INTRODUCTION

FRE 301 imposes a presumption for civil actions and proceedings, upon the party against whom it is directed, with the burden of going forward with evidence to rebut or meet the presumptions. However, the burden of persuasion remains throughout the trial or proceedings upon the party upon whom it was originally cast.

How does that apply in tax cases? We learned as young lawyers certain principles. In general the statutory notice is presumed to be correct and generally the court will not go behind the notice to determine the Comm'r's motives or procedures.

Because of the presumption of correctness, the taxpayer generally has the burden of proof. That burden is often thought to include both the burden of production and the burden of persuasion.

In 1998 Congress enacted Taxpayer Bill of Rights III, which created IRC Section 7491(a). This Section shifts the burden of proof in certain civil tax matters involving individuals or small businesses from the taxpayer to the United States in court proceedings involving federal income, estate, gift, and generation skipping taxes, but the taxpayer must meet a few conditions. The prerequisites required to shift the burden of proof from the taxpayer to the IRS are:

1. Produce Credible Evidence
2. Substantiate any item required by the code and regulations
3. Maintenance of records required by the code
4. Reasonable cooperation with request by the Secretary for meetings, interviews, witness information and documents.
5. Meet the net worth limitations that apply under section 7430.

Burden of proof represents two separate aspects of trial proceedings:

a. Burden of production and
b. Burden of persuasion.

a. The burden of production requires the taxpayer to introduce evidence sufficient to support a finding in the taxpayer's favor. The burden of production constitutes presenting evidence for a *prima facie* case at a threshold evaluation level. The burden of production standard does not require the taxpayer to provide evidence of whether each element is true or not; but sufficient evidence that a reasonable person could find that each element in the case is more likely true than not.

b. The burden of persuasion requires the taxpayer to convince the trier of facts that his evidence outweighs that of the Service on a particular issue.

Finally, there is presumption of correctness regarding the Notice of Defiency.

While this presumption is a procedural device, it requires the taxpayer to move forward providing evidence contrary to the Commissioner's determination.

First Act:

Taxpayer is the owner a mortgage processing company that historically has been very profitable but is presently experiencing financial difficulties due to possible irregularities. In 2009 he donated company stock to Help the Homeless, Inc. a local organization described in section 501(c)(3) claiming a value of $50 per share.

Taxpayer, who is a California resident, began collecting art and antiques as a hobby in 2005. In 2007 taxpayer fell in love with Ms X an art dealer, appraiser and curator. Taxpayer informed Ms. X he was seeking a 1913 painting of Ellen White. After a brief search Ms. X procured the painting for $10,000, which she later sold to taxpayer in August of that year for $13,000.

Prior to taxpayer's purchase, Ms. X had the painting evaluated by two outside appraisers for $30,000 and $35,000 respectively. In 2009 taxpayer also donated the painting to Help the Homeless, Inc. which appraised the painting for $40,000. However, taxpayer not satisfied with that amount, asked Ms. X for an appraisal which she provided reflecting $45,000 value. Taxpayer deducted $45,000 on his 2009 tax return.

The IRS determined the fair market value of the painting to be $20,000 and thus issued a statutory notice of deficiency informing taxpayer of his tax liability. IRS also disallowed his claimed deduction for the contribution of stock determining that the stock had no value as a matter of law as the mortgage company was in bankruptcy. The RAR contains a informal "report" by a cooperating engineer revenue agent that values the stock at no more than $10 per share.

APPEALS ADMINISTRATIVE CONFERENCE:

AO: Good morning Mr. Conroy and thank you for making it to this conference hearing on time. You filed a petition in the Tax Court for your 2009 tax year. This conference is an opportunity for the parties to discuss whether we can find common ground to settle the case before the case goes back to field counsel for trial. Did you bring any documents with you?

TP: Yes, I brought copies of the appraisals, comparisons and other supporting documents which I gave to the revenue agent during the examination.

AO: That's good, but I have seen those documents from the exam unit. And , if we are unable to resolve the valuation at this level, you know the court will automatically begin valuation at the level the IRS has determined, as the IRS Notice of Deficiency is presumed correct.

TP: That's crazy! You have not proven anything, how are you correct?

AO: Well that is what the law presumes and you'll have to overcome the burden of proof if we go to court.

TP: What else will I need to do?

AO: Well, you would need to show everything you have to prove that the value of the donations you claimed is correct since the burden of proof is on you.

TP: What's that? What's a 'burden of proof'?

AO: Without getting too technical, it means you will have to persuade the judge with your evidence that what you say is more correct than what the IRS says, by about 51%, on each of the standards or reasons the law says you have to meet. You also have to show the judge that any objective or reasonable person would believe that what you have presented is more true than not. Can you really do that?

Anyway, lets start with the valuation of the stock. The judge is not going to be impressed that you saw fit to value the stock at $50 a share – when your company had just filed for bankruptcy protection. He won't be surprised that the agent gave the stock a zero value. The company was in bankruptcy for goodness sake. By definition it had no value. This is a big risk for you.

TP: It was a workout. The stock was worth at least $50 dollars a share. Anyway, I didn't value the stock. I paid an appraiser for his professional opinion, and that's what I used. I didn't want to be greedy – I instructed my appraiser, Mr. M.A. Instructed, to value the shares fairly. And Mr. Instructed took the reorganization into account when he did so. Look at his report. Lots of companies that experience a reorganization recover from temporary cash flow issues and go on to bigger and better things. Why, it just happened to GM and Chrysler.

Comment [L1]: Can we come up with a better name?

AO: Even if you think that a company in bankruptcy can have any value you have a large risk. The Service's expert [Engineer revenue agent] says that the stock is worth at most $10 a share. Either the stock has no value by definition because the company's bankrupt or it is worth at most $5 a share. That's a huge risk.

TP: No, that's why I'm going to win this case. Every time I turned around the agent had a new theory for disallowing the deduction. And now you do too. Can't you just pick

one theory and stick with it?? All this jumping around is arbitrary and capricious and unfair to me. First the Service asserts in the stat notice that the stock has no value as a matter of law and now it's going to abandon that theory at trial by bringing in a so-called expert to argue that the value is miniscule?? I'm going to ask the Court to switch the burden of proof to the Service. Your own so-called expert's report shows that the notice of deficiency is invalid.

AO: This isn't a reconstructed income case. And in any event, you haven't been disadvantaged. The stat notice was correct to take into account the bankruptcy proceedings in valuing the stock. While the Service's expert did place a different value on the stock, it didn't fundamentally change the issue – the stock was overvalued in calculating the amount of the deduction. You have the burden of showing that you're entitled to the deduction and the amount of the deduction. That's even in the Tax Court rules.

Besides, burden of proof doesn't matter in valuation cases – the court's going to do what the court's going to do anyway. Often it will just split the difference. But in this case, your valuation was so over inflated that it's almost offensive. You know the old saying about pigs.

TP: That saying applies to the Service too when it overreaches. People I've talked to tell me I have a particularly good chance of shifting the burden because I live in California, and appeal would be to the 9th Circuit. That's what the hair product guy, Paul Mitchell, did in his estate tax case when the notice of deficiency valued his stock at $105 million but then at trial the IRS expert testified it was only worth $81 million.

AO: The 9th Circuit doesn't matter. Any experienced judge can write an appeal proof decision on valuation. Anyway, lets move on and talk about the art donation.

TP: Ok. But I've shown you everything I have! I have shown you the appraisals and valuation documents; I have provided documents from Clyde's Auction House, which are original and authenticated. The documents are all from credible sources you know. I also gave you appraisals from individuals whose appraisals you have accepted in prior cases. And I've shown you all the records I have maintained since I began to collect art and I've never once missed any scheduled meeting with you guys. I've tried my best to cooperate with you and I still don't understand what is going on!

AO: Based upon the documents you've given to us, I still cannot find where the value of this painting is worth more than $17,000. I know the statutory notice of defciency listed $20,000 but after review, I think it should be changed to $17,000, and that is the best offer you can have on your art donation.

TP: You're offering me <u>less</u> to settle then what's in the notice of deficiency? I cannot accept this settlement offer from you. I have provided you with everything, yet still it seems you expect me to prove it all over again. I'm going to hire that attorney from the

Paul Mitchell case. He knows how to shift the burden to the IRS! Thank you for the conference and have a good day!

DISCUSSION

Before we go the the courtroom scene, what do you think about the burden of proof at this point? Does the taxpayer - who meets the net worth test - meet the 7491 requirements?

The prerequisites required to shifting the burden of proof from the taxpayer to the IRS are:

1. Provide Credible Evidence
2. Substantiate any item required by the code and regulations
3. Maintenance of records required by the code
4. Reasonable cooperation with request by the Secretary for meetings, interviews, witness information and documents.
5. Taxpayer must meet the net worth limitations that apply under section 7430.

DISCUSSION

Does the Service undercut its presumption of correctness by changing its position on the stock's value from zero as a matter of law to $10 based on an engineer revenue agent's report?

Would it matter if the report was submitted as an Expert Report pursuant to the court's rules?

AT TAX COURT:

Petitioner Atty: Good Morning your Honor. I am Kelley Miller and I will be representing Mr. Taxpayer in this valuation case.

Judge: Good Morning Counsel

Respondent Atty: Good Morning your Honor. I am Saul Abrams and I will be representing the Internal Revenue Service today in this case.

Judge: Good Morning Ms. Miller, as you already know the Notice of Deficiency is presumed correct and I understand that I will first hear from you on a motion. Is that correct?

Petitioner Atty: Your Honor, before we get started, may I submit this Motion to the Court to shift the burden of proof from the TaxPayer to the Service?

Respondent Atty: Objection your Honor! Taxpayer's Counsel needs to present and satisfy the five elements of the burden of proof before introducing the Motion to shift the burden of proof on us.

Judge: Counsel, are you sure you want to present your Motion at this time?

Petitioner Atty: Your Honor, failure to present my Motion at this time, may probably require my client to bear the burden of proof on the valuation issue. Under Federal Rule of Evidence 301, the burden of proof lays with my client, however as opposing counsel is well aware, Section 7491 of the Internal Revenue Code shifts that burden to the IRS provided my client meets certain elements outlined in that statute. My client is well prepared to present evidence to show he meets those elements which are supported in this Motion. Accordingly, at this time, we will present evidence under Section 7491(a)

Judge: I sometimes see other attorneys wait until later in a valuation case to introduce their Motion to Shift the Burden of Proof. Mr. Abrams do you have any objection to Ms. Miller presenting their evidence to shift the burden of proof to the IRS?

Respondent Attny: Your Honor, the Service would like to note for the record that Section 7491 of the IRC is very clear that the burden will only shift 'AFTER the taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer. . . .' Is opposing counsel presenting any facts that we haven't been stipulated? Or is this valuation a question of law before this court?

Petitioner Attny: Your Honor, we intend to present evidence that will prove factually that the basis upon which the Service has made its valuation are incorrect. And we intend to prove those facts in line with elements required under the burden of proof and burden of production that are attributed to my client under the law.

Comment [A2]: Ven, above you said the Motion was to shift the burden of proof, but the objection was regarding the burden of production which is it? Also, generally you don't present a motion to shift the burden, that occurs automatically once you present your case. Is it different for tax court?

Comment [A3]: Production or proof?

Before the Calendar

IRS 1: I'm done for the day, the petitioner in the A case isn't going to show up.

IRS 2: The petitioner in the B case isn't going to show up either, but I still need to present evidence regarding the section 6662 penalty.

IRS 3: Why, the notice of deficiency is presumed to be correct. So with out any contrary evidence, the court should uphold the deficiency and any penalties asserted in the notice.

IRS 2: Although you are correct about the deficiency, section 7491(c) places the burden of production on the Commissioner with respect to an individual's liability for a penalty or addition to tax.

IRS 1: Burden of production? How is it different than the burden of proof?

IRS 2: In *Higbee v. Commissioner*, the Tax Court decided how they are different. The burden of production requires the Commissioner to present sufficient evidence indicating that it is appropriate to impose the penalty. So after we meet the burden of production, the burden of proof required the petitioner to present sufficient evidence to persuade the court that the Commissioner's determination is incorrect.

IRS 1: What about defenses?

IRS 2: The Tax Court held in *Higbee* that the burden of production does not require the Commissioner to introduce evidence regarding reasonable cause, substantial authority, or other defenses.

IRS 1: I should have no problem meeting the burden of production in my case. The petitioner's understatement is over the threshold for a substantial understatement.

IRS 2: Meeting the burden may be easy if the understatement is attributable to disallowed deductions. But what if the understatement is attributable to unreported income?

IRS 3: Why would that matter? If the petitioner does not show up, he/she is going to be liable for the entire understatement.

IRS 2: The difference matters because of the burden of production. If the petitioner failed to report income shown on an information return, I do not think that an information return alone shows that a substantial understatement penalty is appropriate. But if the deficiency is based on disallowed deductions, which are a matter of legislative grace, I think the deficiency is sufficient.

IRS 1: Well I guess we are going to find out if there is a difference because the deficiency in my case is based on unreported income and I did not plan for other evidence.

IRS 2: I have problems as well. The notice of deficiency in my case asserts a section 6662 penalty for negligence or disregard of rules or regulations. How do I show either of those when the petitioner does not show up? I can't show negligence without the petitioner because I need to show how his/her actions were negligent. So all I can do is prove disregard of rules or regulations with legal arguments in the brief.

IRS 3: Good luck, I have another burden of proof problem. The petitioner filed a motion to shift the burden regarding reasonable cause to a section 6662 penalty under section 7491(a).

Trial 1

Judge: Are petitioner and respondent ready to proceed?

IRS 1: Your honor, petitioner is not here. Therefore, I would like to file a motion to dismiss for lack of prosecution.

Judge: Counsel, are there any penalties asserted in the notice of deficiency that respondent has the burden of production regarding?

IRS 1: Yes your honor, a section 6662 substantial understatement penalty.

Judge: Would respondent like to present any evidence to meet the burden of production?

IRS 1: No your honor. The presumption that the deficiency is correct is sufficient to meet the burden of production. Petitioner's understatement attributable to that deficiency is substantial as defined by section 6662(d).

Judge: What created petitioner's deficiency? Disallowed deductions or unreported income?

IRS 1: Unreported W-2 income.

Judge: Does the character of the item that created the deficiency affect respondent's burden of production.

IRS 1: Not in this case your honor. Without any evidence that petitioner did not receive the income, the presumption that the deficiency is correct and the size of

the understatement show that the section 6662 penalty is appropriate.

Moderator: How should the judge respond? Is the presumption that the deficiency is correct sufficient to meet the burden of production?

A few points about unreported income from the article in Tax Lawyer called "Tax Evidence III: A Primer on the Federal Rules of Evidence as Applied by the Tax Court."

- *If the Commissioner determines that the taxpayer has unreported income, he must introduce substantive evidence linking the taxpayer to that income.*
- *If the Commissioner fails to carry his burden of establishing that the taxpayer received unreported income, the deficiency notice is not entitled to the presumption of correctness. The burden of production shifts to the Commissioner, but the notice is not invalidated.*

So, what should the Respondent have done? Should Respondent present the W-2 as evidence? What if Respondent doesn't have a W-2 or 1099 reflecting income paid to the taxpayer? What could Respondent do to link the taxpayer to the unreported income? What can Respondent do with an uncooperative taxpayer before trial – requests for admission? Try to compel stipulations? But what kind of resources does Respondent typically spend in a case like this? Very little, right? Should Respondent have to do anything when the taxpayer essentially doesn't participate in the litigation at all?

Trial 2

Judge: Counsel do we have a petitioner?

IRS 2: No your honor.

Judge: Does the respondent have a motion to dismiss?

IRS 2: Yes your honor.

Judge: What created petitioner's deficiency?

IRS 2: Disregarded Schedule C expenses. Specifically, $10,000 of "travel, meals, and entertainment" expenses.

Judge: Let talk about penalties. Are there any penalties asserted in the notice of deficiency?

IRS 2: Yes your honor. A section 6662 penalty for negligence or disregard or rules or regulations.

Judge: Which is it? Negligence or disregard of rules or regulations?

IRS 2: Both your honor. Respondent intends to show that petitioner's failure to keep adequate books and records was negligent and that this/her failure to keep records showed disregard for section 274.

Judge: I would like to discuss negligence first. How does respondent intend on meeting the burden of production for negligence?

IRS 2: Your honor, respondent believes that the lack of substantiation evidence offered by the petitioner meets the burden of production.

Judge: Is respondent arguing that the lack of evidence meets the burden of production?

Moderator: How should Respondent respond? What evidence could Respondent have offered to show negligence? Should Respondent have made a document request for all books and records that support the claimed deductions, and if the taxpayer didn't respond, inform the Court of the taxpayer's failure to respond to discovery? Maybe produce the document request and any follow-up correspondence as evidence of the failure to keep books and records? Is a document request even necessary? Could a failure to respond to a Branerton letter suffice? Again, in cases involving an uncooperative or absent taxpayer, what more could or should Respondent do?

Judge: How about disregard of rules or regulations? Does respondent wish to produce any evidence to meet the burden of production?

IRS 2: No your honor. A reasonable person would have met the substantiation requirements of section 274. Because petitioner has not produced the documents required under section 274, the penalty is appropriate.

Judge: Isn't that the same argument you made regarding negligence?

Moderator: How should Respondent respond? Can Respondent meet the burden of production for negligence or disregard of rules or regulations penalty when Petitioner does not present any evidence? In other words, can a lack of evidence on Petitioner's side carry Respondent's burden of production?

It is important to note a distinction between substantial understatement penalties under section 6662(b)(2) and negligence penalties under section 6662(b)(1). A Tenth Circuit case called Barrett v. United States points out that, while Respondent can carry his burden of production for a substantial understatement penalty by simply showing the amount of the underpayment, that will not carry the burden of production to show negligence. There must be something more

than just a mathematical calculation of the understatement to meet the burden of production for a section 6662 penalty for negligence or disregard of rules or regulations. See Barrett v. United States, 561 F.3d 1140, 1148 n.7 (10th Cir. 2009).

Trial 3

Judge: I understand that there is a motion to be heard regarding this matter. Are petitioner and respondent ready to proceed?

Petitioner: Yes, your honor, I am.

IRS 3: Yes, your honor.

Judge (to Petitioner): You have filed a motion to shift the burden of proof with respect to a Section 6662 accuracy-related penalty.

Petitioner: That's correct, you honor. I did some research on this issue and I learned that under Section 7491 the burden of proof as to this accuracy related penalty may be shifted from me to the respondent. And, as my motion describes, you honor, I've kept all my records for the years in issue, I've cooperated with the IRS and with the respondent throughout this entire process, and I've introduced credible evidence in my case so for these reasons, I think that the respondent should bear the burden of proof as to this accuracy-related penalty that was imposed.

IRS 3: You honor, may I be heard?

Judge: Certainly.

IRS 3: Thank you. Your honor, in his motion petitioner has argued that his record-keeping and his "credible" records should suffice to shift the burden of proof to respondent as to the accuracy-related penalty at issue; however, petitioner has not shown any error with the Notice of Deficiency.

Judge: And why is that significant?

IRS 3: Well, you honor, respondent's burden with respect to the Section 6662 penalty here is straightforward. Specifically, respondent is only required to show that petitioner's understatement exceeds the greater of $5,000 or ten percent of the tax required to be shown on the return. In this case, your honor, the Notice clearly satisfies this burden as it shows that petitioner's understatement is greater than ten percent of the tax required to be shown on his return.

Judge: (to Petitioner) Sir, you've heard respondent's reply. Do you have any response?

Moderator: Before we discuss how Petitioner should respond, let's take a step back and discuss whether it is possible to shift the burden of proof to Respondent in this situation, because this is an issue that arose in our group as we were scripting our scenes. If you read the burden-shifting provision of section 7491(a), it says that the burden of proof may be shifted to the Commissioner, provided that certain requirements are met, for "any tax imposed by subtitle A or B." In this scene, we are dealing with a 6662 penalty, which is imposed by subtitle F of the Code, rather than a tax under subtitle A or B. So, the question is whether burden shifting under section 7491(a) even applies to penalties. Any thoughts?

If you look at Higbee v. Comm'r, 116 T.C. 438 (2001), which is the case in our materials, it seems pretty clear that the burden-shifting provision under section 7491(a) does not apply to penalties. The Court says:

> *Finally, we note that Congress placed only the burden of production on the Commissioner pursuant to section 7491(c). Congress' use of the phrase "burden of production" and not the more general phrase "burden of proof" as used in section 7491(a) indicates to us that Congress did not desire that the burden of proof be placed on the Commissioner with regard to penalties. FN6 See sec. 7491(c). Therefore, once the Commissioner meets his burden of production, the taxpayer must come forward with evidence sufficient to persuade a Court that the Commissioner's determination is incorrect.*

Higbee has been followed more recently by the Tax Court in Mason v. Comm'r, 132 T.C. 301 (2009), which says essentially, that 7491(a) does not apply to trust fund penalty cases because that penalty is under subtitle F, and section 7491(a) only shifts the burden for any tax imposed by subtitle A or B.

Although it looks clear in Tax Court, it doesn't look as clear in other courts. Both the Court of Federal Claims and the Ninth Circuit Court of Appeals have stated, albeit in dicta, that 7491(a) does apply to penalties. The Court of Federal Claims said in Allison v. U.S., 80 Fed. Cl. 568 (2008), that, under 7491, "[where] the taxpayer provides basic cooperation, the government has both the initial burden of production and the ultimate burden of proof on factual issues relating to a taxpayer's liability" for any penalty relating to a tax under subtitle A or B. The Court addressed the Higbee decision from the Tax Court and stated that it disagreed with that decision based on the "plain language" of 7491.

Finally, in an unpublished Ninth Circuit decision called Feldman v. Comm'r, 152 Fed. Appx. 622 (9th Cir. 2005), the Court of Appeals described 7491(a) as stating that "when there is a factual issue concerning a taxpayer's liability for a tax or penalty, the burden of proof shifts to the Internal Revenue Service ("IRS") once the taxpayer introduces credible evidence on the issue." So, the Ninth Circuit slipped in the word "penalty" but didn't cite anything other than the statute,

so it's unclear where they got that idea.

So, can it be done? Can the burden of proof be shifted to Respondent under section 7491(a) for a penalty, or is Respondent's burden on penalties always limited to the burden of production under section 7491(c)?

If it can be done, how would it work in this scene, where Petitioner is trying to shift the burden on an accuracy-related penalty and Respondent simply points to the amount of the understatement listed in the Notice of Deficiency? Wouldn't Petitioner have to come forward with evidence sufficient to rebut the Notice of Deficiency? At that point, assuming Petitioner had been cooperative, can the burden shift?

United States Code Annotated Currentness
Rules of Evidence for United States Courts and Magistrates (Refs & Annos)
Article III. Presumptions in Civil Actions and Proceedings

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 [deleted] for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv.L.Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv.L.Rev. 59, 82 (1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959).

The so-called “bursting bubble” theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too “slight and evanescent” an effect. Morgan and Maguire, *supra*, at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910), the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty

of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co. v. Henderson,* 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), the Court overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specified acts of negligence by defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in *Turnipseed* in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the difference between a derailment and a grade crossing collision of no significance? Would the *Turnipseed* presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its "rational connection"? If *Henderson* forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain *Henderson.* The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as *Turnipseed* intimated might be done ("considerations of public policy arising out of the character of the business"), and the structure of the decision in *Henderson* fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. The problem would be one of economic due process only. While it seems likely that the Supreme Court of 1929 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the nonexistence of the presumed fact in civil cases is laid at rest by *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). The Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." 359 U.S. at 443, 79 S.Ct. at 925.

"In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id.* at 446, 79 S.Ct. at 927.

The rational connection requirement survives in criminal cases, *Tot v. United States,* 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of *Ferry v. Ramsey,* 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 (1928). In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their

assent and with knowledge of insolvency, and the fact of insolvency was prima facie evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id.* at 94, 48 S.Ct. at 444. Mr. Justice Sutherland dissented: though the state could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not encompass them. "Rational connection" is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), but not that Romano should have known that his presence at a still could convict him of possessing it, *United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965).

In his dissent in Gainey, Mr. Justice Black put it more artistically:

"It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called 'possession' and 'carrying on an illegal distillery business' but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry v. Ramsey*, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888, and many other cases." 380 U.S. at 84, n. 12, 85 S.Ct. at 766.

And the majority opinion in *Romano* agreed with him:

"It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter." 382 U.S. at 144, 86 S.Ct. at 284.

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

1974 Enactment

Rule 301 as submitted by the Supreme Court provided that in all cases a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The Committee limited the scope of Rule 301 to "civil actions and proceedings" to effectuate

its decision not to deal with the question of presumptions in criminal cases. (See note on [proposed] Rule 303 in discussion of Rules deleted). With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgment implicit in the Court's version that the so-called “bursting bubble” theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced--a view shared by only a few courts--lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact. House Report No. 93-650.

The rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that “even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact.” The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: “Presumptions are not evidence, but ways of dealing with evidence.” This treatment requires juries to perform the task of considering “as evidence” facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck v. Sarver* [20 Cal.2d 585, 128 P.2d 16, 21 (1942)] and was repealed after 93 troublesome years [Cal.Ev.Code 1965 § 600].

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

> “Another solution, formerly more popular than now, is to instruct the jury that the presumption is ‘evidence’, to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.” [McCormick, Evidence, 669 (1954); *Id*. 825 (2d ed. 1972)].

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that

the inference they are to draw is conclusive. Senate Report 93-1277.

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The conference adopts the Senate amendment. House Conference Report No. 93-1597.

CROSS REFERENCES

Self-authentication--
Foreign public documents, see Fed.Rules Evid. Rule 902, 28 USCA.
Presumptions under Acts of Congress, see Fed.Rules Evid. Rule 902, 28 USCA.

LAW REVIEW COMMENTARIES

Institutional liability for hazing in interscholastic sports. Scott R. Rosner and R. Brian Crow, 39 Hous. L.Rev. 275 (2002).

Rewarding employers' lies: Making intentional discrimination under Title VII harder to prove. Note, 44 DePaul L.Rev. 673 (1995).

Title VII and Rule 301: An analysis of the *Watson* and *Atonio* decisions. Hugh Joseph Beard, Jr., 23 Akron L.Rev. 105 (1989).

LIBRARY REFERENCES

American Digest System

Evidence 53 to 89, 90 to 98.

Key Number System Topic No. 157.

Corpus Juris Secundum

CJS Evidence § 201, Effect of Presumptions and Other Substitutes for Evidence.
CJS Evidence § 214, Operation and Effect--Burden of Proof.

RESEARCH REFERENCES

United States Code Annotated Currentness
Rules of Evidence for United States Courts and Magistrates (Refs & Annos)
Article III. Presumptions in Civil Actions and Proceedings

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are *Cities Service Oil Co. v. Dunlap,* 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), and *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchaser, contributory negligence, and nonaccidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. "tactical" presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. *Vestal, Erie R.R. v. Tompkins:* A Projection, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, The Federal Courts and the Federal System, 697 (1953); 1A Moore, Federal Practice ¶ 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217-218 (1963). Hence the rule employs, as appropriately descriptive, the phrase "as to which state law supplies the rule of decision." See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, § 2344(c), p. 40, P.F.D. No. 1 (1965).

CROSS REFERENCES

I.R.C. § 7491

Effective: October 21, 1998

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 76. Judicial Proceedings
Subchapter E. Burden of Proof
§ 7491. Burden of proof

(a) Burden shifts where taxpayer produces credible evidence.--

(1) General rule.--If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

(2) Limitations.--Paragraph (1) shall apply with respect to an issue only if--

(A) the taxpayer has complied with the requirements under this title to substantiate any item;

(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and

(C) in the case of a partnership, corporation, or trust, the taxpayer is described in section 7430(c)(4)(A)(ii).

Subparagraph (C) shall not apply to any qualified revocable trust (as defined in section 645(b)(1)) with respect to liability for tax for any taxable year ending after the date of the decedent's death and before the applicable date (as defined in section 645(b)(2)).

(3) Coordination.--Paragraph (1) shall not apply to any issue if any other provision of this title provides for a specific burden of proof with respect to such issue.

(b) Use of statistical information on unrelated taxpayers.--In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

(c) Penalties.--Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

CREDIT(S)

(Added Pub.L. 105-206, Title III, § 3001(a), July 22, 1998, 112 Stat. 726, and amended Pub.L. 105-277, Div. J, Title IV, § 4002(b), Oct. 21, 1998, 112 Stat. 2681-906.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. House Conference Report No. 105-599, see 1998 U.S. Code Cong. and Adm. News, p. 297.

Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

References in Text

Subtitle A or B, referred to in subsec. (a), is subtitle A or B of this title, respectively classified to section 1 et seq. and 2001 et seq. of this title.

Amendments

1998 Amendments. Subsec. (a)(2). Pub.L. 105-277, § 4002(b), added the last sentence relating to application of subparagraph (C) to qualified revocable trusts.

Effective and Applicability Provisions

1998 Acts. Amendment by section 4002 of Pub.L. 105-277 effective as if included in the provisions of the 1998 Act [Internal Revenue Restructuring and Reform Act, Pub.L. 105-206, July 22, 1998, 112 Stat. 685] to which they relate, see section 4002(k) of Pub.L. 105-277, set out as a note under section 1 of this title

Section 3001(c) of Pub.L. 105-206 provided that:

"(1) In general.--The amendments made by this section [enacting this section] shall apply to court proceedings arising in connection with examinations commencing after the date of the enactment of this Act [July 22, 1998].

"(2) Taxable periods or events after date of enactment.--In any case in which there is no examination, such

amendments shall apply to court proceedings arising in connection with taxable periods or events beginning or occurring after such date of enactment [July 22, 1998].”

Prior Provisions

A prior section 7491, Act Aug. 16, 1954, c. 736, 68A Stat. 893, which placed the burden of proof in establishing the applicability of an exemption upon the defendant in the case of marihuana offenses, was repealed by Pub.L. 91-513, Title III, § 1101(b)(5)(A), Oct. 27, 1970, 84 Stat. 1292. Such repeal was effective the first day of the seventh calendar month that began after the day immediately preceding the date of enactment of Pub.L. 91-513, which was approved on Oct. 27, 1970, see section 1105(a) of Pub.L. 91-513, as amended, set out as an Effective and Applicability Provisions note under section 951 of Title 21. Prosecutions for any violation of law occurring (and civil seizures or forfeitures and injunctive proceedings commenced) prior to the effective date of repeal are not to be affected or abated by reason thereof, see section 1103 of Pub.L. 91-513, set out as a Savings Provisions note under former sections 171 to 174 of Title 21.

LAW REVIEW COMMENTARIES

The tax court as a conscientious objector in Daubert's war against bad science. David Case, 45 S. Tex. L. Rev. 685(2004).

LIBRARY REFERENCES

American Digest System

Internal Revenue 4616, 4909, 5075.

Key Number System Topic No. 220.

Corpus Juris Secundum

CJS Internal Revenue § 675, Presumptions and Burden of Proof.
CJS Internal Revenue § 677, Presumptions and Burden of Proof--Incomes Taxable.
CJS Internal Revenue § 694, Presumptions and Burden of Proof as to Findings of Commissioner.
CJS Internal Revenue § 769, Evidence.
CJS Internal Revenue § 802, Presumptions and Burden of Proof.
CJS Internal Revenue § 836, Actions for Collection of Penalties--Presumptions and Burden of Proof.
CJS Internal Revenue § 847, Actions to Recover Penalties Paid--Evidence.

RESEARCH REFERENCES

ALR Library

161 ALR, Fed. 373, Construction and Application of 26 U.S.C.A. § 6015(B)(1)(C) Requiring that Spouse Not Know of Omission of Gross Income from Joint Tax Return to Obtain Innocent Spouse Exemption from Liability For...

United States Tax Court.
Earl G. HIGBEE and Lesley A. Higbee, Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent
No. 14035-99.

June 6, 2001.

Taxpayers petitioned for redetermination of deficiencies arising from overstated deductions and penalties. The Tax Court, Vasquez, J., held that: (1) burden of proof was on taxpayers who failed to introduce credible evidence; (2) IRS' burden for imposing penalty was producing sufficient evidence indicating penalty was appropriate; and (3) addition to tax for untimely filing and accuracy-related penalties were warranted.

Decision for IRS.

West Headnotes

[1] Internal Revenue 220 3270

220 Internal Revenue
220V Income Taxes
220V(I) Deductions
220V(I)1 In General
220k3270 k. In General. Most Cited Cases

Internal Revenue 220 3300

220 Internal Revenue
220V Income Taxes
220V(I) Deductions
220V(I)1 In General
220k3300 k. Evidence. Most Cited Cases
Deductions are a matter of legislative grace, and taxpayer bears burden of proving that he is entitled to deductions claimed. Tax Court Rule 142(a), 26 U.S.C.A. foll. §7453.

[2] Internal Revenue 220 3300

220 Internal Revenue
220V Income Taxes
220V(I) Deductions
220V(I)1 In General
220k3300 k. Evidence. Most Cited Cases
Taxpayer bears burden of substantiating amount and purpose of claimed deductions, by maintaining records sufficient to enable IRS to determine taxpayer's correct tax liability. 26 U.S.C.A. §§6001, 7491; 26 C.F.R. §1.6001-1(a); Tax Court Rule 142(a), 26 U.S.C.A. foll. §7453.

[3] Internal Revenue 220 3442

220 Internal Revenue
220V Income Taxes
220V(I) Deductions
220V(I)3 Losses
220k3442 k. Evidence. Most Cited Cases
Generally, for casualty loss substantiation, estimates of the cost of repairs are not evidence of the actual costs of repairs, unless the repairs are actually made. 26 U.S.C.A. §165; 26 C.F.R. §1.165-7(a)(2).

[4] Internal Revenue 220 3442

220 Internal Revenue
220V Income Taxes
220V(I) Deductions
220V(I)3 Losses
220k3442 k. Evidence. Most Cited Cases
Taxpayers failed to provide credible evidence of a casualty loss, and thus burden of proof as to this issue was not placed on IRS, where document of small claims complaint did not indicate whether litigation was commenced or completed, and did not qualify as a competent appraisal or reliable estimate of cost of any repairs. 26 U.S.C.A. §§165, 7491(a)(2); 26 C.F.R. §1.165-7(a)(2); Tax Court Rule 142(a), 26 U.S.C.A. foll. §7453.

[5] Internal Revenue 220 3377

220 Internal Revenue
220V Income Taxes

220V(I) Deductions
220V(I)2 Expenses
220k3377 k. Evidence. Most Cited Cases

Taxpayers' charitable deductions were not substantiated by preprinted forms of charitable organizations on which taxpayers filled in the type, number of items donated, and estimated value, or by taxpayers' self-generated receipts, or by checks and receipts that appeared to be for purchase of goods and services, and thus burden of proof was not placed on IRS. 26 U.S.C.A. §§170(a)(1), 7491(a)(2); 26 C.F.R. §1.170A-13(a)(1), (b)(1); Tax Court Rule 142(a), 26 U.S.C.A. foll. §7453.

[6] Internal Revenue 220 3377

220 Internal Revenue
220V Income Taxes
220V(I) Deductions
220V(I)2 Expenses
220k3377 k. Evidence. Most Cited Cases

Taxpayers did not provide sufficient credible evidence for additional unreimbursed employee expenses and Schedule C and E expenses, since they offered only their self-serving testimony, and failed to explain origin of expenses, and thus burden of proof was not placed on IRS. 26 U.S.C.A. §7491(a)(2); Tax Court Rule 142(a), 26 U.S.C.A. foll. §7453.

[7] Internal Revenue 220 5233

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(C) Assessment
220k5232 Evidence
220k5233 k. Presumptions and Burden of Proof in General. Most Cited Cases

For IRS to meet its burden of production on penalties assessed, IRS must come forward with sufficient evidence indicating that it is appropriate to impose the relevant penalty. 26 U.S.C.A. §7491(c).

[8] Internal Revenue 220 5215

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(B) Grounds and Amount
220k5215 k. In General. Most Cited Cases

Internal Revenue 220 5219.10

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(B) Grounds and Amount
220k5219.10 k. Reasonable Cause. Most Cited Cases

Taxpayer must introduce evidence regarding reasonable cause, substantial authority, or similar defenses to meet taxpayer's burden of proof for defenses to accuracy-related penalty assessment. 26 U.S.C.A. §7491(c).

[9] Internal Revenue 220 5217

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(B) Grounds and Amount
220k5217 k. Failure to Make Returns. Most Cited Cases

Addition to tax for failure to timely file return was appropriate, where taxpayers, without reasonable cause, filed their return approximately one year after it was due. 26 U.S.C.A. §6651(a)(1).

[10] Internal Revenue 220 5219.10

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(B) Grounds and Amount
220k5219.10 k. Reasonable Cause. Most Cited Cases

Honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge, and education of taxpayer may indicate reasonable cause and good faith, precluding accuracy-related penalty. 26 U.S.C.A. §§6662(d)(2), 6664(c)(1); 26 C.F.R. §1.6664-4(b)(1).

[11] Internal Revenue 220 5216

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(B) Grounds and Amount
220k5216 k. Failure to Keep Books. Most

Cited Cases

Internal Revenue 220 ⚿5217.70

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(B) Grounds and Amount
220k5217.70 k. Disregard of Rules or Regulations. Most Cited Cases

Internal Revenue 220 ⚿5219

220 Internal Revenue
220XXXI Penalties and Additions to Tax
220XXXI(B) Grounds and Amount
220k5219 k. Negligence. Most Cited Cases
Accuracy-related penalty was warranted based on negligence or disregard of rules or regulations, where taxpayers failed to keep adequate books and records or to properly substantiate their tax items. 26 U.S.C.A. §6662(a); 26 C.F.R. §1.6662-3(b).

***438** Ps filed a petition seeking redeterminations of R's disallowance of several deductions and imposition of an addition to tax and accuracy-related penalty. The parties settled most of the issues regarding the disallowed deductions except one regarding certain Schedule C deductions. At trial, Ps claimed additional deductions on account of a casualty loss, charitable contributions, unreimbursed employee expenses, and Schedule C and E expenses that were neither claimed by Ps on their tax returns nor raised in the notice of deficiency. The examination in the instant case took place after the effective date of sec. 7491, I.R.C., as amended by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, sec. 3001, 112 Stat. 685, 726.
Held: Because Ps failed to introduce credible evidence, Ps failed to meet the requirements of sec. 7491(a), I.R.C., as amended, so as to place the burden of proof on R for the factual issues relating to the deductions in issue.
Held, further, to meet his burden of production pursuant to sec. 7491(c), I.R.C., as amended, R must come forward with sufficient evidence indicating that it is appropriate to impose a penalty, addition to tax, or additional amount.
Held, further, R met his burden of production with regard to the addition to tax and accuracy-related penalty.Earl G. Higbee and Lesley A. Higbee, pro sese.

Erin K. Huss, for respondent.

OPINION

VASQUEZ, J.

Respondent determined the following deficiencies in, addition to, and accuracy-related penalty on petitioners' 1996 and 1997 Federal income taxes:

Year	Deficiency	Addition to Tax Sec. 6651(a)(1)	Penalty Sec. 6662(a)
1996	$10,796	$2,669	-
1997	12,443	-	$2,488.60

Unless otherwise stated, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

After concessions, we must decide whether petitioners are entitled to the following deductions: (1) $1,328 for a casualty ***439** loss, (2) $6,937.20 for charitable contributions, (3) $6,468.09 for unreimbursed employee expenses, (4) certain amounts paid on account of a failed business as part of a chapter 13 bankruptcy proceeding, and (5) various expenses related to two rental properties. Finally, we must decide whether petitioners are liable for an addition to tax under section 6651(a)(1) and an accuracy-related penalty under section 6662(a).

Background

Petitioners contest respondent's determinations with regard to their 1996 and 1997 tax years. In the notice of deficiency, respondent disallowed the following deductions for 1996:(1) A $3,000 capital loss, (2) $57,099 in expenses listed on petitioners' Schedule A, Itemized Deductions, (3) $5,487 in expenses listed on petitioners' Schedule C, Profit or Loss From Business, and (4) $25,811 in expenses listed on petitioners' Schedule E, Supplemental Income and Loss. After concessions, the parties agreed that petitioners are entitled to: (1) The $3,000 capital loss, (2) $7,070 in itemized deductions, FN1 (3) $3,567 in Schedule C expenses (with the remainder still in dispute), and (4) the $25,811 Schedule E expenses.

With regard to the 1997 tax year, respondent disallowed the following deductions: (1) A $3,000 capital loss, (2) $41,172 in itemized deductions, and (3) $25,965 in Schedule E expenses. After concessions, the parties agreed that petitioners are entitled to: (1) The $3,000 capital loss, (2) $12,083 in itemized deductions, FN2 and (3) the $25,965 Schedule E expenses.

At trial, the only issue remaining with regard to the notice of deficiency was whether petitioners were entitled to the $1,920 in Schedule C deductions reported on petitioners' ***440** 1996 tax return and disallowed by respondent. Petitioners, however, raised new issues at trial by claiming additional deductions for a casualty loss, charitable contributions, unreimbursed employee expenses, and Schedule C and E expenses that were neither claimed on their returns nor raised in the notice of deficiency.

We combine our findings of fact and opinion under each separate issue heading. Some of the facts have been stipulated and are so found. The stipulation of facts, the supplemental stipulations of facts, and the attached exhibits are incorporated herein by this reference. At the time petitioners filed their petition, they resided in Phoenix, Arizona.

Discussion

I. *Disallowed Deductions*

[1][2] Deductions are a matter of legislative grace, and a taxpayer bears the burden of proving that he is entitled to the deductions claimed. See Rule 142(a); *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 112 S.Ct. 1039, 117 L.Ed.2d 226 (1992); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348 (1934). The taxpayer is required to maintain records that are sufficient to enable the Commissioner to determine his correct tax liability. See sec. 6001; sec. 1.6001-1(a), Income Tax Regs. In addition, the taxpayer bears the burden of substantiating the amount and purpose of the claimed deduction. See *Hradesky v. Commissioner*, 65 T.C. 87, 90, 1975 WL 3047 (1975), affd. per curiam 540 F.2d 821 (5th Cir.1976).

Section 7491(a), a new provision created by Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub.L. 105-206, sec. 3001, 112 Stat. 685, 726, places the burden of proof on respondent with regard to certain factual issues. Section 7491 applies to examinations commenced after July 22, 1998. See RRA 1998 sec. 3001(c), 112 Stat. 727. The examination in the instant case commenced after July 22, 1998; accordingly, we evaluate whether respondent bears the burden of proof pursuant to section 7491(a).

Section 7491(a)(1) provides that if, in any court proceeding, the taxpayer introduces credible evidence with respect to factual issues relevant to ascertaining the taxpayer's liability for a tax (under subtitle A or B), the burden of proof with respect to such factual issues will be placed on the Commissioner.***441** For the burden to be placed on the Commissioner, however, the taxpayer must comply with the substantiation and record-keeping requirements of the Internal Revenue Code. See sec. 7491(a)(2)(A) and (B). In addition, section 7491(a) requires that the taxpayer cooperate with reasonable requests by the Commissioner for "witnesses, information, documents, meetings, and interviews". Sec. 7491(a)(2)(B). Finally, the benefits of section 7491(a) are unavailable in the cases of partnerships, corporations, and trusts unless the taxpayer meets the net worth requirements of section 7430(c)(4)(A)(ii). See sec. 7491(a)(2)(C).

Respondent argues that because petitioners have failed to meet the requirements of section 7491(a)(1) and (2), the burden of proof should remain with petitioners as to the remaining issue associated with respondent's determination of petitioners' 1996 tax liability. We therefore examine the evidence to establish whether petitioners have presented credible evidence and have met the other requirements of section 7491(a)(1) and (2) so as to place the burden of proof on respondent.

A. *Casualty Losses*

Pursuant to section 165(a) and (c)(3), a taxpayer is allowed a deduction for an uncompensated loss that arises from fire, storm, shipwreck, or other casualty. Section 165(h), however, states that any "loss * * * shall be allowed only to the extent that the amount of the loss to such individual arising from each casualty * * * exceeds $100" and only to the extent that the net casualty loss "exceeds 10 percent of the adjusted gross income".

[3] When property is damaged rather than totally destroyed by casualty, the proper measure of the amount of the loss sustained is the difference between the fair market value of the property immediately before and after the casualty, not to exceed the property's adjusted basis. See sec. 1.165-7(b)(1), Income Tax Regs. The fair market values required by the Treasury regulations must generally be ascertained by competent appraisal. See sec. 1.165-7(a)(2)(i), Income Tax Regs. As an alternative, the Treasury regulations provide that if the taxpayer has repaired the property damage resulting from the casualty, the taxpayer may use the cost of ***442** repairs to prove the casualty loss. See sec. 1.165-7(a)(2)(ii), Income Tax Regs. In general, estimates of the cost of repairs are not evidence of the actual costs of repairs unless the repairs are actually made. See *Lamphere v. Commissioner*, 70 T.C. 391, 396, 1978 WL 3307 (1978) ; *Farber v. Commissioner*, 57 T.C. 714, 719, 1972 WL 2424 (1972).

Petitioners claim a casualty loss deduction in the amount of $1,328 on account of alleged damage to their home and personal property which was not deducted on their tax return. Mr. Higbee testified that the $1,328 represents the damage to petitioners' property which was not reimbursed by their insurance company but awarded by a small claims court.[FN3] In support, petitioners provided a form document entitled "Small Claims Complaint/Summons/Answer" which appears to be issued by the Glendale Justice Court in Glendale, Arizona, but which does not bear any type of notation or certification by a governmental official.

In order for section 7491(a) to place the burden of proof on respondent, the taxpayer must first provide credible evidence. The statute itself does not state what constitutes credible evidence. The conference committee's report states as follows:

> Credible evidence is the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness). A taxpayer has not produced credible evidence for these purposes if the taxpayer merely makes implausible factual assertions, frivolous claims, or tax protestor-type arguments. The introduction of evidence will not meet this standard if the court is not convinced that it is worthy of belief. If after evidence from both sides, the court believes that the evidence is equally balanced, the court shall find that the Secretary has not sustained his burden of proof. [H. Conf. Rept. 105-599, at 240-241 (1998), 1998-3 C.B. 747, 994-995 .]

Further, the conference report explains the purpose of the limitations set forth in section 7491(a)(2):

> Nothing in the provision shall be construed to override any requirement under the Code or regulations to substantiate any item. Accordingly, taxpayers must meet applicable substantiation requirements, whether generally imposed [10] or imposed with respect to specific items, such as charitable contributions or meals, entertainment, travel, and certain other expenses. Substantiation requirements include any requirement of the ***443** Code or regulations that the taxpayer establish an item to the satisfaction of the Secretary. Taxpayers who fail to substantiate any item in accordance with the legal requirement of substantiation will not have satisfied the legal conditions that are pre-

requisite to claiming the item on the taxpayer's tax return and will accordingly be unable to avail themselves of this provision regarding the burden of proof. Thus, if a taxpayer required to substantiate an item fails to do so in the manner required (or destroys the substantiation), this burden of proof provision is inapplicable.

10 See e.g., Sec. 6001 and Treas. Reg. sec. 1.6001-1 requiring every person liable for any tax imposed by this Title to keep such records as the Secretary may from time to time prescribe, * * *. [*Id.* at 241, 1998-3 C.B. at 995; certain fn. refs. omitted.]

[4] Petitioners' evidence does not meet the requirements of section 7491(a). Besides the fact that the form document entitled "Small Claims Complaint/Summons/Answer" does not actually indicate whether litigation in small claims court was commenced or completed, the document itself does not qualify as a competent appraisal or reliable estimate of the cost of any repairs. Because petitioners have failed to provide credible evidence of a casualty loss, the burden of proof as to this issue is not placed on respondent. Further, for similar reasons regarding our discussion of petitioners' evidence for purposes of section 7491, we conclude that petitioners have not met their burden of proof. See Rule 142(a). Consequently, we reject petitioners' claimed casualty loss deduction.

B. *Charitable Contributions*

Section 170(a)(1) provides that a taxpayer may deduct "any charitable contribution * * * payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary." Pursuant to the Treasury regulations, contributions of money are required to be substantiated by canceled checks, receipts from the donee organizations showing the date and amount of the contributions, or other reliable written records showing the name of the donee, date, and amount of the contributions. See sec. 1.170A-13(a)(1), Income Tax Regs. Similarly, contributions of property other than money must be substantiated, at a minimum, by a receipt from the donee showing the name and address ***444** of the donee, the date and location of the contribution, and a description of the property in detail reasonably sufficient under the circumstances. See sec. 1.170A-13(b)(1), Income Tax Regs. Where it is unrealistic to obtain a receipt, taxpayers must maintain reliable written records of their contributions. See *id.*

To substantiate additional charitable contributions of $6,937.20 for 1996 not previously claimed on their return for that year, petitioners offered several documents to the Court. Some of the documents do not have any indication of being provided by a donee organization but instead appear to have been generated by petitioners. Other documents consist of preprinted forms issued by alleged charitable organizations which petitioners filled in with the type and number of items donated and the estimated value of the donation. In addition, petitioners submitted checks and receipts which appear to be for the purchase of goods and services. Lastly, at trial, petitioners attempted to buttress their claims by describing the types of goods allegedly donated.

[5] While the preprinted forms appear authentic, we nevertheless conclude that petitioners' self-generated receipts and other documents are not credible evidence of the order necessary to substantiate the deductions claimed in the instant case. See *Tokh v. Commissioner*, T.C. Memo.2001-45. Further, we do not find petitioners' testimony credible. We hold that petitioners have failed to introduce credible evidence to substantiate the actual items contributed and their fair market values.[FN4] See sec. 7491(a)(1) and (2)(A). Consequently, the burden of proof is not placed on respondent. Because petitioners have failed to present us with any credible evidence, they have not met their burden of proof pursuant to Rule 142(a) to support their claimed deductions. We therefore hold that petitioners are not entitled to a deduction for charitable contributions in excess of the $1,500 that respondent has already allowed.

***445** C. *Unreimbursed Employee Expenses and Schedule C and E Expenses*

[6] Petitioners argue that they are entitled to a deduction of $6,468 .09 for unreimbursed employee expenses instead of the $3,075 deduction returned on their Schedule A for 1996. Aside from Mrs. Higbee's self-serving testimony at trial that these additional expenses related to her employment at a beauty salon, petitioners have failed to provide us with sufficient and credible evidence for us to rule in their favor.

Petitioners also claim additional Schedule C deductions of $8,087 .26 for 1996 and $8,590.48 for 1997 on account of amounts allegedly owed and paid with regard to their failed beauty salon business. Petitioners contend that they paid these amounts while in a chapter 13 bankruptcy proceeding.[FN5] In support, petitioners submitted to the Court a document entitled "Debtor Receipts and Disbursements Summary" which provides general information about the deposits made by petitioners with the trustee of the bankruptcy estate and the disbursements to creditors by the trustee. As to the bankruptcy-related expenses claimed, petitioners have failed to provide us with sufficient credible evidence that petitioners had outstanding business debts which were paid while in bankruptcy. Further, petitioners have failed to explain the origin of these expenses in sufficient detail for us to find that these expenses would be allowable for the tax years in issue. Petitioners have failed to meet the substantiation and record-keeping requirements of section 7491(a). The burden of proof therefore is not placed on respondent. Finally, we conclude that petitioners have not met their burden of proof to support the claimed deductions, and therefore we sustain respondent's determination as to this issue. See Rule 142(a).

Petitioners also claim additional Schedule E deductions with regard to their rental activities for repairs ($5,976.31 for 1996 and $2,080 for 1997), legal expenses ($5,217 for 1996), automobile expenses ($475.64 for 1996), and insurance ($139 for 1996) not previously deducted on their tax returns. Again, we reiterate that petitioners have failed to provide this Court with credible evidence for us to allow petitioners' ***446** claims with respect to the disallowed deductions. We therefore reject all of petitioners' contentions as to these issues.

II. *Addition to Tax and Accuracy-Related Penalty*

[7] Under RRA 1998, Congress also enacted a provision, section 7491(c), requiring the Commissioner to carry the "burden of production" in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount (penalties). Although the statute does not provide a definition of the phrase "burden of production", we conclude that Congress' intent as to the meaning of the burden of production is evident from the legislative history. The legislative history of section 7491(c) sets forth:

> in any court proceeding, the Secretary must-initially come forward with evidence that it is appropriate to apply a particular penalty to the taxpayer before the court can impose the penalty. This provision is not intended to require the Secretary to introduce evidence of elements such as reasonable cause or substantial authority. Rather, the Secretary must come forward initially with evidence regarding the appropriateness of applying a particular penalty to the taxpayer; if the taxpayer believes that, because of reasonable cause, substantial authority, or a similar provision, it is inappropriate to impose the penalty, it is the taxpayer's responsibility (and not the Secretary's obligation) to raise those issues. [H. Conf. Rept. 105-599, *supra* at 241, 1998-3 C.B. at 995.]

Therefore, with regard to section 7491(c), we conclude that for the Commissioner to meet his burden of production, the Commissioner must come forward with sufficient evidence indicating that it is appropriate to impose the relevant penalty.

[8] The legislative history to section 7491(c), however, also discloses that the Commissioner need not introduce evidence regarding reasonable cause, substantial authority, or similar provisions. In addition, the legislative history indicates that it is the taxpayer's responsibility to raise those issues. We therefore conclude that the taxpayer bears the burden of proof with regard to those issues.

Finally, we note that Congress placed only the burden of production on the Commissioner pursuant to section

7491(c). Congress' use of the phrase "burden of production" and not the more general phrase "burden of proof" as used in section 7491(a) indicates to us that Congress did not desire that the burden of proof be placed on the Commissioner with regard ***447** to penalties. [FN6] See sec. 7491(c). Therefore, once the Commissioner meets his burden of production, the taxpayer must come forward with evidence sufficient to persuade a Court that the Commissioner's determination is incorrect.

Having described the framework of section 7491(c), we evaluate whether respondent has met his burden of production with regard to the section 6651(a)(1) addition to tax and the section 6662 accuracy-related penalty. We also discuss whether petitioners have presented any evidence which would cause us not to sustain respondent's determinations with regard to the addition to tax and the accuracy-related penalty.

Section 6651(a)(1) imposes an addition to tax for a taxpayer's failure to file a required return on or before the specified filing date, including extensions. The amount of the liability is based upon a percentage of the tax required to be shown on the return. See sec. 6651(a)(1). The addition to tax is inapplicable, however, if the taxpayer's failure to file the return was due to reasonable cause and not to willful neglect. See sec. 6651(a)(1). Under section 7491(c), as noted above, the Commissioner bears the burden of production with regard to whether the section 6651(a)(1) addition to tax is appropriate, but he does not bear the burden of proof with regard to the "reasonable cause" exception of section 6651(a).

[9] Respondent determined that petitioners are liable for a section 6651(a)(1) addition to tax with regard to their 1996 tax return. The parties have stipulated that petitioners filed their 1996 return on April 18, 1998, approximately 1 year after it was due. [FN7] Accordingly, we conclude that respondent has produced sufficient evidence to show that the section 6651(a)(1) addition to tax is appropriate, unless petitioners prove that their failure to file was due to reasonable cause.

Petitioners have not provided any evidence indicating that their failure to file was due to reasonable cause. Therefore, an addition to tax of 25 percent of the amount required to ***448** be shown as tax on the return is sustained in the instant case. Because the parties have made several concessions, respondent's original section 6651(a)(1) addition to tax computation must be adjusted to reflect such changes. As a final matter, we note that there is a discrepancy in the record with regard to petitioners' amount of withholding. [FN8] SEE SEC. 6651(b)(1) (providing that the amount required to be shown as tax on the return for purposes of the section 6651(a)(1) addition to tax shall be reduced for timely payments or credits allowed to be claimed on the return). The parties are asked to consider this discrepancy in their Rule 155 computations.

Pursuant to section 6662(a), a taxpayer may be liable for a penalty of 20 percent on the portion of an underpayment of tax (1) attributable to a substantial understatement of tax or (2) due to negligence or disregard of rules or regulations. See sec. 6662(b). A substantial understatement of tax is defined as an understatement of tax that exceeds the greater of 10 percent of the tax required to be shown on the tax return or $5,000. See sec. 6662(d)(1)(A). The understatement is reduced to the extent that the taxpayer has (1) adequately disclosed his or her position and has a reasonable basis for such position or (2) has substantial authority for the tax treatment of the item. See sec. 6662(d)(2)(B). In addition, section 6662(c) defines "negligence" as any failure to make a reasonable attempt to comply with the provisions of the Internal Revenue Code, and "disregard" means any careless, reckless, or intentional disregard.

[10] Whether applied because of a substantial understatement of tax or negligence or disregard of the rules or regulations, the accuracy-related penalty is not imposed with respect to any portion of the understatement as to which the taxpayer acted with reasonable cause and in good faith. See sec. 6664(c)(1). The decision as to whether the taxpayer acted with reasonable cause and in good faith depends upon all the pertinent facts and circumstances. See sec. 1.6664-4(b)(1), Income Tax Regs. Relevant factors include the taxpayer's efforts to assess his proper tax liability, including the taxpayer's reasonable and good faith reliance on the advice of a

professional such ***449** as an accountant. See *id.* Further, an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge, and education of the taxpayer may indicate reasonable cause and good faith. See *Remy v. Commissioner*, T.C. Memo.1997-72.

For the 1997 tax year, respondent determined that petitioners are liable for an accuracy-related penalty attributable to a substantial understatement of tax or, in the alternative, due to negligence or disregard of rules or regulations. Petitioners have conceded that they are not entitled to $30,245 in itemized deductions relating to NOL carryovers ($28,036) and certain taxes ($2,209) claimed on Schedule A of their 1997 tax return. With regard to respondent's determination that petitioners were negligent and disregarded rules and regulations, respondent argues that he has met his burden of production under section 7491(c) through petitioners' above concessions, along with evidence in the record indicating that petitioners were experienced in business affairs. Further, respondent contends that because petitioners have failed to introduce any evidence to indicate that they were not negligent, petitioners have failed to meet their burden of proof, which they retain despite the application of section 7491(c).

[11] Respondent has shown that petitioners have failed to keep adequate books and records or to substantiate properly the items in question. Such a failure in the instant case is evidence of negligence. See sec. 1.6662-3(b), Income Tax Regs. Consequently, we conclude that respondent has met his burden of production for his determination of the accuracy-related penalty based on negligence or disregard of rules or regulations. Additionally, with regard to that determination, petitioners have failed to meet their burden of proving that they acted with reasonable cause and in good faith. We therefore sustain respondent's determination that petitioners are liable for the accuracy-related penalty on the underpayment associated with the disallowed itemized deductions conceded by petitioners.[FN9]

***450** In reaching our holdings herein, we have considered all arguments made, and to the extent not mentioned above, we find them to be moot, irrelevant, or without merit.

To reflect the foregoing,

Decision will be entered under Rule 155.

FN1. The parties agreed that petitioners are entitled to deduct the following amounts: (1) $822 for taxes, (2) $1,189 for interest, (3) $1,500 for charitable contributions, (4) $484 for union dues, and (5) $3,075 for unreimbursed employee expenses. We remind the parties that when making their Rule 155 calculations, miscellaneous itemized deductions must be adjusted for the 2-percent floor. See sec. 67.

FN2. The parties agreed that petitioners are entitled to deduct the following amounts: (1) $3,263 for taxes, (2) $4,531 for charitable contributions, and (3) $4,289 for unreimbursed employee expenses. We note that petitioners claimed other expenses on their Schedule A in the section entitled “Job Expenses and Most Other Miscellaneous Deductions”. Because petitioners have not raised any arguments with regard to those amounts, we treat their failure to raise any assignments of error as a concession. See *Petzoldt v. Commissioner*, 92 T.C. 661, 683, 1989 WL 27845 (1989).

FN3. Petitioners assert that the judgment remains unpaid.

FN4. For instance, on one of the preprinted forms, petitioners listed a charitable contribution of $700 for “cribs” and $200 for “baby clothes”. Because petitioners have failed to establish how they arrived at those fair market values, we are unable to allow such deductions. Further, petitioners have not produced any other independent and credible evidence indicating that those donations were actually made.

FN5. The claimed deduction of $8,087.26 for 1996 encompasses the $1,920 still in dispute with regard to respondent's deficiency determ-

ination.

FN6. We note that sec. 6665(a)(2) provides that any reference to tax shall be deemed also to refer to penalties. However, the application of sec. 6665(a)(2) is limited by the language "Except as otherwise provided in this title". Considering that limiting language of sec. 6665(a)(2), the reference in sec. 7491(a) to tax liabilities imposed by subtitle A or B (whereas penalties are imposed by subtitle F), and the structure of sec. 7491 as a whole, we believe that Congress intended for sec. 7491(c) (and not sec. 7491(a)) to apply to penalties.

FN7. In addition, the 1996 tax return, which is part of the record, reflects that it was not timely filed.

FN8. Petitioners claimed withholding of $154.46 on their 1996 tax return. It appears that respondent did not give credit for such withholding in the notice of deficiency.

FN9. Because of respondent's concessions (see *supra* p. 4), we conclude that the accuracy-related penalty based on a substantial understatement of tax is not applicable as the understatement does not exceed the greater of 10 percent of tax required to be shown on the return or $5,000. See sec. 6662(d)(1).

U.S.Tax Ct.,2001.
Higbee v. C.I.R.
116 T.C. No. 28, 116 T.C. 438, Tax Ct. Rep. Dec. (RIA) 116.28

END OF DOCUMENT