The Erwin N. Griswold Lecture

The United States Tax Court: Yesterday, Today, and Tomorrow

Theodore Tannenwald, Jr.

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I am deeply honored to have been asked to give the Erwin Griswold Memorial Lecture to such a distinguished group of tax practitioners as the American College of Tax Counsel. Beyond this, my selection has a strong emotional element. Erwin Griswold taught me tax in the only course in tax at the Harvard Law School in the academic year 1938-1939. In that same year, Erwin had two briefs to write and needed research assistance. At that time, I needed money, and a joint effort resulted which produced a strong personal relationship that lasted over all the ensuing years. Erwin was my close friend, and I'm sure he will be listening to me today. What is more, since he never hesitated to let me know the reactions to my opinions, I would not be surprised if I got a message from him about this speech some time in the next several days.

Today, I will talk about the United States Tax Court--when and how it started, the changes that have taken place, what its status and problems now are, and what I see for the institution in the years ahead. My remarks will reflect my own personal views, which may or may not be those of the Court or any of my colleagues for whom I should not and do not speak.

I shall not burden you with a recital of all the details of the history of the Court. However, some background is essential to understanding how it all started and what have been the major elements in the evolution of the Court to its present status. For those who want a more comprehensive description of this evolution, I recommend Professor Harold Dubroff's book The United States Tax Court: A Historical Analysis published by Commerce Clearing House in 1979 and his supplementary articles appearing in volume 52 of the Albany Law Review (1987).

The Court was originally created in 1924 as the Board of Tax Appeals. Given the present day attitude of many members of Congress and the public, it is interesting to note Professor Dubroff's description of the circumstances leading to that creation: "The Board was spawned in a period of general disfavor with the Bureau of Internal Revenue, which was experiencing considerable difficulty in coping with the administrative problems created by the new broad-based income and profits taxes. Among the Bureau's real or imagined defects were inefficiency, arbitrariness, and favoritism." Plus ca change, plus c'est la meme chose!

At the outset, the Board was established as an independent agency within the Executive Branch of the Government--a status which would be the source of difficulty for a long time to come. Two years later, when the Revenue Act of 1926 was being considered, careful attention was given to the procedures being utilized by the Board. The 1924 Act had given the Board authority to determine its own rules of evidence, but the Board had declined to exercise that authority. Rather, it simply applied the evidentiary rules generally accepted by other courts and, given the fact that the cases before it were tried without a jury, the Board utilized the rules of evidence applicable to equity proceedings. Congress responded by requiring the Board to follow the rules of evidence applicable in courts of equity of the District of Columbia. This provision was later modified to what is now its present form, namely that the Tax Court shall follow "the rules of evidence applicable to trials without a jury in the United States District Court for the District of Columbia." Today this means the Federal Rules of Evidence.

Another element that generated considerable discussion in 1926 was the Board rule that placed the burden of proving the deficiency erroneous on the taxpayer. Many of us forget that this rule has a judicially created foundation, as contrasted with the statutory foundation which exists in respect of other matters.

Again Professor Dubroff's comments on the discussions which took place are particularly meaningful in light of the provision placing the burden of proof on the Government contained in the recent bill passed by the House of Representatives. Professor Dubroff writes:

Comment was also directed at the Board rule requiring the taxpayer to bear the burden of proving the deficiency erroneous, and some argued that since the Government was the party seeking to impose an additional tax, it should be required to show some rational basis for the proposed action. In less than dazzling displays of legal erudition it was alleged that placing the burden of proof on the taxpayer was "contrary to establish legal practice" and violated the Anglo-Saxon presumption of innocence.

Congress did not, however, enact a general burden of proof rule in 1926. Other changes considered and adopted by the Revenue Act of 1926 were designed to implement the view which permeated the creation of the Board in 1924 that the Board was a judicial body, the only exception being the decision not to change the rule established by the 1924 Act which permitted non-attorneys to practice before the Board.

The next significant legislative attention to the Court came when the Revenue Act of 1942 changed the name of the Board to the Tax Court of the United States.

Further legislative consideration of the status of the Court came in the late sixties. The Tax Reform Act of 1969 removed the Court's description as an independent agency within the Executive Branch and established it as a court of record under Article I of the Constitution. This designation made the Court a legislative court, thus technically part of the Legislative Branch of Government, although clearly recognized as a judicial body.

At the same time, Congress again refused to grant life tenure to the judges, a status which had been sought as early as 1926. Rather, the Tax Reform Act of 1969 eliminated appointments to fill unexpired terms, provided for a 15-year term, and included a provision which granted retirement status to any judge who notified the President that he or she was willing to be, but was not, reappointed at the end of his or her term. Thus, the judges of the Court obtained economic life tenure.

The issue of Article III status for the Court and its judges has always been fraught with jurisdictional problems, i.e., the Senate Finance and House Ways and Means Committees versus the Judiciary Committees, the Justice Department versus the Treasury Department, the view of incumbent Chief Justices of the United States that such status should be accorded only to generalist judges and the impact of Article III status on the ability of non-attorneys to practice before the Court, to say nothing of the reluctance of the Congress to increase the categories of judges who would have life tenure. The issue of Article III status has receded into the background and, as of today, is unlikely to be the subject of active consideration, in view of the apparent continued reluctance of a number of members of Congress to grant such status. However, the current talk about revamping the substantive tax structure may revive the Article III issue, as well as two other issues that are now dormant, namely the centralization of deficiency and refund litigation and the creation of a National Court of Tax Appeals. I shall return briefly to these issues when I speak of what the future may hold for the Court.

My recital of the past would not be complete if I failed to mention other developments over the years which have cemented the status of the Tax Court as a respected judicial body. Such developments notably include the judicial decision excluding the Court from the application of the Administrative Procedures Act, the establishment of the principle that the "clearly erroneous" rule applicable to appeals from District Court decisions should also govern appeals from decisions of the Tax Court, and the decision of the Supreme Court in the Freytag case which recognized the Court as a court within the meaning of Article II of the Constitution and confirmed the power of the Chief Judge of the Court to appoint its Special Trial Judges. Our good friend Erwin Griswold played a critical role in persuading the Supreme Court to reach

this decision. You will recall that the special trial judges came on the scene as a result of the creation of a small tax case category by the Tax Reform Act of 1969. They have done yeoman service in disposing of cases in this category as well as trials of larger cases, particularly those involving tax shelters. Indeed, without the special trial judges, the Court would have found it difficult to handle its workload.

It is also significant that, over the years, the general trend has seen Congress adding periodically to the basic jurisdiction of the Tax Court in respect of deficiencies in income, estate, and gift taxes. These additions have involved excise taxes imposed with respect to the activities of private foundations; declaratory judgment actions regarding retirement plans, tax-exempt organizations and the status of certain governmental obligations; disclosure actions; restraining certain premature assessments and sales of seized property; reviewing certain jeopardy assessments and levies, and a little known area under TEFRA where the Tax Court acquired its first refund jurisdiction. Recent additions encompass jurisdiction to review requests for abatement of interest, employment taxes, and declaratory judgments in respect of eligibility to pay estate tax in installments and gift tax valuations. Additional jurisdiction is now proposed in pending legislation, i.e., declaratory judgments in respect of innocent spouse relief (including authority to order refunds), increasing the limit for small tax cases to $25,000, expanded authority to award attorney's fees and authority to order refunds of amounts collected during the period after issuance of deficiency notices when assessment is prohibited.

At this point, I think it is appropriate to deal with a canard that has existed for a long time, namely that the Tax Court is a pro-Government tribunal. In the first place, a taxpayer is able to come to the Tax Court without paying, unlike the pay first and ask for a refund route in the District Courts and the Court of Federal Claims. This capability tends to encourage the filing of cases which have little or no merit in order to postpone the day of payment since, in most situations, the Internal Revenue Service is prohibited from assessing and collecting the tax while a case is pending in the Tax Court. This factor has an obvious skewing effect on any statistical analysis. In the second place, unlike refund suits, most Tax Court cases involve multiple issues. This makes it very difficult to determine who is the winner in a Tax Court case where split disposition of issues regularly occurs. If one compares the success of the taxpayer and the Government in dollar terms, it appears that the Government recovers only about 25 percent of the deficiencies asserted. Finally, to the extent that the pro-Government view of the Tax Court has, in the past, rested on the fact that most of the judges came to the Court from Government positions (10 out of the 16 in 1969), such is no longer the case. Of the 19 presidentially appointed active judges, taking into account the two vacancies for which nominations have been made, 11 came to the Court from the private sector. Of the 8 retired judges now serving on recall, 5 came to the Court from the private sector.

The undeniable fact is that whatever the doubts and reservations about the attitude of the Tax Court in the past, the judges are now accorded a high degree of respect for their competence and fairness, and the Court is held in high regard as a judicial institution.

I now turn to the present state of the Court's operations.

There is a lot of talk that the Court does not have enough work to keep it busy. To a large degree this is based on the sizable drop in the Court's inventory from 84,000 pending cases in 1986 to the present level of 26,000 cases. But this only tells part of the story. Accompanying the drop in the number of pending cases has been the increase in the amounts involved in pending cases from $16.3 billion in 1986 to $28 billion now. This latter development comes from the influx of cases such as those involving section 482 and other complex issues arising from the wide-ranging national and global operations of modern businesses. They usually require substantial judicial management in the pre-trial stage and involve lengthy trials. This presents a far different picture from the usual one-half day trial time for a case on a regular trial session which normally involves relatively few pre-trial problems. The number of regular trial sessions and scheduled weeks has dropped in recent years--from 115 in 1987 (197 weeks) to 83 in

1997 (130 weeks). In 1997, however, there were 30 special sessions (45 weeks). Unfortunately, the numbers of special sessions and weeks involved for 1987 are not available but my recollection is that there were considerably fewer at that time. If my recollection is correct, there has not been a significant drop in overall scheduled trial time during the 10-year period. Finally, I note that the workload of the Court is exposed to significant upward change as a result of the recent and proposed legislation, a matter to which I shall return later.

One of the most significant changes in the Court's operations over the years has been the extent to which the judges have become involved in pre-trial activities. When I came on the Court in 1965, a judge did very little prior to the commencement of a trial session beyond reading the file, which usually consisted of nothing more than a far-from-revealing petition and answer. Beyond this, if a case was not ready for trial, the judge simply continued it, leaving another judge to struggle with it at a later trial session. Now, it is normal for a judge to be involved very shortly after the trial sessions are scheduled and the tax services publish the names of the assigned judges. For the most part, this involvement is by telephone, but face-to-face conferences with the judge and the parties sometimes take place. Beyond this, if the case is not ready for trial at the scheduled session, the judge is expected to retain jurisdiction, see that the case is made ready for trial, and then either try it at a special session or arrange to put it on the next scheduled trial session.

Not the least important element of early judicial intervention has been the ability of the judge to encourage the parties to settle. The judges, however, are quite aware of the potential for bias from such participation, but the fact of the matter is that the parties generally welcome such intervention. In the area of pre-trial settlement efforts, the Court has been working with the California bar under a system whereby a special trial judge acts as a mediator in an effort to settle cases in advance of a regular trial session. As yet, there has not been enough experience upon which to base a decision as to whether and how this management tool should be utilized. In other situations, the Court has utilized arbitration where the issue has been valuation, usually in an estate tax case, and the parties have agreed to be bound by the decision of the mutually selected arbitrator. And, of course, the Apple Computer case was settled by arbitration under the effective supervision of Judge Jacobs.

The need for judicial management has been highlighted in section 482 cases, where the parties make an early request for the assignment of a judge or the Chief Judge sua sponte makes such an assignment. Before I comment on particular problems of judicial management, let me make three over-arching observations in respect of section 482 cases.

First, the task of the parties and the Court is complicated by the fact that the presence of a business purpose will not necessarily insulate the taxpayer from a section 482 allocation. This factor has a serious impact on the task of the judge, who must go beyond broad business considerations which he or she can understand and deal with the details of a pricing process which is, in large measure, the product of the knowledge and experience of the operators of the business--knowledge and experience not within the judge's background or capable of ready acquisition by the judge.

The second observation is that the handling of the problems of a section 482 case is significantly dependent upon one's view of tax litigation. I suspect that most lawyers view a tax case as an adversary proceeding no different from any other lawsuit. I think there is a difference--at least in degree--and particularly in respect of a section 482 case. In my view, and I hasten to say that I am expressing my personal view, which is not fully shared by all my colleagues, a tax case, whether it be a section 482 case or another type of tax case, requires the expenditure of greater effort by the parties and the Court toward uncovering all the facts to the end that the taxpayer should not, as Judge Friendly once put it, be able to "eat, drink and be merry at the expense of the Federal fisc" but at the same time should not be required to pay more than is properly due the Government. In short, the pre-trial process--especially discovery--

should be viewed as a cooperative venture, investigatory in nature, and not as an artillery duel or a fencing match. I say this in full recognition of the duty a lawyer owes to his client but couple that recognition with a reminder that the lawyer is an officer of the Court and, in that capacity and additionally because of his professional responsibility, generally has an obligation to a third participant in the case, namely the taxpaying public. Obviously, the attitude of the judge, assigned to manage and hear a case, with respect to the nature of a tax dispute will significantly affect the plans of the lawyers not only in the pre-trial process but in the trial itself, where the judge may be expected to ask questions.

Third, the audit stage is not infrequently characterized by a struggle between inexperienced revenue agents who find their investigatory efforts impeded by the "furnish as little information as possible" attitude of knowledgeable and experienced employees or counsel of the taxpayer. As a result, the revenue agent's efforts are often unsuccessful in developing a sound approach, capable of being rationally articulated in the notice of deficiency.

To be sure, Congress has recently provided additional tools and sanctions to enable the Service to obtain necessary information. It remains to be seen how far these tools will improve the situation. The fact of the matter is that without better trained revenue agents who are appropriately educated as to the material which will be needed for trial, if that becomes necessary, the new tools will still not provide the answer to the need for a fully developed case. Indeed, in the area of availability of foreign records, one must recognize the fact that inability of the taxpayer to use the records may be of no importance to sustaining its burden of proof but could be of crucial importance to the Service in countering a prima facie case which the taxpayer may be able to make. Beyond this consideration lies the obvious point that the taxpayer knows what records exist (including those in the hands of third parties) which it does not need to use but which would obviously play a significant role in the Service's presentation of its position. The problems of availability of foreign records extends beyond a section 482 case to a variety of other cases produced by global activities.

Let me now turn to the specifics of judicial management utilized by the judges in various other types of cases.

The initial and perhaps most important task of the judge is to construct, with the help of the parties, a comprehensive pretrial schedule covering discovery, exchange of expert reports (including rebuttal reports), stipulations, trial memoranda, etc. This schedule will include not only specific time limits but explanatory material which serve as guides to what the judge expects from the parties.

The promulgation of a schedule, no matter how comprehensive and detailed, is only the beginning. Implementation problems inevitably arise. Usually, the judge has to contend with an attitude continuing from the audit process, namely the taxpayer's lawyers undermining of the discovery process by continuing to exhibit a "play your cards close to the chest" attitude, i.e., "stonewalling" the Commissioner, in order to take maximum advantage of the fact that the Court is likely sooner or later to cut off discovery, leaving Government counsel without some of the information needed to develop a clear position. In making this observation, I am not unmindful that the Government lawyers often pursue an "ask for the kitchen sink" approach in making their discovery requests. This approach seeks to preserve the option to adopt a theory or theories of the case as discovery unfolds and to postpone disclosure of the Government's position until the last possible moment before trial. Neither of these approaches is conducive to the framing of the issues for trial. The problem of drawing the line in recognition of the need to provide a level playing field is one of the most difficult the judge has to face in terms of balancing the proper focus of the trial and information relevant to that focus against the desire to move the case forward with reasonable dispatch and to accord the parties fair procedural treatment. Here again, the need for well-trained and well-guided lawyers, not only those of the Service but of the taxpayers as well, and the problem of records not needed by the taxpayer but essential to enable the Service to counteract the case the taxpayer will otherwise

make, come into play. The effective control and implementation of discovery is a key element in the pre-trial process.

Among the specific problems which the judge is likely to encounter are the following:

(1) Work product and attorney-client privileged information. This presents the judge with a difficult situation. Often, an in camera inspection is requested. But it is important for the parties to remember that, in such an inspection, the judge sees the documents and, even if the judge finds the privilege properly claimed, he or she has read the information and it is only human for the judge to remember it at least subconsciously. The Court has sometimes solved this problem by having another judge or a special trial judge do the inspection, but this procedure is not without its drawback. Conducting an in camera inspection effectively usually requires a reasonable amount of knowledge of the case, which takes time and can involve delay.

(2) Protective orders. Very often there is a need to issue orders to protect the extent to which confidential financial information and trade secrets can be used. This is particularly true where the parties, by mutual arrangement, interview various persons, including taxpayer's current or former employees or third parties who may be sources of relevant information. This is a ticklish problem to which there is no uniform guideline. Allied to this aspect is the allocation of discovery costs. Often substantial costs are involved and the judge's intervention can be a tool for controlling the abuse of the discovery process.

(3) Experts. I need not elaborate on the current feeling among the judges that today's experts are not a source of independent analysis and conclusions but rather are "hired guns" operating under instructions, if not actual editing of their reports, to tailor their views to fit the result desired by the client. One technique utilized by several judges to dilute such an atmosphere is to require advance exchange not only of original expert reports but rebuttal reports as well. The rebuttal reports help to focus on the weaknesses, including bias, of the other party's experts and often facilitate settlement. Another potentially helpful procedure is the use of a Court-appointed expert or technical adviser. This procedure is not without its problems, particularly with reference to communications between the expert or adviser. Clearly, such a person should at all times be subordinate to the judge and have no power of decision as to any aspect of the case.

With respect to trials of complicated cases, a critical issue is often the application of burden of proof rules in respect of new matter or what happens if the deficiency notice is found to be arbitrary and capricious. This latter aspect is often present in a section 482 case, where the deficiency notice has been found to be arbitrary and capricious so that the Service must develop an independent foundation for a decision in its favor. The taxpayer, on the other hand, continues to have the burden of persuasion. Unfortunately, in a significant number of such cases, each party has spent most of the time attacking the other party's allocation formula rather than establishing the soundness of its own formula. Thus, where the taxpayer fails to carry its burden of proof, the judge is left to his or her own devices without being able to use the deficiency notice which has been found to be arbitrary and capricious as an anchor of decision, namely providing the amount of the deficiency to be sustained. As a result, the judge must find a formula, without the benefit of sufficient help from the parties as to what that formula might be. This is a task which requires the Court to find a middle ground--a task which it has disavowed in other contexts--and one which is most difficult to perform in light of the judge's level of knowledge of the workings of a specific industry.

A final development, in respect of current trial procedures in large cases, is the increasing tendency of the Court to limit the length of the briefs to be submitted. In so doing, the parties can be encouraged to submit agreed facts to the maximum extent feasible, which will not be charged to the limitation amounts, in order to maximize the available space for argument.

Before I turn from the present to the future in respect of the operations of the Court, there is one matter which troubles me to the point that I feel compelled to speak out.

I am sorry to tell you that, in my opinion, the quality of professional representation before the Court is substantially less than when I left private practice. This is true both with respect to the conduct of trials and the briefs; the latter are often not understandable as to the legal analysis and are written in unbelievably poor English. Furthermore, carelessness in spelling and citations is too often the order of the day. A technique needs to be developed to educate lawyers, particularly the ones just starting out, to the utmost importance of doing a good job, even if you cannot charge for all your time. A concerted effort needs to be made to recreate the standard of professional pride which was understood to be a fundamental element of the practice of law when I started almost 60 years ago. I say "recreate" instead of "revive" because I believe many of the current law school graduates are totally unaware of the need for professional pride; they have been totally immersed in the competitive demands of private practice, i.e., the overriding importance of making maximum use of the "meter." Both the law schools and continuing legal education systems should direct their attention to including courses and programs in which lawyers who understand the "old school" standards can speak of, and illustrate, their experiences.

The obligation for educating young lawyers to the importance of professional pride extends to experienced practitioners. They must find the time to act as mentors to new additions to their staffs. Those neophytes need continuous guidance as to their deficiencies in work habits and work product in order to acquire an appreciation of what being a good lawyer means. Discharging this responsibility, even though it may involve nonbillable hours, is essential to maintaining a respected status for the legal profession.

Turning now to a consideration of what the future holds for the Tax Court, there are several matters which will or may require attention. Obviously, as I pointed out earlier, there have been new additions to our jurisdiction in the declaratory judgment and other technical areas. It is hard to evaluate what the impact of such expanded jurisdiction on the Court's operations will be, but you will recall that previous extensions of our jurisdiction to declaratory judgments and awards of litigation costs generated concern over an increased workload which in fact did not materialize.

One area of extension of our jurisdiction which may significantly impact our workload is the employment tax jurisdiction. Clearly, that area will present the Court, as it has the District Courts over the years, with troublesome questions of line drawing between employee and independent contractor, an issue which I hasten to add has already been faced by the Court on many occasions in the self-employment tax context.

The pending provisions in section 301 of the Internal Revenue Service Restructuring and Reform Bill of 1997, recently passed by the House of Representatives, would establish a general rule shifting the burden of proof to the Commissioner in "any court proceeding in respect of any factual issue relevant to ascertaining the income tax liability of the taxpayer." Various conditions are set forth in the statutory provision and in the accompanying committee report which must be satisfied before the burden of proof shift comes into play, notably the need for full cooperation by the taxpayer with the Service and the preservation of the requirement of substantiation as to any item. I do not intend to analyze the numerous questions of interpretation in respect of application and implementation which will have to be answered if this provision is passed. Rather, I will deal with its potential impact on the operations of the Court, among which are the following:

(1) A procedure will have to be developed for determining whether the conditions of the provision have been satisfied so that the burden of proof should be shifted. This involves deciding whether and when the determination is to be made. To wait until or after the trial creates a difficult situation because the location of the burden of proof can materially affect the evidence a party needs or may believe necessary to produce at trial. To dispose of the matter at an earlier date may require a hearing or at least the submission

of affidavits or other written material and thus produce delay in the implementation of the pre-trial process and the trial itself. On the other hand, a pre-trial determination may be a factor in encouraging the parties to settle. The Court has had to deal with a comparable situation, albeit on a much smaller scale, in accumulated earnings tax cases.

(2) In determining whether the conditions of cooperation and/or substantiation have been met, the Court will eventually be faced with claims, particularly by pro se taxpayers, of lack of knowledge that there were such conditions or of not understanding what they had to do. This situation will be accentuated because of the extensive portrayal to the public of the provision shifting the burden of proof, often without reference to the conditions attaching to its application, that has taken place over recent months. I believe it will be incumbent on the Service, in the interest of fair administration of the tax law, to devise methods by which taxpayers will be warned well in advance of litigation of the elements of cooperation and substantiation which they will be expected to satisfy. In this connection, one wonders how a taxpayer can "substantiate" that he or she did not receive income. "Substantiation" of deductions is more easily understood.

(3) The proposal to shift the burden of proof may have a significant impact on the discovery process. As you know, the Court's present rules restrict discovery, particularly where third parties are concerned. Discovery of documents in the hands of third parties is not available except by way of subpoena returnable at trial or a prior court hearing but not at depositions unless they are involved in the testimony of the deponent. Similarly, in the absence of unusual circumstances and a Court order, depositions of parties are not permitted without the party's consent and depositions of nonparties are limited. The discovery rules, as they now exist, have been adopted incrementally over the last 20 years against a background of less ability of Court involvement than is the case with the District Courts because the Tax Court is not regularly located at the place of trial and, while telephone communication with the Court has significantly improved, it is not always a satisfactory substitute for physical contact.

The Court was also influenced in adopting a limited discovery framework by the fact that, since the taxpayer had the burden of proof, he or she would of necessity have to come forward with the evidence. As a result it was not necessary to give the Government too free a hand in compelling the taxpayer to show what he or she had. I think it clear that a shift in the burden of proof will create an increased need of the Government to assure itself that it is obtaining all relevant evidence, not only during the audit process where a summons can be used, but also by way of discovery after a case has been docketed. In this context, the Court's discovery rules may prove too restrictive and consideration may have to be given to expanding them, perhaps to the extent of adopting rules comparable to those in the Federal Rules of Civil Procedure, particularly Rule 26. Such a development would bring into play the elements which caused the Court not to adopt a broader set of discovery rules in the first place.

(4) Shifting the burden of proof is likely to complicate the procedural aspects of small tax cases. The need to determine whether the conditions for such a shift exist may require more extensive pleadings and/or discovery with concomitant delay and additional difficulty for small case taxpayers, a category which will be enlarged by raising the small case jurisdictional limit to $25,000. Such consequences would contravene the objective Congress had in mind when it established the small tax case category in 1969.

(5) Perhaps the most difficult question which the Court will have to face is how to deal with situations where no records exist or would be expected to exist and where the only evidence is the taxpayer's statement in respect of a key fact. For example, suppose the issue is the source of a $30,000 bank account of the taxpayer. The taxpayer testifies that the money came from gifts from his mother over many years which he accumulated under his mattress and finally decided to put it into the bank. There is no other evidence to support the taxpayer's claim--all the members of the family and particularly the mother are dead. Under today's evidentiary standard, the Court need not accept this self-serving testimony as gospel.

Based on the nature of the evidence and the manner of presentation, the judge can conclude that the taxpayer has failed to carry his burden of proof and loses. If the Government has the burden of proof, what happens? Does the failure to accept the affirmative presentation by the taxpayer mean that the negative is proven, i.e., that he did not get the money from the mother and that therefore it is income? If the Court cannot reach the conclusion that it is income, there is no evidence either way and, under the proposed provision, the Government would lose. This would be a strange situation but it would occur unless the Court can hold that failure to prove an affirmative is evidence of the negative. The law is far from clear on how this situation should be handled, but it will need to be resolved, and I believe there will be more situations where this issue will occur than many people think.

Beyond the issues to which I have referred lie interesting questions as what the impact of a major revision of our tax structure may have on the Tax Court. I have in mind the enactment of a value-added tax, flat tax, consumption tax, national sales tax, or variations thereof, either supplementary to or as a substitute for the income tax. I do not need to tell you that none of these alternatives will eliminate the need for judicial resolution of disputes. There will be many disputes because all the alternatives have their complexities, some perhaps more than others. The question of which court or courts should have jurisdiction of such litigation will likely arise. The answer may turn upon whether the litigation context will be a deficiency or a refund or both. It does not take much imagination to see a renewal of an old debate as to whether tax litigation should be centralized in one court or continued in its present split form. Subsumed in such a renewed debate may well be the issue of creating a National Court of Tax Appeals, which our friend Erwin Griswold strongly favored as early as 1942 and again advocated to this audience in 1993. Parenthetically, I should note that I am yet to be persuaded to embrace Erwin's point of view. Neither of these issues is on the front burner now, but given the fact that restructuring seems to be the order of the day insofar as the administration of the tax law is concerned, it seems to me that restructuring of the judicial system for handling tax cases could be a natural outgrowth of any attempt to make a major change in our system of taxation.

Given the recent tendency to vest new jurisdiction of tax cases in the Tax Court and the fact that the Court has been given limited refund jurisdiction which had been withheld from it in the past, it may well be that Congress will choose the Tax Court, if not for all such litigation involving refunds, at least for a substantial part of it. This is particularly the case in view of the overloaded dockets of the District Courts.

I leave you with the strong belief that whatever the future components of the tax law may be, the Tax Court is ready, willing, and able to deal with the myriad of substantive and procedural issues that need to be litigated. It is a Court composed of judges with extensive tax background and as capable as any group that might be assembled to face the challenge of new concepts. In a similar vein, members of the tax bar will need to meet this very same challenge in the substantive as well as litigation arenas. I am confident that you will play your role with skill and dedication. It is my fervent hope that, although you will understandably seek to benefit your clients, you will discharge that critical professional responsibility in a manner which furthers the development, administration and enforcement of a tax system that is understandable, efficient, well respected, and, above all, fair to all taxpayers--large and small alike.

Bench and bar must play a meaningful and constructive role in the turbulent period of tax reform and restructuring which seems to lie ahead. Erwin Griswold would expect no less of us.

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