such losses in form of additions to a bad debt reserve.

(3) In *Union National Bank & Trust Co. of Elgin*,³⁰ there is again the case of a bank petitioning for the right to substitute the loss experience of another bank, because its own loss experience was incurred under different conditions, and under a different management than existed in the years at issue. Again the Tax Court ignored its own pronouncement in *The First National Bank at Wilkesburg* case to the effect that Mimeograph 6209, C.B. 1947-2, page 26, does not have the force and effect of law by making the following observations at Page 543 of the opinion:

In this case, for the years 1949, 1950, and 1951, the Commissioner has applied the provisions of his Ruling, Mim. 6209, 1947-2 Cum. Bull. 26, to petitioner. That ruling is declaratory of the Commissioner's position with respect to reasonable annual additions to reserves for bad debts by banks in general. . . .

It is clear that under the Commissioner's ruling, Mim. 6209, supra, a bank is required to use its own experience in determining its 20-year moving average loss rate, unless it does not have a 20-year experience of its own. First National Bank of LaFeria, 24 T.C. 429, 432. Petitioner is not a new bank. Petitioner has a 20-year experience of its own. Petitioner has never received the Commissioner's consent to use a substituted bad debt experience of another bank or of other banks. In making his determinations, which have given rise to the deficiencies, the Commissioner has used petitioner's own 20-year experience in applying the provisions of Mim. 6209.

(4) in the case of *Miners National Bank of Wilkes-Barre*,³¹ the Tax Court was confronted with a bank bad debt reserve deduction issue, and the contention that Mimeograph 6209, C.B. 1947-2, Page 26, should not be administered on basis that F.H.A. Title II loans are in fact "100 percent Government guaranteed loans." In such case, the Tax Court decided once again, in spite of the Court's prior determinations that the Mimeograph does not have the force and effect of law:

For some reason the parties have attempted to confine the Court to the very narrow question of whether the Commissioner

³⁰ 26 T.C. 537 (1956).

³¹ 33 T.C. 42 (October 14, 1959).

properly interpreted his own Mim. 6209, 1947-2 Cum. Bull. 26 by determining that for the purpose of that Mimeograph F.H.A. Title II loans were in fact "100% Government guaranteed loans."

We think this is not proper. Mim. 6209 does not have the effect of law and, certainly, neither do individual rulings under it have the effect of law. The fundamental question still is whether petitioner has proven error in the Commissioner's determination in this case.

The Court concluded:

We rest our holding, not on the narrow ground of whether or not F.H.A. Title II loans are "100% Government Guaranteed," but on the broader ground that petitioner has not shown that the Commissioner in this case unreasonably exercised the discretion vested in him by law.

(5) The issue as to Mimeograph 6209 came up for consideration in *American State Bank v. United States*.³² In that case the taxpayer upon trial offered specific proof as to the discriminatory effect of the Mimeograph's arithmetic application to the taxpayer by introducing proof as to the ratios allowed competing banks:

- (a) One competitor had a ratio of 0.9801%.
- (b) Another competitor had a ratio of 0.758289%.
- (c) All banks in the Seventh Federal Reserve District had a bad debt experience of 0.833%.
- (d) The taxpayer's ratio as allowed by the Commissioner was 0.14808% for one year, and 0.2608% for another year.

Nevertheless, both the District Court and the Circuit Court of Appeals decided that in order for the taxpayer to increase its bad debt reserve additions, it was required to prove actual losses sufficiently to justify allowance of the reserve addition claimed. In other words, practically all the banks in the United States are entitled to use Mimeograph 6209 in establishing reserves for potential losses except such banks as, because of unusual circumstances in their historical pattern, do not come within a strict interpretation of its provisions.

In the *American State Bank* case, the taxpayer relied upon the argument that the tax law could not be administered in a discriminatory fashion, and on this point the United States District Court for the Eastern District of Wisconsin commented as follows:

One further observation may be noted. While the record here does not support a finding of present or anticipated future losses which establish the insufficiency of the allowed additions to reserves or of the inadequacy of the accumulated reserve, it nevertheless demonstrates the Bank's disadvantageous position in re-

³² 176 F. Supp. 64, 4 A.F.T.R. 2d 5540 (1959), affirmed 279 Fed. 2d 585, 5 A.F.T.R. 2d 1678 (1960).

spect to deductions from income for tax purposes relative to comparable Milwaukee banks.

The Commissioner's application of the method proposed in the pertinent Rulings results in substantially larger proportionate deductions being available to banks having sustained heavy losses and to those organized subsequent to the heavy loss years than to banks newly organized during these years. Such deductions may be justified in cases of banks actually having sustained proportionate losses. However, the disparity between the position of hypothetical banks which had no experience since they were not in existence and may rely on borrowed heavy loss experience, and that of plaintiff Bank which had little or no experience for several of the heavy loss years due to its newness and economic factors, but is denied the use of substituted loss experience, may result in the application of the Commissioner's formula in a discriminatory manner.

Tax disadvantage and potential discrimination have not been considered pertinent factors in judging the reasonableness of the Commissioner's determinations as to additions to reserves as deductions from income. The Bank has not met its heavy burden of showing that the Commissioner's determinations in question here are unreasonable or arbitrary.

Despite this comment respecting the discriminatory aspects of Mimeo-graph 6209, it did not help the taxpayer in the result.

(Incidentally, under date of July 14, 1961, the United States Treasury Department issued a Report on the proposed taxation of mutual savings banks and savings and loan associations that fully corroborated the position and contentions of the American State Bank. In said Treasury Report (Page 5) there is contained the following language as to what banks generally were being allowed as a bad debt reserve:

Most taxable institutions, in establishing bad debt reserves for Federal income tax purposes, are not permitted to base their anticipated loss experience upon the experience of the economic collapse of the 1930's. However, because of considerations peculiar to certain financial institutions, the commercial banks are permitted to establish bad debt reserves equal to three times their average loss experience for the worst 20-consecutive-year period beginning after 1927. This formula, therefore, does take into account depression experience. The average reserve ratio established by commercial banks using the reserve method amounts to 2.4 percent of uninsured loans. It is estimated that application of a comparable formula to mutual thrift institutions would produce a reserve ratio of between 2 and 3 percent of uninsured loans.)

(6) The decision in the American State Bank case is in direct conflict with the decision in *Winter Garden Production Credit Association, v. R. L. Phinney, Director of Internal Revenue*,³³ where a different Federal District Court made the following observation:

That being true, the question remains as to whether the Commissioner abused his discretion and, if so, to what extent. I am convinced that he did, and that the rate which the Commissioner determined is unduly low and unrealistic. I am convinced that this is so because the Commissioner's calculation does not take into account the highly significant fact that capable farm credit agencies suffered severe bad debt losses during the early 1930's; and the taxpayers here escaped this fate by reason of the fact that they were organized during the height of the depression days and that, with negligible exception, the farmers' economic condition has prospered and improved during the taxpayers' entire history.

The same rule was applied by the United States District Court, Dist. of S.D., S. Div. in *Mitchell-Huron Production Credit Association, v. W. C. Welsh, District Director of Internal Revenue*.³⁴

Another beautiful example as to how the courts may disregard the Commissioner's position in denying relief to a particular taxpayer is demonstrated in the case of *Red Star Yeast and Products Company v. Commissioner*.³⁵ In that case, the Commissioner contended that payments made to another corporation represented the purchase price of a secret process. Upon trial there was proof that the payments made were in fact research expenditures, and that the taxpayer actually received no benefit from the payments made. Upon trial an oral stipulation was introduced into the record on point that it had been the Commissioner's policy to allow research expenditures as expense under the 1939 Code. The United States Tax Court decided that the expenditures were research expense, and produced little, if any, benefit to the taxpayer, and the Tax Court concluded that the payments would qualify for deduction as a business expense under the policy of the Commissioner of Internal Revenue. In spite of the foregoing, the Tax Court held that the expenditures were not deductible, because the Commissioner's publicly expressed policy was not in any way binding upon the Court, absent provision for the deduction in the Internal Revenue Code, or in the Regulations. Upon receiving that result, I promptly reminded the Joint Committee of Congress that the 1954 Code provision covering research had been enacted in reliance upon the Commissioner's testimony before Congress that the 1954 Code provision merely reflected the existing policy under the 1939 Code, and I suggested that the 1954 Code provision be made retroactive. Instead of introducing new legislation, the Commissioner of Internal Revenue agreed that the taxpayer was entitled to the deduction. By agreement a decision was entered allowing the deductions in spite of the published opinion of The United States Tax Court that the deductions were not allowable.

³³ 139 F. Supp. 213, 49 A.F.T.R. 686 (1955).

³⁴ 163 F. Supp. 883, 2 A.F.T.R. 2d 5504 (1958).

³⁵ 25 T.C. 321 (1955).

The practical problem

Of course, the courts can present an excuse. The courts can baldly state that tax cases are required to be decided entirely on basis of their interpretation of the statute and decided precedents no matter how awkward the result. Courts can suggest too that the law is complex to the point of contributing to the confusing pattern. Unfortunately for both the taxpayers and the legal profession, there has already developed the strong feeling that there is no point in litigating a tax case. Incidentally, this feeling applies as to all litigation involving the government, and is not restricted to tax cases. Some persons believe that the remedy lies in the enactment of a more simple tax law, while others believe that an attempt should be made to have Internal Revenue provide a more equitable administration.

Any suggestion that United States taxpayers must plead to Congress for a new law, or must petition the Commissioner of Internal Revenue for a better administration, completely ignores the purpose of the judicial branch. The United States Constitution specifically provided the judicial branch as the third arm intended to protect the citizens against either or both the legislative and executive branches. Now there is strong reason to suspect that this third branch has ceased to function in the manner intended by the Constitution.

The technical language of court decisions does not hide the obvious result that the Federal Courts consider their principal duty to be one of upholding the Commissioner of Internal Revenue. Only occasionally does a court make history by kicking over the traces. Although attorneys cannot voice their opinions respecting court decisions too freely, because they must practice before the very tribunals they would criticize, it is an open secret that experienced attorneys have described the language of some court decisions as a type of veneer that provides a better appearance for the unusual, and often unconstitutional, results reflected in a particular opinion.

Some outspoken critics freely state that the courts are functioning as if they were a division of the executive branch, rather than an independent branch of the government specifically intended to control the executive division.

Sometimes a court decision seems unmindful of practical effects. For example, in *Estate of Clara Nickoll v. Commissioner*,³⁶ the taxpayer claimed a loss on partial demolition of a building in process of rebuilding to suit a new tenant. From the court's opinion, one gathers that there was no dispute as to the amount of the loss incurred, but that Internal Revenue had disallowed the loss as a tax deduction. The Tax Court decided that the taxpayer must have considered the new lease to be of more value than the old building, so that the taxpayer was

³⁶ 32 T.C. 1346 (1959).

"compensated" for any loss suffered from the demolition. The decision of the Tax Court was upheld by the United States Circuit Court of Appeals in 282 Fed. 2d 895, 6 A.F.T.R. 2d 5650. One must presume that in future years the taxpayer will be required to depreciate a non-existent asset.³⁷

Extensions of this doctrine could produce a maze of confusion. Will some future decision hold that the loss upon junking a piece of equipment will be disallowed, because the taxpayer was compensated by obtaining space in the factory where the machine used to stand? Where a taxpayer sells a property at a loss, will some future court decision hold that the loss should be disallowed, because compensation was obtained through getting funds that can be invested in a more profitable piece of property? Where a fire destroys a plant, will a court presume that any resulting loss is to be disallowed because the taxpayer was compensated through the process of getting insurance cash for at least part of the cost of the antiquated plant and obsolete inventory?

One could cite also the case of *John W. and Marian McMichael Chamberlin*.³⁸ The principal issue in that case concerned the taxable character of payments received under an interest in an exclusive license which interest was received in exchange for shares of stock. The patent contract interest so received was highly speculative. The exchange occurred in 1936 and 1937, and at that time neither the taxpayer nor Internal Revenue placed a value on the contract interest received. The patented item was not fully developed and had not even been produced for sale. The payments thereafter received were reported as income as received upon the authority of *Burnet v. Logan*,³⁹ and *Carter v. Commissioner*,⁴⁰ and a long line of cases. As a matter of fact, in case after case, beginning with *Burnet v. Logan*, the courts have laid down the legal fundamental that the valuation of a contract might be acceptable for some tax purposes, but did not provide the element of certainty required in the taxation of incomes. The result of following this valid legal doctrine was that any payments later received upon such speculative contracts represented proceeds from the sale of the original property for which the particular contract was received.

The Commissioner of Internal Revenue has never been too fond of capital gain tax treatment.⁴¹ In this particular instance, he decided to work a change by promulgating Revenue Ruling 58-402, C.B. 1958-2, Page 15. In said Revenue Ruling, the Commissioner emphasized:

³⁷ Unless the fiction is created that the valuable lease was "purchased" by the taxpayer at a "cost" equal to the cost of the property demolished.

³⁸ 32 T.C. 1098, affirmed 286 Fed. 2d 850, 6 A.F.T.R. 2d 5967, (1960) *certiorari denied* October 9, 1961.

³⁹ 283 U.S. 404, 9 A.F.T.R. 1453 (1931).

⁴⁰ 9 T.C. 364 (1947), affirmed 170 F. 2d 911, 37 A.F.T.R. 573 (1948).

⁴¹ The writer would fully subscribe to the Commissioner's views provided all capital gain gimmicks are abolished in the Internal Revenue Code.

Therefore, it is necessary (*Fleming v. Commissioner*, 153 Fed. (2d) 361), in order to prevent escape from the ordinary income tax by converting income payments into capital gains, to ascertain the value of the property in the prior sale or exchange and to close that transaction, except in rare and extraordinary cases. Otherwise, the ordinary income tax on the income collected from the contract or claim after the sale or exchange is converted into a tax on capital gains.

The Tax Court took the suggestion, and decided in the *Chamberlin* case that the speculative contract had to be valued at time of receipt, and capital gains treatment was denied. The decision was affirmed by the Court of Appeals for the Seventh Circuit, and certiorari has been denied by the Supreme Court.

The *Chamberlin* case decision has changed the law. Now speculative type contracts must be valued at time of receipt for income tax purposes where capital gain treatment would otherwise result.⁴² Sooner or later the philosophy can be expected to extend to all cases involving receipt of highly speculative contract interests where there is no capital gain issue.

What can be done?

It will not be a simple matter to correct the 30-year departure of tax law from legal fundamentals. A long time and considerable effort will be required to restore Constitutional precepts and citizens' rights to the field of tax litigation.

Attorneys are required, of course, to accept the decision in a case no matter how faulty the reasoning reflected by the court's opinion. This does not require, however, that attorneys treat court decisions as the "gold cloth" in the fable that started this presentation. A faulty decision should be treated like an infection, because that is what it is. A faulty decision should be isolated and subjected to critical analysis. This does not suggest that a single attorney, or a few attorneys, adopt a form of Russian roulette through offering critical comment about the work product of judges before whom they practice. The obvious answer is that the task should remain for the Bar Associations and their committees. Incidentally, if attorneys are "officers of the court" by name, it is time that they reflect the responsibility of such office. The work of no human being should be held so sacrosanct that it cannot be objectively evaluated, and subject to critical comment if required. Only by such process can the quality of the decisions of the Federal judiciary be maintained!

Attorneys should devise ways and means of reducing, if not eliminating, the gross inequities confronting a taxpayer who litigates a civil

⁴² See *Wiseman v. Halliburton Oil Well Cementing Co.*, C.C.A. 10, 301 F. 2d 654, 5 A.F.T.R. 2d 1015 (1960); *Anthony Campagna v. U.S.*, 289 F. 2d 926, 7 A.F.T.R. 2d 1358 (1961); *Grill v. U.S.*, U.S. Court of Claims (June 6, 1962) 9 A.F.T.R. 2d 1728 (1962).

tax case against the Government. For example, they must devise a method of neutralizing the effect of Revenue Rulings upon pending cases. It is positively absurd that opposing counsel in a lawsuit is privileged (in effect) to freely publicize and broadcast opinions that bear a ring of authority while the issue covered by the Revenue Ruling is pending for decision in some Federal Court.

The unequal contest factor requires also that counsel for taxpayers adopt some means of overcoming the disadvantages inherent in the process where Government counsel has complete knowledge as to where particular issues are pending for trial and decision, while taxpayers' counsel cannot (except with time consuming effort) have any understanding as to the status of thousands of cases pending in courts throughout the United States. Tax attorneys generally do not even get to know that a major tax rule is in process of formation until the decision is published—some weeks after it was rendered. *If* taxpayers' counsel were sufficiently organized to have advance knowledge as to important issues pending, the attorneys would be in position to collaborate in filing briefs as a friend of the court, and could provide a factor of direction to the cases litigated by taxpayers. Only by this process can taxpayers even come close to approximating the position of Government counsel who actually can give direction to the litigation of particular issues. Stating the issue simply, on the one hand are several thousand disorganized persons, each working by themselves, while on the other hand are the large departments of Government counsel rather well coordinated, and with full knowledge of what is transpiring as to almost any type of tax issue.

Finally, attorneys had better recognize that many court opinions too often reflect the philosophy of law clerks, which philosophies are somewhat foreign to the basic understandings of older attorneys. Often these law clerks treat the rights of citizens under the United States Constitution as a type of quaint theory that must give way to the authority of the United States Government. There is evidence that many attorneys leave law school to enter service with the Government, and thereafter serve for life on a Federal Court bench without their having ever engaged in a practice where they might learn about the importance of the rights (and problems) of individuals. Once attorneys properly evaluate this particular problem, they should make effort to restore the subject of Constitutional law, and matters relating to the rights of citizens, to their proper importance in present day law school courses of study.

One thing is certain, unless attorneys in tax practice resolve that some of the problems enumerated in this presentation are of their own concern, we are fast approaching the day when it can be said that a tax attorney's work is almost wholly useless.