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Articles

Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases

by
Leo P. Martinez*

The power to tax is among the most fundamental and wide-reaching powers of government.1 It is axiomatic that any government needs the financial support of its citizens, whether voluntarily or involuntarily obtained, to function efficiently or even to function at all.2 Cicero aptly

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The United States Constitution expressly gives the Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises . . ." U.S. CONST. art. 1, § 8, cl. 1. The basic nature of the power to tax has been widely recognized by the courts. See, e.g., Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874) (taxing power is the "strongest, the most pervading of the powers of government"); Society for Sav. v. Coite, 73 U.S. (6 Wall.) 594, 606 (1867) (taxing power "resides in government as a part of itself"); Providence Bank v. Billings & Pittman, 29 U.S. (4 Pet.) 514, 563 (1830) (the taxing power is of vital importance, essential to the existence of government). The fundamental nature of taxation was implicitly recognized by Chief Justice Marshall's celebrated dictum regarding state taxation and sovereign immunity:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

2. "The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government." Nichols v. United States, 74 U.S. (7 Wall.) 122, 129 (1868).
stated: "Taxes are the sinews of the state." Indeed, it has been observed that a "world without taxation is a world without government."

Inextricably woven into the fabric of taxation is a fundamental notion of fairness. A postulate of any system of taxation is that the burden of paying the tax should be borne equally by all or at least that the burden should be levied in a consistent and rational fashion. Thus, where there is perceived inconsistency or unfairness in the system, there is heard a cry to refine or modify it.


4. Epstein, supra note 1, at 49. Epstein goes on to discuss the dilemma presented by the apparent fact that taxation involves institutional coercion. Id.


The Constitution prohibits direct taxes unless such taxes are levied in proportion to the populations of the states. U.S. Const. art. I, § 9, cl. 4. The second United States federal income tax was held unconstitutional because, as a direct tax, it was not levied in proportion to the states' populations. Pollack v. Farmers Loan & Trust Co., 157 U.S. 429, reh'd, 158 U.S. 601 (1895). The constitutional prohibition against disproportional direct taxes apparently had its genesis in the concern that the levy of taxes be fair and consistent. See id. at 553-86, 158 U.S. at 617-37. Of course, the sixteenth amendment overrules the result in Pollack by expressly providing for an income tax without the section 9 prohibition. Pennsylvania Mut. Indem. Co. v. Commissioner, 277 F.2d 16, 19-20 (3d Cir. 1960).

The Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States . . . ." U.S. Const. art 1, § 8. Literally absent from this uniformity requirement is the power to lay and collect taxes other than the indicated duties, imposts, and excises. Despite the possibility that this apparent omission suggests inequity or unfairness, the Supreme Court has held that this omission is a recognition that so long as taxes are geographically uniform they may apply to particular individuals in a nonuniform manner. See Knowlton v. Moore, 178 U.S. 41, 83-109 (1900); L. Tribe, American Constitutional Law 245 (1977).


6. Edmund Burke once noted that "[t]o tax and to please, no more than to love and be wise, is not given to men." Burke, quoted in C. Webber & A. Wildavsky, supra note 1, at 1.
A recent proliferation of proposed legislation that calls for the enactment of procedural safeguards for taxpayers in the tax collection system provide concrete examples of this sentiment. Not surprisingly, this legislation seems to enjoy popular political support. This support is derived not only from the traditional enmity reserved for the tax collector, but also from documented incidents of abusive and, in a few cases, criminal conduct directed against taxpayers by Internal Revenue Service (IRS) employees. Predictably, one of the authors of these bills charges that under the current system, "the IRS has too many rights, and the taxpayer too few."

The bills generally call for sweeping changes in the system of tax collection. A common provision in these bills would change the burden of proof in any way, whether fair or unfair, of the power to tax inevitably results in resistance. This resistance to what appears to be socially fundamental has led some to suggest that "[a]n across-the-board attack on the budgetary base is equivalent to revolution." Id. at 31. Notwithstanding (or perhaps by reason of) the revolutionary aspect of resistance to taxation, the United States enjoys an extensive tradition of avoiding the tax collector. J. HAWS, A BRIEF HISTORY OF AMERICAN RESISTANCE TO TAXATION, INCOME TAX COMPLIANCE 113 (1983).

Of course, one person's perception of tax equity is another's unfairness or inconsistency. See Bittker, Income Tax "Loopholes" and Political Rhetoric, 71 Mich. L. Rev. 1099 (1973).


9. In fiscal year 1986, 259 criminal cases involving current or former IRS employees were filed and 236 resulted in conviction or guilty pleas. Wall St. J., July 8, 1987, at 1, col. 5. There has been some indication that the IRS is responding to correct errant agents' behavior. Wall St. J., Sept. 25, 1987, at 1, col. 5; see also Taxpayer Complaints: Hearings before the Subcommittee of the House Committee on Ways and Means, 96th Cong., 2d Sess. (1980); Saunders, The Scariest Dunner, FORBES, Nov. 2, 1987, at 76-81.


11. For example, Senate Bill 604 as originally proposed would have made the following changes to existing tax collection procedures: (1) The Secretary of the Treasury would be required to distribute to all taxpayers a comprehensive statement setting forth various taxpayer rights including appeals procedures, refund and complaint procedures, and the procedures available to the IRS in enforcing the revenue laws. § 2.

(2) An Office of Inspector General would be created under the auspices of the Inspector General Act of 1978 (5 U.S.C. App. § 3) within the department of the Treasury. § 3. According to the Senate report on the Inspector General Act the purpose of the Act was to create an
of proof in tax cases by placing the burden of proof on the IRS on all

Office of the Inspector General and Auditor General to consolidate resources to combat fraud, waste, abuse, and mismanagement in certain executive departments and federal agencies. S. REP. NO. 1071, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2676, 2676. Although it was recognized that the Department of the Treasury could benefit from more rigorous auditing, an inspector general was not originally created in the Department because "it would be undesirable to superimpose an inspector general, who is basically a law enforcement official, on law enforcement agencies." Id. at 14, 1978 U.S. CODE CONG. & ADMIN. NEWS at 2689.

(3) New Code § 7519 would be enacted and would provide for a number of taxpayer rights including the recording by taxpayers of IRS interviews and a modified "Miranda" type warning to be given taxpayers prior to interviews. § 4. Interestingly, the Bill is silent as to any sanction for failure to give such warning. Moreover, nothing in the Bill or the legislative history so far suggests any intent to give exclusionary effect to evidence obtained as a result of failure to give the warning.

(4) The Comptroller General's authority would be expanded to oversee the administration of the internal revenue laws by the IRS. § 5.

(5) Personnel evaluation of performance of IRS employees would not be based in any way on the amount of revenue collected. § 6.

(6) Investigation by IRS officers and employees as to the beliefs or associations of any individual or organization would be made criminal, except otherwise lawful investigations concerning organized crime. § 7. A civil cause of action would be created for investigations conducted in violation of this provision. Id.

(7) The levy and distraint provisions of the Code would be amended to increase notice periods and the class of property exempt from levy would be expanded. § 8. Significantly, the Bill would create an "economic levy" rule, that is, no levy could be made on property if the expenses in connection with the levy would exceed the fair market value of the property. Id.

(8) Judicial review of jeopardy assessments would be expanded. § 9.

(9) New Code § 6159 would authorize the Secretary of the Treasury to allow the installment payment of outstanding tax liability. § 10. Such installment payment of taxes would be authorized (presumably at the taxpayer's option) if the outstanding liability did not exceed $20,000 and if the taxpayer has not been delinquent in the payment of tax liability installments in the preceding three years. § 10(b).

(10) Written advice given to taxpayers by the IRS would be binding and any deficiency resulting from heeding such advice would be abated, as long as any error in the advice was not due to an inadequacy on the part of the taxpayer. § 11. Moreover, each officer or employee of the IRS would, at the time any oral advice is given, have to inform the taxpayer that oral advice does not bind the IRS although no sanction is provided for failure to so advise a taxpayer. § 11(b).

(11) The Office of Ombudsman would be empowered to issue "taxpayer assistance orders" to provide relief from levy on a taxpayer's property if the Ombudsman determined that the taxpayer would suffer irreparable harm, loss or if the levy was carried out in violation of law. § 12.

(12) The imposition of an IRS lien would be appealable to the Secretary of the Treasury. § 13.

(13) Sales of seized property could not be limited artificially to the outstanding liability plus expenses of sale if the fair market value of the property exceeded such sum. § 14.

(14) Class audits of taxpayers involved in a particular trade, business or profession would be limited by requiring the IRS to comply with certain notice requirements and to allow affected taxpayers to contest alleged deficiencies individually or through a spokesman. § 15.

(15) The Regulatory Flexibility Act would be made applicable to the IRS. § 17. The Regulatory Flexibility Act is designed to ensure that federal agencies tailor their regulatory
issues in all administrative and judicial proceedings.\textsuperscript{12} Such proposals to place the burden of proof on the IRS surface periodically.\textsuperscript{13} While no such proposal has been yet adopted by Congress, the sponsors of these proposals remain firm in their belief that the government should bear the burden of proof in tax cases.\textsuperscript{14} Their willingness to accept tax relief in exchange for a price apparently paid by the IRS clouds the fact that retention of the present system generally is more consistent with their constituents' financial and personal interests.

The lack of meaningful debate on the burden of proof shifting provisions indicates widespread ignorance as to the historical role played by the burden of proof in the tax collection system. While the curbing of the tax collector's powers has an undeniably seductive appeal, shifting of the burden of proof in tax cases must be closely examined to determine and informational requirements to the scale of the businesses and organizations under their authority. The Act requires agencies which promulgate rules to provide information regarding the rationale and legal basis for any proposed rule as well as how the rule may affect smaller organizations in terms of reporting and record keeping. 5 U.S.C.A. § 601-03 (West Supp. 1987).

\textsuperscript{12} For example, section 16(a) of S. 604 originally provided:

\begin{quote}
Notwithstanding any other provision of law, in all administrative and judicial proceedings between the IRS and a taxpayer, the burden of proof on all issues shall rest upon the IRS, except that in the event the taxpayer is the sole possessor of evidence that would not otherwise be available to the IRS, the taxpayer may be required to present the minimum amount of information necessary to support his position.
\end{quote}

In a revised version of the bill introduced October 2, 1987, this provision was deleted. 37 TAX NOTES, Oct. 5, 1987, at 12. In its place, the burden of proof would be placed on the IRS to prove that its claim against the taxpayer was substantially justified to prevent a taxpayer from recovering professional, presumably attorneys, fees. \textit{Id.} Still alive in its present form is H.R. 634, introduced by Congressman Dannemeyer as the "Taxpayer Protection Act." H.R. 634, 100th Cong., 1st Sess. (1987). H.R. 634 would create new Code § 7429 which would provide:

\begin{quote}
In any administrative and judicial proceedings between the Internal Revenue Service and a taxpayer, the burden of proof on all issues shall rest upon the Internal Revenue Service: \textit{Provided, however}, that in those instances where the taxpayer is the sole possessor of evidence that would not otherwise be available to the Internal Revenue Service, the taxpayer may be required to present the minimum amount of information necessary to support his position.
\end{quote}

\textit{Id.} § 11.

\textsuperscript{13} For example, in hearings conducted before the Senate in 1925, a representative of the American Institute of Accountants seriously urged that the burden of proof be shifted to the government in tax cases. \textit{Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means}, 69th Cong., 1st Sess. 877 (1925). More recently, Congressman Collins of Texas introduced a bill which provided: "In all administrative and judicial proceedings between the Internal Revenue Service and a taxpayer, the burden of proof on all issues shall rest on the Internal Revenue Service." H.R. 2389, 97th Cong., 1st Sess. (1981). The language in the 1981 bill is strikingly similar to the burden of proof provision of the original Senate Bill 604 and House Bill 634. \textit{See supra} note 11.

\textsuperscript{14} 36 TAX NOTES, Sept. 14, 1987, at 1029.
whether the change will produce the stated goal of promoting equity, or whether it represents uncritical acceptance of a popular fancy without due consideration of the role that the burden of proof plays in the system of tax collection. In order to address that concern, section I of this Article discusses the assignment of the burden of proof in general. Section II discusses the origin of the burden of proof rules in the tax collection system in particular. Section III identifies and analyzes the rationales behind the current tax system's burden of proof rules. Finally, section IV assesses the anticipated effects of a shift in the burden of proof from taxpayers to the IRS. This Article concludes that the proposal to shift the burden of proof in tax cases from the taxpayer to the IRS, however attractive the prospect may seem, affords a brief glimpse into Pandora's box. As with the opening of that box, the proposed change in the allocation of the burden of proof is ill-advised and, with the exception of the critical examination that follows, should remain unexplored.

I. Burden of Proof in General

A. Definitions

In order to obtain a desired result, the parties to a controversy must persuade a neutral third party, either judge or jury, to act or refrain from acting in accordance with a predetermined pattern of conduct. The party with the obligation of persuasion—what Wigmore termed the risk of nonpersuasion—is said to bear the burden of proof. The effect of non-persuasion on a party with the burden of proof is that the particular issue at stake in the litigation will be decided against the party.

The burden of proof in civil controversies serves a number of desirable goals. In his 1911 Treatise on the Modern Law of Evidence, Chamberlayne postulated that practical restrictions as to time and space necessitate the assignment of a burden of proof. According to


17. C. CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 931, at 1093 (1911). Chamberlayne said:

Where, for example, . . . scientific truth is under investigation, there is no limitation of time as to when the ultimate conclusion must be reached, nor any restriction imposed regarding the place at which the investigation must be conducted. Science, therefore, acknowledges no burden of proof. . . . [T]he mentally untrained nature of the jury and the limits of time which should be devoted to a trial . . . make it necessary that before the trial should begin . . . it should . . . be known . . . which of the parties is to wage an offensive and which a defensive combat.
Chamberlayne, the roots of our modern trial procedure can be found in trial by ordeal or combat, which suggests the necessity of determining which of the parties is to wage offensive combat and which is to wage defensive combat.\textsuperscript{18} Whatever the merits of Chamberlayne's analogy to trial by combat, it is clear that the burden of proof serves as a practical starting point for resolution of a dispute.\textsuperscript{19}

Recognizing that the burden of proof is grounded in necessity does not suggest that practicality alone supports its existence. The fundamental nature of the role of the burden of proof in dispute resolution also suggests its utility. That is, there must be a means by which a neutral arbiter can ascertain the existence or nonexistence of facts.\textsuperscript{20} Logically, a neutral arbiter of a dispute must be persuaded that the uncertain is clear or that the improbable exists.\textsuperscript{21} The burden of proof provides one tool that can be used by the decision-maker to reach a result if proof is equivocal or if proof fails to reach a threshold level of persuasion.\textsuperscript{22} If a party is unable to so persuade the decision-maker that a fact exists or that the uncertainty is clear, that party necessarily will have failed to achieve the desired result.\textsuperscript{23}

The burden of proof also functions to reduce confusion.\textsuperscript{24} The burden of proof makes decision-making predictable by preordaining a result. If a party fails to meet the burden of proof, that party will fail; conversely, if a party satisfies its burden of proof, that party will prevail.\textsuperscript{25} The allocation of the burden of proof introduces into decision-making a

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} See W. Best, The Principals of the Law of Evidence 46 (Morgan ed. 1882) (the taxpayers are left with the choice between choosing haphazardly through barbarism and ignorance or following unbending and dogmatic rules relating to the burden of proof); B. Jones, Commentaries on the Law of Evidence 849 (2d ed. 1926); McBaine, Burden of Proof, Degrees of Belief, 32 Calif. L. Rev. 242, 242 (1944).
\textsuperscript{21} McBaine, supra note 19, at 244.
\textsuperscript{22} W. Best, supra note 19, at 46; C. McCormick, supra note 15, at 948.
\textsuperscript{23} This is particularly the case in the commonly occurring situation in which evidence presented is contradictory, of questionable veracity, or simply deficient in some respect. See McBaine, supra note 19, at 246.
\textsuperscript{24} C. McCormick, supra note 15, at 948; see, e.g., Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 547 (9th Cir. 1949) (the party upon whom the burden of proof rests will lose if no evidence is given on either side).
\textsuperscript{25} F. James & G. Hazard, supra note 15, at 315; C. McCormick, supra note 15, at 948.
simple algorithm that imposes order and structure upon the dispute resolution process.

By contrast, if no burden of persuasion were acknowledged by the courts, the triers of fact might assign their own burden, substituting their own notions of equity or justice for those mandated by law. McCormick suggests that "[s]uch a result would be most undesirable," because rational decision-making requires a consistent rather than a case-by-case determination and resolution of controversy. 26

The burden of proof thus provides the parties to a controversy the necessary structure and guidance to pursue a claim. This responsibility of proof may well act to impose a very real risk of loss on a particular party. 27 Indeed, a certain amount of risk-bearing and risk-shifting may be reasonably required of any moderately sophisticated and efficient dispute resolution system. 28

B. The Burden of Production and the Burden of Persuasion

Confusion over the definition of "burden of proof" exists because the term has been used to describe two distinct aspects of trial proceedings: first, the burden of persuasion and second, the burden of production. 29 The burden of persuasion generally is defined as the obligation of

26. Id.

27. Viewed in this light, Wigmore's reference to the burden of proof as the risk of nonpersuasion is especially appropriate. 9 J. WIGMORE, supra note 15, at 285.

28. Professor J.P. McBaine warned what would happen if rules on burden did not exist: No lawsuit can be decided rationally without the application of the commonplace concept of burden of proof—the duty to persuade—or as is sometimes otherwise stated the risk of non-persuasion. Nor can any legal system be praised for practicability if there exists vagueness, uncertainty or confusion as to the scope or extent of the burden, or if the language commonly employed to describe its scope or extent is not easily comprehensible to those whose duty it is to determine whether the burden has been sustained. . . . Certainly a legal system which would take no account of whose obligation it is to persuade the trier of the facts would be a crude one, woefully lacking in reasonableness and wisdom. In modern society such a system would soon break down completely. McBaine, supra note 19, at 242.


In describing how this two-burden concept operates, commentators seem to rely primarily on one of two models: the Wigmore model or the McNaughton model. J. WIGMORE, supra note 15, at 292-99.

Wigmore describes the burden of proof as containing three distinct linear stages. The first and last stages represent stages at which the judge must decide an issue, while the middle stage represents the point at which an issue is before the jury. The operation of this model can best
persuading a trier of fact, whether judge or jury, on the disputed issues in

be explained through the use of a simple example. Suppose Litigant A begins at the initial stage of the Wigmore model where she is initially faced with the burden of production. In order to move to the middle stage, she must produce a certain threshold amount of evidence. This evidence must be sufficient to cause the judge to make the decision to place the issue before the jury for consideration. If the evidence is insufficient, Litigant A's case would fail to reach the middle stage and the judge would be compelled to grant a directed verdict for her opponent. If A is able to produce enough evidence to satisfy the judge, her case enters the middle stage. There she must meet the burden of persuasion in order to advance to the third stage. If she fails to meet the burden of persuasion, the jury must resolve the issue against Litigant A and in favor of her opponent. If, however, Litigant A provides such compelling evidence that she meets the burden of persuasion, the case shifts to the last stage and the duty of producing evidence shifts to the other party. The judge must then decide whether the other party has presented sufficient evidence to reenter the middle stage for jury consideration. If the other party fails to meet his burden, the judge must decide for Litigant A. If the other party meets the burden of production, the jury must again decide the matter. It is important to note that under the Wigmore formulation, the burden of production remains with Litigant A.

According to Wigmore, the important practical distinction between the two senses of the burden of proof is that "[t]he [burden of persuasion] operates when the case has come into the hands of the jury, while the . . . [burden of production] implies a liability to a ruling by the judge, disposing of the issue without leaving the question open to the jury's deliberations." 9 J. WIGMORE, supra note 15, at 299 (emphasis omitted).

In a 1955 Harvard Law Review article, Professor John T. McNaughton called the Wigmore model "misleading." McNaughton, supra note 29, at 1384. He claimed that the Wigmore model inaccurately implied that the burden of production was satisfied when the existence or (nonexistence) of the fact appeared to be some small percent probable, such as 20% or 30%. According to McNaughton, the burden of production should be satisfied only when the judge believes there is a possibility that a reasonable jury will believe that existence of the fact is over 50% probable. Id. at 1385. It follows then, according to McNaughton, that the burden of production is interdependent with the burden of persuasion rather than a completely distinct factor. Id.

McNaughton's model of the burden of proof attempts to demonstrate this relationship. McNaughton's model is a simple horizontal axis with probabilities ranging from 0% to 100%. This axis represents the jury's belief in the probability of the truth of the issue as presented by Litigant A. If, for example, the jury believes an issue is more probably true than not, the jury decision could be represented by any point to the right of number 50, and in a civil case, Litigant A (the proponent) could prevail (i.e., Litigant A would be said to meet the burden of persuasion). Superimposed on this model is the burden of production. As in the Wigmore model, the judge must decide whether a matter is within the jury's competence. With the McNaughton model, the judge must determine a realistic range for a jury decision. McNaughton believes that this range determination decides the decision path to be followed. Three possibilities exist. The first possibility is that the judge may decide that a reasonable jury would find the issue to have less than a 50% chance of truth, for example the range between a 10% and 30% chance of truth. In such a case, the judge would direct a verdict for the opponent because the judge necessarily would decide that no reasonable jury would find the issue to more likely be true than not. The second possibility is that the judge could find that a reasonable jury would find the issue to have more than a 50% chance of truth, for example between an 80% and 90% chance of truth. In that case a directed verdict for the proponent would result because no reasonable chance of a decision in the opponent's favor could occur. The third possibility is that the judge believes a reasonable jury would find that the issue straddled the 50% probability mark, and thus the issue could be given to the jury. For exam-
a controversy.\textsuperscript{30} The burden of production is a procedural device which allows a judge to determine whether a dispute is within the limits of a jury's competence.\textsuperscript{31} The burden of production recognizes that the extent of a jury's opportunity to decide a matter does not fall on the jury by default, rather the judge exerts control over what the jury is allowed to consider.\textsuperscript{32} The distinction between the burden of persuasion and the burden of production is clear. Each allows for different levels of decision-making by judge and jury, and each is associated with a different level of risk. Moreover, there exists a difference between the two burdens that is not readily apparent and that serves to place them in sharp contrast with each other. While the burden of production may shift if a sufficient amount of evidence is presented, in contrast, the burden of persuasion is fixed and does not change during the course of a trial.\textsuperscript{33} The

\begin{thebibliography}{10}
\bibitem{James-Hazard} F. JAMES \& G. HAZARD, supra note 15, at 318-321 n.3; C. MCCORMICK, supra note 15, at 946 n.1. The McNaughton model, however, is not universally used. E.g., G. LILLY, THE LAW OF EVIDENCE 42-44 (1978) (viewing burden of production as more distinct and independent from the burden of persuasion than does McNaughton).
\bibitem{Wigmore} 9 J. WIGMORE, supra note 15, at 292; McNaughton, supra note 29, at 1382-93. If the burden of production is not met, the court decides the case and the jury has no role to play. 9 J. WIGMORE, supra note 15, at 292-93.
\end{thebibliography}
term "burden of proof" is used in this Article to mean this unchanging burden of persuasion.

C. Allocation of the Burden of Proof: Rules and Rationale

While the need for allocating the burden of proof is inescapable, difficulty arises in choosing the method of assigning the burden to a particular party. If the risk of loss inheres in the possession of the burden of proof, the allocation of the burden of proof to a particular party is of paramount importance in dispute resolution. That the method of choice itself may be at the heart of a contest early in a trial should come as no surprise.

The rules governing allocation of the burden of persuasion are either fixed by statute or exist as developed in the common law. The allocation rules provide a framework within which it is possible to predict whether and under what circumstances a party might be assigned the burden of proof. These rules can be synthesized into several broad policy-oriented principles. The following sections discuss these principles for determining which party has the burden of proof.

(1) The Burden of Proof is Assigned to the Party Who Has the Affirmative of the Issue

The basic allocation rule provides that the party who has the affirmative of an issue is assigned the burden of proof. The reason advanced for the rule is that the negative of an issue is more difficult to prove—the corollary being that disputes are more easily resolved if the burden of proof is made easy to satisfy.

This rule has been criticized widely. It has been suggested that this doctrine is erroneously interpreted to mean that even though a party is required to plead a fact, proof is not required if the averment is negative rather than affirmative in form. The primary point behind this criti-

34. Arthur v. Unkart, 96 U.S. 118, 122 (1877); United States v. Linn, 42 U.S. (1 How.) 104, 111 (1843); Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 547 (9th Cir. 1949); Bauer v. Clark, 161 F.2d 397, 400 (7th Cir. 1947); Gilmore v. United States, 93 F.2d 774, 776 (5th Cir. 1938); In re Chicken Antitrust Litigation, 560 F. Supp. 1006, 1008 (N.D. Ga. 1982); C. CHAMBERLAYNE, supra note 17, at 1116; F. JAMES & G. HAZARD, supra note 15, at 322; McCormick, supra note 15, at 949; Laughlin, The Location of the Burden of Persuasion, 18 Pitt. L. Rev. 3, 5-6 (1956); see Smith v. Hill, 232 Mass. 188, 190, 122 N.E. 310, 310 (1919), aff'd, 260 U.S. 592 (1923).
35. Laughlin, supra note 34, at 5-6. This idea has sometimes found expression in the standard that the burden of proof settles on the party on whom the burden rests more lightly. See Rodgers v. United States, 66 F. Supp. 663, 667 (E.D. Pa. 1946).
cism is that language is all too easily manipulated. The easy response to this objection is the well-worn expression that this rule simply exalts form over substance.

A more reasoned approach suggests that the form of an allegation should not be controlling. Today it is more often said that the affirmative includes any negative proposition that a party might have to show. For example, in an action for malicious prosecution, the rule that requires a plaintiff to persuade the jury that the defendant had no probable cause gives the plaintiff the burden of proving not only a verbal negative, but also a substantive negative, nonexistence.

While the courts seldom comment on the apparently well-settled rule that the party who has the affirmative of an issue also has the burden of proof, the fact that the rule is subject to criticism does not require that it be abandoned altogether. Of course, such a result presupposes that each matter at issue in a trial has a naturally occurring affirmative or negative form. Whether this is true may be a matter of philosophical dispute. Support for the continued vitality of the rule, however, lies in the fact that notwithstanding the widespread and longstanding criticism of the affirmative issue allocation rule, many courts continue to rely on it to determine the allocation of the burden of proof.

(2) The Burden of Proof is Assigned to the Plaintiff as to All Elements of His Cause of Action

Ordinarily, the burden of proof is with the plaintiff—the party who initiates the action or proceeding. There is, however, no strict rule that

37. F. James & G. Hazard, supra note 15, at 322; Laughlin, supra note 34, at 5-6.
38. This problem was identified early by Phillips who observed that the burden is "upon him who asserts . . . the affirmative in substance, not in mere form." S. Phillips & T. Arnold, A Treatise on the Law of Evidence 810 (10th ed. 1859); see B. Jones, supra note 33, at 878; C. McCormick, supra note 15, at 949.
40. Id.; see, e.g., Williams v. Coombs, 179 Cal. App. 3d 626, 631, 224 Cal. Rptr. 865, 868 (1986) ("plaintiff must plead and prove that prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice"); Lucchesi v. Giannini & Uniaek, 158 Cal. App. 3d 777, 785, 205 Cal. Rptr. 62, 66 (1984) (malicious prosecution elements).
41. See Laughlin, supra note 34, at 5-6.
42. See, e.g., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 589-90 (1st Cir.) (applying principles to factual situation involving Indian tribal status), cert. denied, 444 U.S. 866 (1979), cert. denied, 464 U.S. 866 (1983); Haultey Cheese Co. v. Wine Brokers, Inc. 706 S.W.2d 920, 922 (Mo. App. 1986) (generally the party asserting the affirmative should bear the burden of proof, though the rule is not invariable).
43. F. James & G. Hazard, supra note 15, at 322; 9 J. Wigmore, supra note 15, at 288; B. Jones, supra note 33, at 848; see Arthur v. Unkart, 96 U.S. 118, 122 (1877); Bell v. Penn
the burden is on the party who brings suit. When the defendant admits
the plaintiff's alleged cause of action, he absolves the plaintiff from the
necessity of making any proof in support of his claim. The defendant
then takes the role of actor in the suit and must satisfy the court of the
grounds of any counterclaim initiated by him. Thus, a defendant, as
the initiator of a counterclaim, may also bear the burden of proof based
on this allocation rule.

As with the affirmative issue allocation rule, the general rule that the
plaintiff bears the burden of proof has been subject to much criticism.
The critics base their argument on the idea that the party to whose case
the issue is essential bears the burden of proof. According to the crit-
ics, the rule simply restates the issue at hand in another form. That is,
the burden of proof determines which party will lose as to an issue if the
burden is not met. Thus, in the critics' view, by placing the burden of
proof for such issues on a party, the rule merely states that the party with
the burden of proof bears the burden of proof. In other words, the
critics argue that the assignment of the burden of proof is supported by
circular reasoning.

The courts apparently have overlooked the tautological nature of
the rule. While the courts provide little guidance for use of the plaintiff
allocation rule, one may speculate that the rule is grounded not in the

sylvania R.R., 284 F.2d 297, 298 (7th Cir. 1960); New York, New Haven & Hartford Ry. v.
Seaboard Sales Corp., 258 F.2d 376, 378 (1st Cir. 1958); Compagnie des Bauxites de Guinee v.
Insurance Corp. of N. Am., 551 F. Supp. 1239, 1242 (W.D. Pa. 1982); Dyco Petroleum Corp.

44. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 369
(1898).

45. Otero v. Buslee, 695 F.2d 1244, 1248 (10th Cir. 1982) (defendant has burden of proof
has burden of proof on affirmative defense of latches); Dyco Petroleum, 443 F. Supp. at 695
(defendant has burden of proof on counterclaims). This may partially explain the use of the
phrase "affirmative defense" used in connection with a defendant's claim. Laughlin, supra note
34, at 18.

46. C. MCCORMICK, supra note 15, at 949-50; 9 J. WIGMORE, supra note 15, at 288;
Laughlin, supra note 34, at 6-7.

47. C. MCCORMICK, supra note 15, at 950 (citing Cleary, Presuming and Pleading: An
Essay on Juristic Immaturity, 12 STAN. L. REV. 5, 11 (1959)).

48. Id.; Laughlin, supra note 34, at 6.

49. See, e.g., Arthur v. Unkart, 96 U.S. 118, 122 (1877) (party alleging illegality in con-
tract has burden of proof); Bell v. Pennsylvania R.R., 284 F.2d 297, 298 (7th Cir. 1960)
("Plaintiffs have the burden of furnishing evidence in the support of the material allegations of
the complaint"); New York, New Haven & Hartford Ry. v. Seaboard Sales Corp., 258 F.2d
376, 378 (1st Cir. 1958) (burden of proof is ordinarily on the plaintiff); Compagnie des Baux-
ites de Guinee v. Insurance Corp. of North America, 551 F. Supp. 1239, 1242 (W.D.P. 1982)
(plaintiff bears burden of proof); Dyco Petroleum, 443 F. Supp. at 695 (burden of proof is on
the claimant).
"loss of case" possibility, but rather in the concept that the initiator of an action, including a defendant using affirmative defenses, should bear the burden of proof. It is reasonable that the party seeking to change the status quo, normally the plaintiff in an action, should bear the burden of proof. It is the plaintiff then who should be charged with the burden of proof on the basis that the plaintiff is the party who must establish facts necessary to remove the case from mere conjecture. Viewed in this way, the plaintiff allocation rule is more nearly defensible.

(3) The Burden of Proof is Assigned to the Party Who is Alleging a Disfavored Contention

Many cases suggest that the party alleging a disfavored contention, such as illegality or fraud by an opponent, bears the burden of proof. Thus, public policy considerations affect the choice of method used in assigning the burden of proof to a party by favoring one party over another with respect to particular issues. With the disfavored contention allocation rule, the party who alleges that the opponent engaged in reprehensible conduct is given the burden of proof. For example, a party claiming negligence is alleging a disfavored contention, and therefore a court may choose to restrain such actions by imposing on the plaintiff the burden of showing the absence of contributory negligence as well as the plaintiff’s burden of proving negligence.

(4) The Burden of Proof is Assigned to the Party Alleging the Least Likely Scenario

The party who seeks to establish the improbable generally is allocated the burden of proof, all other things being equal. According to

53. E.g., Arthur v. Unkart, 96 U.S. 118, 122 (1877) (party alleging illegality in contract has burden of proof).
this principle, courts make a judicial estimate of the probabilities as to an outcome and accordingly assign the burden of proof to the party alleging the least-likely scenario. The probabilities may relate to the type of situation from which the litigation arises or they may relate to the type of litigation itself. For example, assuming that most people pay their bills, the probabilities are that any bill selected at random has been paid; therefore, a plaintiff suing to collect a bill would bear the burden of proof as to nonpayment. If, however, attention is limited to bills upon which suit is brought, a contrary conclusion is reached because people are not prone to sue for paid bills. Therefore, the party alleging payment would bear the burden of proof.

(5) The Burden of Proof is Assigned to the Party with Particular Knowledge About a Matter at Issue

The party who has the easiest access to evidence is most likely to bear the burden of proof. Examples are the burdens to prove inability to work commonly placed upon those alleging disability, and upon those having records who are sued concerning matters within the records. The rule placing the burden of proof on the party with particular knowledge of a matter appears to have considerable merit simply because such a party is plainly in the better position to meet its burden. It has been noted, however, that this consideration should not be overemphasized because one must often plead and prove matters even though the advers-
sary has more information concerning them. This view merely reflects the general reluctance to elevate any one allocation rule over another.

(6) Allocation of the Burden of Proof by Statutory Construction

Most statutes that create a cause of action do not address how the burden of proof should be allocated. In such cases, a court may rely on the wording of the statute to determine which party should bear the burden. Where an exception to a statute appears in the enacting clause, the party relying on the statute to establish a cause of action or defense must prove facts showing that his case does not come within the exception. Where an exception or exemption appears in a different section or clause, however, the party relying on the statute need not prove that his case is not within the exception and therefore the burden of proof on the issue is upon the opposing party.

This practice has been criticized on the basis that legislators do not always enact statutes with burden of proof allocations in mind. Consequently, a burden may be placed on a party that might be inappropriate when one considers the legislature's statutory scheme as a whole.

D. Application of Allocation Rules

In many cases the application of the allocation rules discussed above consistently places the burden of proof on one party. Despite the exist-

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62. See infra text accompanying notes 66-69.
65. Cleary, supra note 54, at 9. Cleary illustrates his point with this Massachusetts statute:
   If any dog shall do any damage to either the body or property of any person, the owner . . . shall be liable for such damage, unless such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog.
   This statute was construed as imposing on a two year old plaintiff the burden of establishing that he was not teasing, tormenting or abusing the dog. Sullivan v. Ward, 304 Mass. 614, 24 N.E.2d 672 (1939) (cited in Cleary, supra note 54, at 9).
66. For example, in Arthur v. Unkart, 96 U.S. 118 (1877), the Supreme Court placed the burden of proof on the plaintiff, who was also observed to allege the affirmative of an issue that alleged a disfavored contention. Id. at 122.
ence of these easily resolved cases, cases do arise in which the application of the rules to a particular case lead to divergent results.\textsuperscript{67} While the possibility of such a conflict should have led to an ordering of rules so that one takes precedence over another, no such ordering has occurred. Many authorities, including Professor McCormick, conclude that there is no overriding principle governing the apportionment of the burdens of proof because the ultimate allocation depends on general considerations of fairness, convenience, and policy.\textsuperscript{68} While the authorities do not suggest that these considerations conflict with the desired goals of certainty and clarity, some uncertainty and confusion necessarily follow if an allocation of the burden of proof rests on not one but several principles, none of which have primacy over any other.\textsuperscript{69}

\section*{II. The Burden of Proof in Tax Cases}

The courts' seeming indifference to articulating a policy-based rationale for allocating the burden of proof appears to be merely a matter of historical curiosity. This serendipitous tendency has been curbed somewhat in cases involving the tax collector because of the importance of the burden of proof in tax collection. Before proceeding, a brief overview of the tax litigation procedure will aid understanding of the role played by the burden of proof.

\subsection*{A. Federal Tax Procedure: A Primer}

Tax trials can take place in three forums: the Claims Court, the federal district courts, and the Tax Court. A taxpayer effectively makes the decision regarding the choice of forum. A taxpayer can, therefore, engage in creative forum shopping based on a number of

\begin{thebibliography}{99}
\bibitem{} E.g., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 589-90 (1st Cir. 1979) (burden of proof on party making affirmative allegation but other factors may override),\textit{cert. denied}, 444 U.S. 866 (1980); Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir. 1947) (burden of proof not on plaintiff but on party with knowledge); Jackson v. Green, 700 S.W.2d 620, 621 (Tex. App. 1985) (burden of proof on party with particular knowledge not plaintiff).
\bibitem{} F. JAMES \& G. HAZARD, supra note 15, at 322; C. MCCORMICK,\textit{supra} note 15, at 952; E. MORGAN,\textit{Basic Problems of Evidence} 28 (1962); 9 J. WIGMORE,\textit{supra} note 15, at 291-92.
\bibitem{} The concept that the need for some play in the joints of the system serves to introduce necessary flexibility is accepted by most. F. JAMES \& G. HAZARD,\textit{supra} note 15, at 322; C. MCCORMICK,\textit{supra} note 15, at 952; E. MORGAN,\textit{supra} note 68, at 28; 9 J. WIGMORE,\textit{supra} note 15, at 291. For some, however, this flexibility may introduce into the dispute resolution system an unnecessary amount of judicial discretion which may influence the outcome.\textit{See} Kennedy,\textit{Freedom and Constraint in Adjudication: A Critical Phenomenology}, 36 J. LEGAL EDUC. 518 (1986).
\end{thebibliography}
considerations.  

A taxpayer against whom a federal tax deficiency is assessed can pursue one of two different courses of action. First, the taxpayer may contest the deficiency by filing a petition in the Tax Court without actually paying the tax asserted to be due. Alternatively, the taxpayer can pay the tax due and then elect to sue the United States for a refund in either the Claims Court or in the appropriate federal district court. As will be discussed in the following sections, the choice of forum will also affect the extent of the burden of proof and the risk of nonpersuasion.

70. These considerations may include the availability of a jury trial, the existence of favorable or unfavorable case law as precedent, the actual payment of the tax, and the degree of informality regarding pretrial procedures. M. GARBIS, P. JUNGHANS & S. STRUNTZ, FEDERAL TAX LITIGATION, ¶ 2.01-2.07, at 2-1 to 2-17 (1985); M. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 9.04[2], at 9-18 to 9-22 (1981); Whitfield & McCallum, Burden of Proof and Choice of Forum in Tax Litigation, 20 VAND. L. REV. 1179, 1179-82 (1967).

71. The term "deficiency" is a term of art and refers to the amount by which the correct tax imposed by the Internal Revenue Code exceeds the tax reported on the taxpayer's return. I.R.C. § 6211(a) (1980 & Supp. 1987); see M. SALTZMAN, supra note 70, ¶ 10.031, at 10-9 to 10-10.

72. The jurisdictional prerequisite for the Tax Court is the statutory notice of deficiency issued by the IRS. I.R.C. §§ 6212, 6213 (Supp. 1987); see I.R.C. § 7442 (Supp. 1987). Taxpayers are then given 90 days (150 days if the notice of deficiency is mailed outside the United States) within which to file a petition in the Tax Court for redetermination of the deficiency. I.R.C. § 6213(a) (Supp. 1987). The taxpayer can avoid payment because collection or levy of the tax is suspended during the 90 or 150 day period, or if Tax Court petition is filed within the specified period, until such time as the Tax Court decision becomes final. I.R.C. § 6213(a) (Supp. 1987). A Tax Court decision becomes final when the statutory time allowed for appeal of 90 days expires. I.R.C. §§ 7481, 7483 (Supp. 1987). A detailed discussion of the process is contained in Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987).

73. The federal district courts and the Claims Court are given concurrent jurisdiction over suits for refund. 28 U.S.C. § 1346(a)(1) (Supp. 1987); Triangle Corp. v. United States, 597 F. Supp. 507, 508 (D. Conn. 1984). A prior overpayment of tax also may give rise to a refund action. I.R.C. § 6402 (Supp. 1987). The suit for refund requires that a prior administrative claim be made for the refund. I.R.C. §§ 6502(a), 7422(a) (Supp. 1987). A taxpayer may well be forced into the Claims Court or the appropriate federal district court if the jurisdictional prerequisites to Tax Court jurisdiction are not met. This might occur when the taxpayer fails to file a timely Tax Court petition or if no statutory notice of deficiency has been issued by the IRS. Curry v. United States, 774 F.2d 852, 854-55 (7th Cir. 1983); I.R.C. § 6213(a) (Supp. 1987).

74. See infra text accompanying notes 75-113. Conversely, the extent of the burden of
B. The Taxpayer's Burden of Proof

Generally, the taxpayer has the burden of proof in any tax controversy, but the extent of the burden differs according to the forum. In Tax Court, the petitioner must demonstrate that the commissioner's assessment is incorrect. In a refund action, the taxpayer has a significantly higher burden—the taxpayer must not only prove the assessment is incorrect, but also must establish the amount to which she is entitled.

The development of this disparate treatment can be traced in part to the establishment of the Tax Court and its predecessor, the Board of Tax Appeals, as well as to the application of the common-law burden of proof allocation rules in the federal courts.

(1) Presumption of Correctness

As with civil cases in general, a number of factors have influenced the allocation of the burden of proof in tax cases. Before the allocation can be discussed meaningfully, an understanding of the preliminaries is required. A significant factor adding to the taxpayer’s burden in both Tax Court and refund suits is the presumption of correctness which attaches to the IRS Commissioner’s assessments or determinations of deficiency. The commissioner’s determinations of tax deficiencies are presumptively correct. Although the presumption is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position. If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the
A number of courts have interpreted the successful rebuttal of the commissioner’s presumption of correctness as shifting the burden of proof to the IRS. This suggestion is squarely inconsistent with the well-developed rules imposing the burden of proof on the taxpayer. One explanation for this seeming departure may be confusion regarding the two-fold definition of the burden of proof. While a successful rebuttal to the commissioner's presumption may shift the burden of production to the IRS, the burden of proof does not shift and remains with the taxpayer. (2) The Burden of Proof in the Tax Court

The Board of Tax Appeals, the immediate predecessor of the present-day Tax Court, was created pursuant to the Revenue Act of 1924. A significant motivation for the creation of the Board was to provide taxpayers a forum in which to contest an assessed tax liability without first having to pay the tax asserted to be due. The Revenue Act of 1924...
expressly left to the Board's discretion the promulgation of rules governing both practice and procedure. With this grant of authority the Board placed the burden of proof on the taxpayer in its rule 20. While the burden has remained with the taxpayer, the burden was eased by the Revenue Act of 1928, which shifted the burden of proof in fraud cases to the government.

The Tax Court succeeded the Board of Tax Appeals pursuant to the Revenue Act of 1942. Like its predecessor, the Tax Court was given wide latitude to make rules regarding trial procedures. In 1969, the Congress removed the Tax Court from the executive branch and the court now derives its authority from article I of the Constitution. The Tax Court shortly thereafter adopted the present rule placing the burden early tax litigation. In re Everett Knitting Works, 1 B.T.A. 5, 6 (1924). Moreover, the Board was quick to state that while it was a part of the executive branch, it remained independent from the then Internal Revenue Bureau. In re J.M. Lyon, 1 B.T.A. 378, 379 (1924).

89. See Notice III-30-19692, III-2 C.B. 425, 431 (1924). B.T.A. Rule 20 states, "Upon hearing of appeals the taxpayer shall open and close and the burden of proof shall be upon him."

Hearsings conducted prior to the Revenue Act of 1928 suggested that no one had seriously questioned the allocation of the burden of proof to the taxpayer. An Act to Reduce and Equalize Taxation, Provide Revenue, and for other Purposes, 1928: Hearings on Revenue Act of 1928, H.R. 1, Comm. on Finance, 70th Cong., 1st Sess. 24-25 (1928) [hereinafter Senate Hearings]. Opposition to the rule surfaced in 1925 in hearings before the House of Representatives. Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means, 69th Cong., 1st Sess. 877 (1925) [hereinafter House Hearings]. A witness representing the American Institute of Accountants favored shifting the burden to the government arguing that "there is no reason why the right of the taxpayer should be sacrificed to the convenience of the commissioner," and that placing the burden on the taxpayer was "contrary to the rule that obtains in any court outside of France." Id. Notwithstanding this argument, at the 1928 hearings satisfaction was expressed with the workability of the rule during its infancy. Senate Hearings, supra, at 523.


91. Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 957 (1942). The term "succeeded" is somewhat inapt in that the statute merely provided for a change of name from the Board of Tax Appeals to "The Tax Court of the United States." Id.
92. Revenue Act of 1942, ch. 619, § 504(b), 56 Stat. 798, 957 (1942) provided that the powers, duties, rights, and privileges of the Tax Court were to be the same as existing by law provided for the Board of Tax Appeals. One case suggested that the Board of Tax Appeals exceeded its authority in enacting the general burden of proof rule. In Budd v. Commissioner, 43 F.2d 509 (3d Cir. 1930), the Third Circuit noted that the board only had legislative grant of authority to promulgate rules of practice and was without power to prescribe rules of evidence. Id. Although the Tax Court's authority has not been enlarged or otherwise changed, the Budd case apparently has not been followed. See I.R.C. § 7453 (1986) (describing Tax Court's authority to promulgate rules of practice and procedure other than rules of evidence).
of proof on taxpayers. As currently in effect, Tax Court Rule 142(a) reads in pertinent part: "The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court. . . ." The rule's allocation of the burden of proof to the taxpayer has occasionally been challenged on constitutional grounds. For example, in Rockwell v. Commissioner, the taxpayer argued that it was a denial of due process for the Tax Court to force him to bear the burden of proof. The Ninth Circuit rejected the taxpayer's claim as "frivolous," observing that Congress could condition the taxpayer's right to contest tax assessments almost without limitation. The court expressly noted that if the allocation of the burden of proof to the taxpayer was constitutionally suspect, the United States Supreme Court would have long ago overturned the practice.

(3) Refund Suits

Taxpayers' right to obtain refunds of federal taxes in federal courts originated with suits against tax collectors. The United States Supreme Court in 1836 "recognized the existence of a right of action against a Collector of Customs for a refund of duties illegally assessed and paid under protest." This right of action was based on the common-law count for money had and received. Suits against collectors initiated the development of an arcane tax refund procedure, which few understood and often caused taxpayers difficulty when the wrong collector was sued. Only with the creation of the Court of Claims in 1855 did re-

94. The United States Tax Court adopted rules of practice and procedure which became effective January 1, 1974. Rule 142(a) is derived from former Rule 32 which in turn was preceded by Rule 20. 60 T.C. 1057, 1133 (1973).
95. 60 T.C. 1057, 1133 (1973).
97. Id.
98. Id. The constitutionality of allocating the burden of proof to the taxpayer appears to remain well settled. May v. Commissioner, 752 F.2d 1301, 1304 n.2 (8th Cir. 1985); McCoy v. Commissioner, 696 F.2d 1234, 1236-37 (9th Cir. 1983).
fund suits directly against the United States first became theoretically possible.\textsuperscript{103} The theory did not find favor with the Supreme Court, which in 1868 held that cases arising under the revenue laws were not within the jurisdiction of the Court of Claims.\textsuperscript{104} The Supreme Court later held the Court of Claims had jurisdiction over claims for tax refunds based, not on the earlier statute, but on legislation enacted in 1866.\textsuperscript{105} Not until 1887 were refund suits allowed in the district courts.\textsuperscript{106}

The common-law heritage of the refund suit explains the origin of the rule allocating the burden of proof to the taxpayer. As noted above, the allocation of the burden of proof in tax refund cases arose from judicial reliance on actions involving the common-law count for money had and received.\textsuperscript{107} At common law, a right of action for \textit{indebitatus assumpsit} allowed a plaintiff to allege that a defendant was indebted to her for a certain sum.\textsuperscript{108} \textit{Indebitatus assumpsit} in turn encompassed the common-law count for money had and received under which an action would lie for money received (as opposed to services or goods received) by the defendant for the use of the plaintiff.\textsuperscript{109}

The idea that the statutory basis for tax refund suits was predicated on the same principles underlying actions in \textit{assumpsit} for money had and received found early expression in tax refund cases.\textsuperscript{110} Because the

\textsuperscript{103} The Act established a Court of Claims to hear claims founded upon any law of Congress, regulation of the executive branch, or upon any contract with the United States. If the court reached a decision favorable to a claimant, both its decision and a bill were submitted to Congress for approval. 2 W. Cowen, P. Nichols, Jr. & M. Bennett, The United States Court of Claims, A History 1855-1978, at 15-18 (1978).

\textsuperscript{104} Nichols v. United States, 74 U.S. (7 Wall.) 122, 129-31 (1868); see 2 W. Cowen, P. Nichols, Jr. & M. Bennett, supra note 103, at 43-44.


\textsuperscript{106} Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. The Act gave the United States District Courts concurrent jurisdiction with the Court of Claims on any claim not exceeding $1,000.


\textsuperscript{109} B. Shipman, supra note 108, at 162-64; J. Koffler & A. Reppy, supra note 108, at 351-53.

common law traditionally placed the burden of proof in such cases on the person making a claim of funds held by another, placing the burden of proof on the taxpayer was a natural consequence. A notion implicit in such allocation is that the taxpayer has voluntarily paid the tax to the government—accordingly in a refund suit the taxpayer should bear the burden of explaining her seemingly inconsistent conduct in requesting the return of the voluntarily paid sums.

As it developed, the burden of proof placed on the taxpayer in refund suits took on a two-part obligation. First, the taxpayer was required to show that an assessment was wrong and second, based on the common-law count for money had and received, the taxpayer was required to show the correct amount to which she was entitled. This formulation of the burden of proof obligation of the taxpayer now is the general rule that governs all refund suits.

(4) Tax Collection Suits

Another possible action arises from the Internal Revenue Code itself. A taxpayer may choose to do nothing at all in response to an IRS notice of deficiency. In such cases, the government can bring an action to enforce the payment of the tax in a so-called "tax collection suit." While the United States Supreme Court has not spoken directly to the burden of proof in these tax collection cases, the Court has suggested that the policy behind the tax collection suits and its cousin, the taxpayer's tax refund suit, are the same. This result is appropriate. First, nothing in the nature of the tax collection suits mandates different treatment.

114. I.R.C. §§ 7401, 7403 (West 1987); M. Saltzman, supra note 70, at ¶¶ 14-45 to 14-51.
115. United States v. Janis, 428 U.S. 433, 440 (1976). But see Bar L Ranch, Inc. v. Phinney, 426 F.2d 995, 998-99 (5th Cir. 1970). In the Bar L Ranch case, the Fifth Circuit concluded that the taxpayer's inaction in such cases warranted different treatment, holding that the taxpayer need only show that an assessment is arbitrary and that the burden of proof would then be on the government to show the existence and the amount of any deficiency. Id. The United States Supreme Court in Janis did not reach this conclusion because it held that an assessment founded upon evidence excluded on constitutional grounds from a state criminal trial was nonetheless competent in a civil tax case. Therefore, according to the Janis Court, the assessment was not arbitrary and was not within the Taylor rule. Janis, 428 U.S. at 441-42.
While the United States is the initiator of the action, the taxpayer's inaction or failure to respond at all to the notice of the deficiency should not accord the taxpayer better treatment than one who elects to pay the tax and sues for refund. Second, if the goal of the tax collection system is efficiency and fairness, placing the burden of proof on the taxpayer advances this goal.

C. Restrictions on the Burden of Proof Rule

Despite the wide reach of the general burden of proof rule, there exist a number of situations in which the commissioner has the burden of proof on certain issues in the Tax Court and in suits for refunds. The discussion that follows describes the major areas in which the IRS bears the burden of proof.116

(1) Cases Involving Fraud

Section 7454 of the Internal Revenue Code provides that in any proceeding, the commissioner must prove issues involving fraud committed by a petitioner.117 In addition to this statutory burden of proof provision, the Tax Court Rules also place the burden of proof on the commissioner on the issue of fraud.118

Because section 7454 refers not to "taxpayers" but specifically to "petitioners," it may be tempting to restrict its application to cases involving taxpayers' Tax Court litigation. Despite this possible and reasonable interpretation restricting the reach of the statute, the courts either have ignored the distinction or reached the same result by relying on the common law without reference to the statute.119 The few courts that have considered the distinction conclude that the policy behind the statute (i.e., that the party alleging fraud should bear the burden of proof)

116. There are a number of other situations which arise under the revenue laws in which the burden of proof is allocated to the IRS. E.g., Traxler v. Commissioner, 61 T.C. 97, 100 (1973), modified, 63 T.C. 534 (1975) (commissioner bears burden of proof of mailing notices of deficiency); I.R.C. § 6703(a) (1987) (commissioner bears burden of proof for certain penalties).
118. Tax Court Rule 142(b), 60 T.C. 1057, 1133 (1973). The commissioner's burden of proof extends only to fraud issues and does not include other issues which may be raised in a particular case. Howell v. Commissioner, 10 T.C. 859, 865 (1948), aff'd, 175 F.2d 240 (6th Cir. 1949).
119. Many cases simply rely on the common law to place the burden of proof on the United States. E.g., Considine v. United States, 683 F.2d 1285, 1286 n.1 (9th Cir. 1985); Loftin & Woodward Inc. v. United States, 577 F.2d 1206, 1236 (5th Cir. 1978); Maroos v. Smyth, 187 F.2d 228, 232 (9th Cir. 1951); Duffin v. Lucas, 55 F.2d 786, 798 (6th Cir. 1932). At least one case has relied on the statute without appreciation of the ambiguous application. Coats v. United States, 258 F. Supp. 1, 5 (E.D. Tex. 1966).
does not change by reason of the fact that the case lies not in the Tax Court but involves a suit for refund against the United States.\textsuperscript{120}

A related provision requires that the IRS bear the burden of proof with respect to whether a payment made by a taxpayer constitutes an illegal bribe or kickback.\textsuperscript{121} The Internal Revenue Code expressly makes such payment not deductible even if made in connection with the active conduct of a trade or business.\textsuperscript{122}

\textit{(2) Cases Involving Wrongdoing by Foundation Managers}

The commissioner bears the burden of proof in matters alleging wrongdoing by foundation managers.\textsuperscript{123} The Tax Court has a similar rule.\textsuperscript{124} The conduct involved in these cases sounds in fraud and results in special sanctions. For example, the provisions governing private foundations in the Internal Revenue Code impose a series of special taxes on each act of "self-dealing" between a "disqualified person" and a private foundation.\textsuperscript{125} Acts of self-dealing under the Code include sales, exchanges or leasing transactions between disqualified persons and a private foundation as well as the transfer of assets to a disqualified person from a private foundation.\textsuperscript{126} The term "disqualified person" (generally defined as officers, directors, trustees, or other persons of authority with respect to a given foundation) includes foundation managers and other persons or entities having substantial interests in a private foundation.\textsuperscript{127} Thus, the charter of an airplane by a foundation manager or other disqualified person is considered by the IRS to be a prohibited self-dealing.\textsuperscript{128} Similarly, the possession by a foundation manager or other disqualified person of paintings owned by a private foundation is a prohibited act of self-dealing to which the special tax may apply.\textsuperscript{129}

\textsuperscript{120} Paddock v. United States, 280 F.2d 563, 567-68 (2d Cir. 1960) (Friendly, J.); Carter v. Cambell, 264 F.2d 930, 937-38 (5th Cir. 1959); Trainer v. United States, 145 F. Supp. 786, 787 (E.D. Pa. 1956); see Lee v. United States, 466 F.2d 11, 14 (5th Cir. 1972).

\textsuperscript{121} I.R.C. § 162(c) (1987). Included are payments made unlawful under the Foreign Corrupt Practices Act, payments which subject the payor to criminal sanction or loss of license, and payments which result in remuneration under the Social Security Medicare and Medicaid programs. \textit{Id}.

\textsuperscript{122} \textit{Id}.

\textsuperscript{123} \textit{Id} § 7454(b).

\textsuperscript{124} Tax Court Rule 142(c), 60 T.C. 1057, 1133 (1973).

\textsuperscript{125} I.R.C. § 4941 (a) (1986).

\textsuperscript{126} \textit{Id} § 4941 (d).

\textsuperscript{127} \textit{Id} §§ 4946 (a), 4946 (b).


\textsuperscript{129} Rev. Rul. 74-600, 1974-2 C.B. 385.
(3) **Affirmative Defenses and Counterclaims**

In the Tax Court, the IRS bears the burden of proof with respect to affirmative defenses, new matters asserted, or increases in deficiencies it might assert.\(^{130}\) Similarly, the United States bears the burden of proof on all affirmative defenses raised in suits for refund.\(^{131}\) The decisions of the courts of appeals conflict regarding the burden of proof on new issues raised in suits for refund. One line of cases holds that the burden of proof remains with the taxpayer, reasoning that if a new matter presents undue hardship to the taxpayer, the trial court can elect to continue the case.\(^{132}\) The other line of cases holds that the burden of proof with respect to new matters lies with the government, although the courts do not advance a theory on the point.\(^{133}\)

In suits for refund in the district courts, the burden of proof remains with the taxpayer on counterclaims asserted by the government.\(^{134}\) This inconsistency may be partially explained by the common practice of seeking refunds for divisible taxes (for example, excise taxes) by paying only a small part of the entire tax liability while still satisfying the full-payment rule. In such cases, the United States is likely to counterclaim for the part of the divisible taxes not paid. The courts have held, and the applicable statute reflects the fact, that in such cases the burden of proof rightfully remains with the taxpayer under the theory that the burden should not be affected by the taxpayer’s procedural ploy.\(^{135}\)

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130. Tax Court Rule 142(a), 60 T.C. 1057, 1133 (1973) provides in pertinent part: “The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in his answer, it shall be upon the respondent.” For a dated but good discussion of the issues involving the definition of new matters, see Piper & Jerge, supra note 85, at 305-11; see also Whitfield & McCallum, supra note 70, at 1183-87 (assessing impact of Rule 32 of the Tax Court Rules of Practice).

131. Crosley Corp. v. United States, 229 F.2d 376, 381 (6th Cir. 1956); Powell v. United States, 123 F.2d 472, 475 (9th Cir. 1941).

132. King v. United States, 641 F.2d 253, 259 (5th Cir. 1981); see Roybark v. United States, 218 F.2d 164, 165-66 (9th Cir. 1954).


135. Lesser v. United States, 368 F.2d 306, 310 (2d Cir. 1966); M. Garbis, P. Junghans & S. Struntz, supra note 70, at 17-27 to 17-29 (1985). There is some conflict on this point and no reconciliation apparently has occurred. Id. at 17-29; Whitfield & McCallum, supra note 70, at 1183-87. Some courts hold that the IRS maintains the burden of proof even in counterclaims. See United States v. Molitor, 337 F.2d 917, 922 (9th Cir. 1964). Even these authorities still recognize that the commissioner’s determination is presumptively correct. Id.
(4) Transferee Liability

The Internal Revenue Code imposes liability on a certain class of nontaxpayers broadly described as "transferees." Transferees may include persons who receive property as donees, shareholders of a dissolved corporation, or assignees of an insolvent person.¹³⁶ Both the Internal Revenue Code and the Tax Court Rules provide that the IRS bears the burden of proof in cases involving transferees.¹³⁷ The burden only extends, however, to the issue of whether the transferee is liable as a transferee and not whether the original taxpayer is liable for the tax.¹³⁸

(5) Accumulated Earnings Tax

The IRS bears the burden of proof in the Tax Court with respect to the reasonableness of accumulations of income subject to the accumulated earnings tax.¹³⁹ In such situations the Internal Revenue Code requires notice to a taxpayer that the accumulated earnings tax penalty might apply. If notice is not given, the IRS bears the burden of proof.¹⁴⁰ Even with notice, the statute provides a mechanism whereby the taxpayer can return the burden of proof to the IRS.¹⁴¹

III. Allocation of the Burden of Proof: Rationale

This section will discuss the rationale behind the current tax system's allocation of the burden of proof both in terms of the general prin-
ciples identified in section I and in terms of the unique requirements of our voluntary-reporting system of taxation. Since the Tax Court developed and operates independently of the district courts and the Court of Claims, this inquiry into why the taxpayer bears the burden of proof, however, is actually two separate inquiries: First, why the plaintiff taxpayer in refund suits bears the burden; and second, why the Tax Court places the burden on the taxpayer petitioner.

An additional point to be discussed is why the burden of proof, with the exception of the restrictions discussed above, is allocated by the common law or, in the case of the Tax Court, by Tax Court Rule 142. The fact that the Code-dominated field of taxation should depend on the common law for a keystone of its construction is counter-intuitive. This is especially true because the exceptions to the general rule allocating the burden of proof to the taxpayer are legislatively created, while the general rule itself is not codified.

A. Common-Law Foundation

The authority for placing the burden of proof on the taxpayer in refund suits lies in case law and tradition. The cases that discuss the burden of proof cite the common-law heritage of refund actions as a major reason why the taxpayer bears the burden of proof.\textsuperscript{142} According to these cases, placing the burden on taxpayers is a natural consequence of this heritage since historically the action to recover on a claim for a refund is in the nature of an action for money had and received.\textsuperscript{143} As described in the previous section, the common-law count for money had and received alleged an indebtedness to the plaintiff for money had and received by the defendant to and for the use of the plaintiff.\textsuperscript{144} Thus, it was incumbent upon the claimant to show that the government had money which belonged to him.\textsuperscript{145} The application of the common-law rationale for the burden of proof then should be consistent with the ra-

\textsuperscript{142} Stone v. White, 301 U.S. 532, 534 (1937). In David v. Phinney, 350 F.2d 371 (5th Cir. 1965), the Fifth Circuit held that:
Since the action for refund of taxes is in the nature of a common law action for money had and received and is governed by equitable principles, the burden of proof is upon the taxpayer to prove not only that the determination of the tax was wrong, but to produce evidence from which another and proper determination could be made.

\textsuperscript{143} Id. at 376 (citing 10 MERTENS LAW OF FEDERAL INCOME TAXATION 58A.35. (1965)).


\textsuperscript{145} 15 THE ENCYCLOPEDIA OF PLEADING AND PRACTICE, 53 (1899).
tionale in allocating the burden of proof to taxpayers. This thesis is demonstrated in the following sections.

(1) The Affirmative of Tax Issues

Despite the dubious underpinnings of the principle that the party who bears the affirmative of an issue bears the burden of proof, the burden of proof in refund cases demonstrates a similar thrust. For example, in 1877 the Supreme Court ruled that the burden of proof is on the party asserting the affirmative of an issue in a case brought by a claimant for refund of paid federal import duties.

In 1934, Judge Learned Hand upheld a taxpayer's challenge of an arbitrary assessment, noting that the presumption of correctness does not extend beyond the assessment. In Judge Hand's view "[a]ny other result would invert the ordinary rules of procedure by imposing a burden of establishing a negative upon the [taxpayer]." Thus Judge Hand not only followed the common-law dictum disfavoring the imposition of proving a negative, but he also implicitly accepted application of common-law principles to tax cases.

Application of the common-law rule in tax refund cases is more difficult because of the taxpayer's two-part burden of proof. The taxpayer's obligation to show the correct amount of the refund to which she is entitled easily fits the common-law concept of an affirmative issue. The taxpayer who seeks to establish that a certain sum should be returned by the sovereign is asserting a positive proposition—thus allocation of the burden of proof to that party is appropriate or at least consistent with the common law.

On the other hand, the taxpayer's obligation to show that the government's assessment is arbitrary or erroneous more nearly requires the establishment of a negative proposition. The court's response to this apparent dilemma has been to focus not on the wrongfulness of the government's conduct but rather on the taxpayer's obligation to establish the existence of overpayment. This consequence remains consistent with the common-law allocation of the burden of proof based not on a single factor but on a combination of factors—none of which predominate.

In this case, the allocation of the burden of proof of a negative is out-

146. See supra text accompanying notes 34-42.
149. See supra text accompanying notes 107-13.
151. See supra text accompanying notes 66-69.
weighed by the allocation of the burden of proof on the basis of a disfa-
vored contention—the illegality of government conduct. These
principles have been followed in a number of cases involving tax refund
suits.

As with the common-law rules in nontax cases, the relative weight
to be given the factors considered in determining the allocation of the
burden of proof as to a particular issue has not developed into an ordered
scheme. The few cases that even consider factors that might in any sense
conflict or lead to divergent results generally favor the government and
generally contain no discussion of either the rationale of favoring one
over another or the weight to be accorded a particular factor.

It may seem to the casual observer that because all tax cases are
procedurally similar, it would be reasonable to expect the development of
an order of priority regarding the weight to be accorded the common-law
factors influencing the burden of proof in tax cases. In one sense, how-
ever, an ordering of factors has not been necessary because application of
the factors in tax cases leads to similar results. As a general proposition,
the factors discussed above all lead to the conclusion that the taxpayer
bears the burden of proof as a general rule. The only exception to that
rule exists with respect to government allegations of fraud or other
wrongdoing. Thus, the only ordering of factors that emerges is predomi-
nance of the disfavored contention rule.

(2) The Taxpayer as Plaintiff

Many cases suggest that the taxpayer should bear the burden of
proof simply because the taxpayer is the plaintiff. In Rockwell v. Com-
mmissioner, the Ninth Circuit took pains to note that “in most litigation,
from time immemorial, the burden of proof—i.e., the burden of persua-
sion—is on the plaintiff.”

Placing the burden of proof on the taxpayer in refund actions is con-
istent with common-law principles because the taxpayer is the initiator

152. E.g., Arthur v. Unkart, 96 U.S. 118, 122 (1877) (burden on claimant to show im-
proper government collection of import duty).
153. Id. at 122; Wright v. United States, 249 F. Supp. 508, 514 (D. Nev. 1965).
154. E.g., Wright v. United States, 249 F. Supp. 508, 514 (D. Nev. 1965) (affirmative of
issues takes precedence over allegation of illegal conduct).
101, 105 (1927); Kurio v. United States, 429 F. Supp. 42, 49 (S.D. Tex. 1970); Wright v.
156. Rockwell v. Commissioner, 512 F.2d 882, 887 (9th Cir.), cert. denied, 423 U.S. 1015
(1975).
of the action. In a tax refund case, the government is content to do nothing—the fisc has the money at issue in its coffers. The taxpayer is the party who desires to alter the status quo by seeking to establish the basis for a judgement in her favor. Thus, according to the common law, the taxpayer rightly should bear the burden of proof.

(3) Least-Likely Scenario

No tax refund case has expressly dealt with the common-law rationale allocating the burden of proof to the party alleging the least-likely scenario. In the majority of cases, the government would be unlikely to fabricate an assessment of taxes due. Thus, the assessment is a likely, if not always reasonable, picture of the taxpayer's obligation. As such, the taxpayer's allegation of overpayment is the least-likely scenario and therefore allocation of the burden of proof to the taxpayer is proper. To be sure, speculation regarding the consistency of the common law in this area does not, without case support, necessarily advance the thesis.

(4) Disfavored Contention

The statutory provisions imposing the burden of proof on the IRS neatly fall within the common-law scheme. Under common law, the party alleging a disfavored contention bears the burden of proof. The Supreme Court has recognized that a taxpayer who sues for a refund of sums paid to the United States effectively is alleging illegal conduct by the government and that as a result the taxpayer should bear the burden of proof. On the other hand, wherever the IRS bears the burden of proof, the alleged taxpayer misconduct can be in some sense characterized as wrongful or morally reprehensible. As such, the allocation of the burden of proof to the IRS is consistent with the common-law allocation of the burden of proof.

Similarly, if the collection of revenue is viewed as a favored or positive aspiration of government policy, claiming funds in the government's possession or resisting the commissioner's claim of nonpayment can be

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157. See supra text accompanying notes 43-51.
158. See Taylor, 293 U.S. at 514.
159. Lest an overly optimistic impression of government conduct be created, see id. (government assessment erroneous and arbitrary); Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987) (assessment based on wrong taxpayer's tax return).
160. See supra notes 52-54 and accompanying text.
162. See supra text accompanying notes 117-29, 139-41 For example, the IRS bears the burden in cases alleging fraud by the taxpayer, illegal payments made by the taxpayer, wrongful acts by foundation managers, and penalties incurred by reason of unreasonably accumulating corporate income. Id.
seen as a disfavored contention. Allocating the burden of proof to the taxpayer as a general proposition then is also consistent with this common-law allocation of the burden of proof.

The statutory provisions regarding the government's burden of proof in cases involving fraud neatly illustrate the application of fundamental burden of proof theory. For example, the premise of the burden of proof is that the party upon whom the burden devolves must lose if the burden is not met. It follows that in a case that involves both a deficiency and a civil fraud penalty, and in which neither the taxpayer or the government are able to meet their respective burdens of proof, the taxpayer would lose on the issue of the tax deficiency liability and yet the government likewise would lose on the issue of imposing fraud penalties. In *Carter v. Campbell*, the Fifth Circuit reached precisely such a result.\(^\text{163}\) The *Campbell* court followed the common-law approach—in other words, the price to be paid for the failure to meet one's burden of proof is that the case, or at least the issue at stake, must be lost to the party bearing the burden of proof.\(^\text{164}\) More specifically, the court noted that the failure of the taxpayer to meet the burden of proof with respect to the deficiency did not bear on and did not lessen the government's burden of proof on the issue of fraud.\(^\text{165}\)

Despite this illustration, there is some suggestion that the government's burden of proof in cases involving fraud flows not from the common-law allocation of the burden to the party alleging a disfavored contention but from the rule requiring a party to prove affirmative issues.\(^\text{166}\) The thrust of this line of authority is that it would be unfair to require the taxpayer to prove a negative, the absence of fraud, in such cases.\(^\text{167}\) Thus, the allocation of the burden of proof to the IRS in cases involving fraud is consistent with either of these common-law allocation rules.

(5) Evidence Uniquely Within the Taxpayer's Knowledge

Under our system of self-reporting of tax liability, the taxpayer ini-
tially decides the extent and amount of her statutory obligation to pay tax. The taxpayer in such cases generally possesses the objective evidence. Certainly, with the exception of filed returns and information provided by the taxpayer, the IRS is in a poor position to establish an affirmative case. The common-law allocation of the burden of proof to the party in possession of the evidence is clearly appropriate.\textsuperscript{168} This idea has been uniformly supported in tax cases.\textsuperscript{169}

If, as noted above, the burden of proof exists as a matter of adjudicatory necessity to provide guidance, reduce confusion, and add structure, the allocation of the burden of proof to the party in possession of relevant knowledge surely meets this goal. While the cases unfortunately do not make this point clear, this aspect of allocation of the burden of proof is implicit in the cases.\textsuperscript{170} The IRS has emphasized this matter in opposing any change to the burden of proof rules.\textsuperscript{171} By placing the burden of proof on the party in possession of relevant information, the possibility of destruction of adverse information is minimized and time is saved by making that party responsible for culling through its own records to meet its burden. Placing the burden of proof on the government in tax cases would detract from these goals. Taxpayers might be tempted to destroy adverse relevant evidence and collection costs would increase because of the IRS' new difficulty in finding relevant information.

(6) Allocation Based on Statute

The Internal Revenue Code provides scant support of the allocation of the burden of proof to the taxpayer. Despite the existence and apparently well-settled nature of the general rule, nowhere does the rule appear in the Code itself. Only indirectly does the burden of proof rule find

\textsuperscript{168} See supra text accompanying notes 58-61.

\textsuperscript{169} E.g., Campbell v. United States, 365 U.S 85, 96 (1961) (ordinary burden is not placed on a litigant to prove fact only within knowledge of her adversary); United States v. Rexach, 482 F.2d 10, 16 (1st Cir. 1973) (burden on taxpayer based, \textit{inter alia}, on "likelihood that taxpayer will have access to the relevant information"), \textit{cert. denied}, 414 U.S. 1039 (1975); Llorente v. Commissioner, 74 T.C. 260, 274 n.3 (1980) (Tannenwald, J., concurring) (quoting Rexach, 482 F.2d at 16).

\textsuperscript{170} Weise v. Commissioner, 93 F.2d 921, 923 (8th Cir. 1938) (burden of proof on taxpayer where facts and evidence peculiarly within his control and knowledge); Taylor v. Commissioner, 76 F.2d 904, 906 (2d Cir. 1935) (A. Hand, J.) (taxpayer has burden because of better chances to find relevant evidence); Carrano v. Commissioner, 70 F.2d 319, 321 (2d Cir. 1934) (L. Hand, J.) (taxpayer is justly charged with the burden of proof on issues as to which he has access to evidence).

\textsuperscript{171} Taxpayers' Bill of Rights: Hearings before the Subcommittee on Private Retirement Plans and Oversight of the Internal Revenue Service of the Committee on Finance, 100th Cong., 1st Sess. 242 (1987) (taxpayer in best position to present evidence while IRS not in a position to know relevant facts); \textit{House hearings}, supra note 89, at 908-09.
legislative approval. An oblique reference to the general rule is contained in the legislative history of section 7422(e) of the Code. Section 7422(e) governs the procedure if the federal district court and the Tax Court have concurrent jurisdiction over the same case. In such an event, the section provides that the burden of proof as to government counterclaims is on the taxpayer if jurisdiction is retained by the district court. The legislative history mentions in a single sentence that the intent of the statute is to ensure that the taxpayer will have the same burden of proof in the district court as would have been the case had the action been pursued in the Tax Court.172 Because the Tax Court by its own rule allocates the burden of proof to the taxpayer, the Congress by its reference at least indicates its knowledge of the general rule.173

The legislative history relating to the Code provisions that expressly allocate the burden of proof to the government contain little or no discussion as to the rationale for these exceptions to the general rule. The enactments are based solely on the penal nature of particular instances in which the burden of proof is borne by the government and do not explicitly recognize the existence of the broader rule allocating the burden of proof to the taxpayer.174 At the same time, congressional recognition of the propriety of placing the burden of proof on the party alleging a disfavored position (i.e., the penal or quasi-criminal nature of these provisions) is consistent with the general common-law approach.

B. Tax Court Allocation of the Burden of Proof

The adoption of the taxpayer burden of proof rules in the Tax Court also reflect a common-law derivation. In 1925, during hearings before the House of Representatives, one of the original appointees of the Board of Tax Appeals, James S. Ivins, explained the Board's rationale in adopting a rule imposing the burden of proof on taxpayers. First, Ivins stated that the Board of Tax Appeals was following the practice of all courts since the beginning of civilization: the moving party, the plaintiff or the initiator of an action, must take the burden of going forward.175 Second,
Ivins noted that if the Board did not have such a rule, the commissioner could not sustain this burden of proof because the taxpayer possessed the relevant evidence. While the Tax Court has never explained its allocation of the burden of proof except through reliance on rule 142, the court has suggested that the rule is based in part on the taxpayer's unique access to knowledge relevant to any given case.

A court reviewing a Tax Court decision must also place the burden of proof on taxpayers in compliance with Tax Court Rule 142, notwithstanding the absence of statutory guidelines or the existence of the common-law allocation rules. This situation does not pose a significant problem since the promulgation of rule 142 harmonizes with the common-law tradition regarding the allocation of the burden of proof. Indeed, the Second Circuit in *Golbert v. Renegotiation Board* upheld the rule, noting that unless the Tax Court's promulgation of the rule was arbitrary or capricious, the court must abide by it. According to the *Golbert* court, "[t]he Congressional history of the Tax Court remedy is in full accord with the view that Congress intended the Tax Court to provide for rules governing the burden of proof. . . . The determination that the burden is upon the petitioner is not contrary to Congressional intent."

C. Unique Tax Allocation Rationale

As expected, there also exists a common rationale for allocating the burden of proof in both refund and Tax Court suits that reflects the unique nature of the tax system. These tax justifications necessarily are interrelated to some extent and none is independent of the others. Yet each deserves separate consideration. The following sections discuss the presumption of correctness, the government's need for revenue, and the taxpayer's possession of evidence as independent justifications for the current allocation of the burden of proof.

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176. *House Hearings, supra* note 89, at 908-09. Interestingly, the hearings considered the IRS use of the power of subpoena to obtain relevant evidence to satisfy its burden of proof if the taxpayer were relieved of the burden. Ivins' response is telling. He stated that use of the subpoena power would not work because "there are a number of taxpayers who do not keep any comprehensible books. They keep nothing but a checkbook and in that checkbook there may be reflected deposits in the banks which amount to two or three times the taxpayer's income." *Id.*

177. *Church of Scientology v. Commissioner*, 83 T.C. 381, 468 (1984); see *Goodmon v. Commissioner*, 761 F.2d 1522, 1524 (11th Cir. 1985); *Rager v. Commissioner*, 775 F.2d 1081, 1083 (9th Cir. 1985); *Hawkins v. Commissioner*, 713 F.2d 347, 353 (8th Cir. 1983); *S. & H., Inc. v. Commissioner*, 78 T.C. 234, 242 (1982).

178. 254 F.2d 416 (2d Cir. 1958).

179. *Id.* at 417.
burden of proof serves laudable goals and that, given judicial oversight of
tax cases, little fundamental fairness is sacrificed.

(3) Unique Knowledge: The Taxpayer's Possession of Evidence

The most significant problem that arises with respect to shifting the
burden of proof to the IRS is the practical consideration that the com-
misssioner could not sustain the burden, because he does not possess the
needed evidence. Under the system of self-reporting tax liability, the tax-
payer possesses the evidence relevant to the determination of tax liability.193 It simply is fair to place the burden of persuasion on the taxpayer,
given that he knows the facts relating to his liability, because the com-
misssioner must rely on circumstantial evidence, most of it coming from
the taxpayer and the taxpayer's records.194

To be fair it should be noted that the proposals to shift the burden of
proof to the IRS provide that if the taxpayer is uniquely in the possession
of relevant information, the taxpayer must present a minimum amount of
information necessary to support his position.195 This safety valve seems
to place the burden of production on the taxpayer without relieving the
government of the overall burden of proof. The provision has two funda-
mental flaws. First, the stated exception will apply in nearly all tax cases
because under our self-reporting system, it is the taxpayer who is gener-
ally in unique possession of evidence. Second, because the burden of pro-
duction works only to place a matter within a jury's competence without
shifting the burden of persuasion, the difficulties with the new rule dis-
cussed below will remain.

IV. An Appraisal of the Proposed Change in Burden of Proof
in Tax Cases

It has been observed that, by allocating the burden of proof, courts
generate "stop gap rules for adjudicating imperfectly clarified dis-
putes."196 While the development of the common-law allocation rules in
tax cases can hardly be characterized as a stop gap approach, the obser-
vation has a certain amount of validity in tax cases. The Internal Reve-
nue Code is silent as to the taxpayer's possession of the general burden of
proof, thus, making the application of the common-law allocation princi-
ples necessary. The omission is glaring since the Code contains a number

193. House Hearings, supra note 89, at 908-09.
194. Id. at 887.
195. See supra note 12.
196. Fletcher, Two Kind of Legal Rules: A Comparative Study of Burden of Persuasion
of specific provisions allocating the burden of proof to the IRS in certain narrow circumstances.\textsuperscript{197} Codification of the exceptions without codification of the general rule seems at first glance an oversight of monumental proportion. A reasonable speculation as to the source of the omission may be the unpopularity of both the tax and the tax collector.\textsuperscript{198} One can scarcely imagine any legislator who desires reelection sponsoring legislation imposing on her constituents a burden that might be considered, at best, an unnecessary coddling of the despised tax collector.\textsuperscript{199}

\begin{itemize}
\item[\textsuperscript{197}] See supra text accompanying notes 116-41.
\item[\textsuperscript{198}] Examples of the tax collector's unpopularity abound. For example, according to legend, Lady Godiva's notorious ride was taken to fulfill a condition upon which her husband, Leofric Earl of Mercia, had promised to relieve his subjects of a tax. \textsc{Webster's New Collegiate Dictionary} 493 (1973) (Godiva defined). The Bible, in a less than flattering context, lumps in the same category tax collectors with sinners and those who disobey the law. Matthew 9:9 to 9:13. Even Henry VIII experienced difficulty with tax collectors. During his reign, Henry VIII caused to be enacted a statute imposing penalties on tax collectors who failed to turn over to him taxes collected from his subjects. An Act for Collectors and Receivers, 1541, 34 & 35, Hen. VIII, ch. 2. See J. Adams, \textit{Secrets of the Tax Revolt} (1984); R. Haws, A Brief History of American Resistance to Taxation, Income Tax Compliance 113 (1983).
\item[\textsuperscript{199}] The IRS's fantasy in this regard might be a significant amendment to I.R.C. § 7454 as follows:

Sec. 7454. Burden of Proof

(a) In General.—Except as otherwise provided in this section, in any suit or proceeding involving a deficiency, or the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, the burden of proof in such suit or proceeding shall be on the taxpayer.

(b) Fraud.—In any suit or proceeding involving the issue whether the taxpayer or petitioner has been guilty of fraud with the intent to evade tax, the burden of proof shall be upon the Secretary.

(c) Foundation Managers.—In any proceeding involving the issue whether a foundation manager (as defined in § 4946(b)) has "knowingly" participated in an act of self-dealing (within the meaning of § 4941), participated in an investment which jeopardizes the carrying out of exempt purposes (within the meaning of § 4944), or agreed to the making of a taxable expenditure (within the meaning of § 4945), or whether the trustee of a trust described in § 501(c)(21) has "knowingly" participated in an act of self-dealing (within the meaning of § 4951) or agreed to the making of a taxable expenditure (within the meaning of § 4952), the burden of proof in respect of such issue shall be upon the Secretary.

(d) Cross References.—

(1) For provisions relating to burden of proof as to transferee liability, see § 6902(a).

(2) For provisions relating to burden of proof as to illegal payments, see § 162(c).

(3) For provisions relating to burden of proof as to counterclaims in a district court or the United States Claims Court, see § 7422(e).

(4) For provisions relating to burden of proof as to certain penalties, see § 6703(a).
\end{itemize}
(1) *Presumption of Correctness*

As noted above, a presumption of correctness arises from the IRS determination of deficiency.\textsuperscript{180} The presumption remains until the taxpayer produces competent and relevant evidence to support her position.\textsuperscript{181} When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.\textsuperscript{182}

The presumption derives from the common-law presumption of administrative regularity.\textsuperscript{183} Clearly the Board of Tax Appeals had this presumption in mind in adopting its rule that the taxpayer has the burden of proof in these circumstances.\textsuperscript{184}

Government need, specifically the need for revenue, is the most important reason why the determination is presumed correct. The presumption facilitates revenue collection. The courts have consistently held that "the right of the United States to collect its internal revenue by summary administrative proceedings has long been settled . . . [because] property rights must yield provisionally to governmental need."\textsuperscript{185} This need for revenue forms the next major consideration in allocating the burden of proof to taxpayers.

(2) *The Government's Need for Revenue*

The government's need for a steady flow of revenue may be the most genuine, if not the most frequently cited, reason for placing the burden of proof on the taxpayer. In *Bull v. United States*,\textsuperscript{186} an action to recover an overpayment of income tax, the Court frankly discussed this concern:

"[T]axes are the lifeblood of government and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment

\textsuperscript{180} See *Welch v. Helvering*, 290 U.S. 111, 115 (1933); see supra text accompanying notes 78-85.

\textsuperscript{181} *Welch*, 290 U.S. at 115; *Niles Bement Pond Co. v. United States*, 281 U.S. 357, 361 (1930); *Cohen v. Commissioner*, 266 F.2d 5, 11 (9th Cir. 1959); *A & A Tool & Supply Co. v. Commissioner*, 182 F.2d 300, 305 (10th Cir. 1950); *Dairy Home Co. v. United States*, 180 F. Supp. 92, 95 (D. Minn. 1960).

\textsuperscript{182} *Barnes v. Commissioner*, 408 F.2d 65, 69 (7th Cir.), cert. denied, 396 U.S. 836 (1969); *Compton v. United States*, 334 F.2d 212, 216 (4th Cir. 1964); *A & A Tool and Supply Co.*, 182 F.2d at 304.

\textsuperscript{183} *United States v. Rexach*, 482 F.2d 10, 16 (1st Cir. 1973), cert. denied, 414 U.S. 1039 (1975); 9 J. WIGMORE, supra note 15, at 625.

\textsuperscript{184} Mr. Ivins observed that "the courts have always held the same with respect to all tax assessments, that the action of the assessing body or officer is prima facie presumed correct." *House Hearings*, supra note 89, at 908-09.

\textsuperscript{185} *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931).

\textsuperscript{186} 295 U.S. 247 (1935).
is given the force of a judgement, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. . . . Thus, the usual procedure for recovery of debts is reversed in the field of taxation. Payment precedes defense and the burden of proof, normally on the claimant, is shifted to the taxpayer.\footnote{187}

Similarly, in the 1931 refund case \textit{Champ Spring Co. v. United States},\footnote{188} the Court explained why the burden of proof rules should be so applied: "The issue in the case is: To whom does the money in equity, justice, and good conscience belong? If the plaintiff fails to show that it has a superior right to that of the defendant, it cannot recover."\footnote{189}

Mr. Ivins, testifying before the House of Representatives, was even more blunt. He predicted: "[i]f you place the burden of proof on the Commissioner, you might as well repeal the income tax law and pass the hat because you will practically be saying to the taxpayer, 'How much do you want to contribute toward the support of the government?'"\footnote{190}

Placing the burden of proof on the government has also been seen as encouraging "taxpayer delay and inaction, thereby imposing on the government the costs . . . of both borrowing money to meet the gap of unpaid taxes and of initiating litigation."\footnote{191} The Tax Court has observed that out of necessity "the Government's burdens in collecting the revenue must be few and light."\footnote{192}

All of these authorities accept as a premise the government's need for revenue. What follows from that premise is the importance of economic efficiency in the tax collection. Hence, the courts willingly embrace the concept that the burden of proof should rest on the taxpayer in tax cases. This allocation of the burden of proof is thus viewed as a minor taxpayer inconvenience to be tolerated in achieving this economic efficiency.

In the rhetoric of the populists, however, the procedural convenience gained from the current burden of proof rule must yield to basic concepts of fairness. What is ignored in the process is that the current

\footnotesize{\begin{itemize}
\item 188. 47 F.2d 1 (8th Cir. 1931).
\item 189. \textit{Id.} at 3. As Judge Hand held, "A plaintiff, seeking an affirmative judgement measured in dollars, must prove how much is due. His claim is for money paid and he must show that every dollar he recovers is unjustly withheld." Taylor \textit{v. Commissioner}, 70 F.2d 619, 621 (2d Cir.), \textit{aff'd sub nom.} Helvering \textit{v. Taylor}, 293 U.S. 507 (1934).
\item 190. \textit{House Hearings}, supra note 89, at 907.
\end{itemize}}

While Congress' reluctance to enact expressly the judicially accepted burden of proof allocation to the taxpayer is understandable, if not defensible, a change in the rule to allocate the burden of proof to the IRS betrays a certain naiveté.\textsuperscript{200} The common-law allocation of the burden of proof to the taxpayer is a tradition of long standing. Indeed the common-law development of the rules allocating the burden of proof in tax cases apparently flowed from the use of the burden of proof as a tool for adjusting the interests of competing parties.\textsuperscript{201} To the extent that it is founded on common sense, this allocation ought not to be lightly brushed aside. Maintenance of the status quo, however, does little to justify the present rule. There are, however, good reasons for placing the burden on the taxpayer.

Three major considerations for not shifting the burden of proof in tax cases to the IRS are (1) the fact that, under our system of voluntary reporting, knowledge of a taxpayer's deeds or misdeeds regarding the payment of tax are uniquely within the taxpayer's knowledge; (2) the government's need for revenue; and (3) that a self-reporting system of tax collection depends on public confidence.\textsuperscript{202} Each consideration warrants discussion.

The point has been made that it is unfair to impose the burden of proof upon the IRS because the taxpayer has access to the information

\textsuperscript{200} Senate Bill 604 originally provided and House Bill 634 presently provides that if information is exclusively within the possession of the taxpayer, the taxpayer may be required to present a minimum amount of information to support her position. S. 604, 100th Cong., 1st Sess. § 16(a) (1987); H.R. 634, 100th Cong., 1st Sess. (1987); see supra note 12. The language of the proposal appears to put the burden of production on the taxpayer when the taxpayer is in possession of relevant evidence. See supra note 12. A problem with such an approach is that a taxpayer would be unlikely voluntarily to keep information that would undermine any position taken.

One possibility to consider is whether the presumption of correctness that attaches to the commissioner's findings would remain if the burden of proof were shifted in either the Tax Court or refund suits. The presumption of correctness is utilized for essentially the same reasons given for imposing the burden of proof on the taxpayer, that is, the presumption of administrative regularity, the likelihood that the taxpayer will have access to the relevant information, and the desirability of bolstering the record-keeping requirements of the Code. United States v. Rexach, 482 F.2d 10, 16 (1st Cir.), cert. denied, 414 U.S. 1039 (1973). The presumption of administrative regularity is a reference to a traditional assumption in any litigation involving the government: the actions of officials are in accordance with the law. See J. Wigmore, supra note 15, at 625.

Maintaining the presumption in favor of the IRS would mean that even if the government held the burden of proof, the taxpayer would have the initial burden of production. In order to prevail, the taxpayer would have to present sufficient evidence to overcome the presumption favoring the government's assessment.

\textsuperscript{201} Fletcher, supra note 196, at 894.

\textsuperscript{202} See supra text accompanying notes 179-86.
that bears upon his tax liability. While this alone may justify the continuation of the existing rule, one may ponder the logical response if the roles were reversed. One probable result would be increasing the reporting requirements to enable the IRS to meet its burden of proof. Given the recent proliferation of legislation that increases reporting requirements and penalties for understating or overstating value, and other legislation to curb tax abuses, a likely response to changing the burden of proof would be pressure to increase such enactments to stem increased abuse of the self-reporting system. Thus taxpayers could expect the possibility of greater government intrusion into their personal affairs. The greater reporting requirements necessarily will increase the costs to both the taxpayer and the government. Taxpayer compliance with increased reporting requirements will increase taxpayer accounting costs, while commitment of greater resources to monitor and enforce compliance will increase government’s costs.

A tax system in which the burden of proof is borne by the government does little to encourage the preservation of records held by the taxpayer; on the contrary, such a system would lend itself to easy concealment of tax obligation. Noncompliance with the revenue laws increases when information regarding a taxpayer’s obligation either is not available to the IRS or when the IRS does not have a source of evidence independent of the taxpayer. As the likelihood of successful concealment of tax obligations increases, so too will noncompliance.

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203. See supra text accompanying notes 187-88.
204. An example of this approach is shown by I.R.C. § 6703(a) (1987) which places the burden of proof on the IRS in cases involving the promotion of abusive tax shelters under I.R.C. §§ 6700, 6701, 6702 (1987). The enactment of I.R.C. § 6703 (1987) was followed by the enactment of I.R.C. §§ 6111, 6112 (1987) which created new reporting requirements with respect to tax shelters. See LeDuc, The Legislative Response to the 97th Congress to Tax Shelters, The Audit Lottery and other forms of Intentional or Reckless Noncompliance, 18 TAX NOTES 363, 392 (1983).
206. Senate Bill 604’s application of the Regulatory Flexibility Act will be undermined because reporting will increase and become more complex. See supra text accompanying note 186.
The widely acknowledged need for revenue is at best uncomfortably juxtaposed with measures that reduce the efficiency of tax collection. No one seems to quarrel with the proposition that the government requires revenue. If one accepts that proposition, a logical corollary is that the revenue collection system should be efficient so that the revenue collected fulfills purposes other than simply tax collection. Shifting the burden of proof to the IRS necessarily will increase its costs of collection by requiring an expansion of its investigatory function and by making trials more expensive by virtue of the search for evidence of taxpayer wrongdoing. In short, the entire tax collection system would become more economically inefficient. While the conduct of IRS employees may occasionally be less than exemplary, the proposed cure is worse than the disease. Efficiency in tax collection simply does not equate to inherent unfairness in the tax collection system. To sacrifice efficiency with respect to the burden of proof is ill advised.

The backbone of our revenue system is voluntary compliance. In order to raise revenue, the United States relies on its citizens to come forward and meet their obligations under the revenue laws. Despite growing concerns of an "underground economy," there is evidence that the IRS is examining fewer tax returns and collecting more revenue than ever before. On the other hand, the concerns regarding revenue non-compliance are not trivial. Former IRS Commissioner Roscoe Egger has estimated that in 1974 taxpayers voluntarily paid 85% of their total income tax liability—a number he estimated would fall to 81.6% by 1986. According to Egger, each one percent reduction in the level of compliance would equate to a revenue loss of five billion dollars. Meanwhile, difficulty in tax collection arising out of shifting the burden of proof to the IRS could result in an increase in tax rates or the shoul-

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209. See supra text accompanying notes 1-5.
210. If a study of trial costs were undertaken, an educated estimate likely would reveal greater government expenditure of resources in cases in which it has the burden of proof. For example, the fraud penalty owes its existence in part to a recognition that the government must be reimbursed for the heavy expense of investigation. Helvering v. Mitchell, 303 U.S. 391, 401 (1938).
211. United States v. Geneves, 405 U.S. 93, 104 (1972) (the tax system is largely dependent on voluntary compliance); United States v. Fowler, 794 F.2d 1446, 1451 (9th Cir. 1986) (Reinhardt, J., dissenting) (tax system committed to voluntary compliance); Tax Reform Proposals: Hearings before the Senate Committee on Finance, 99th Cong., 1st Sess. 8 (1985) (testimony of Commissioner Egger); Zelensky, Efficiency and Income Taxes: The Rehabilitation of Tax Incentives, 64 TEX. L. REV. 973, 1027 n. 106 (1986).
212. M. SALTMAN, supra note 70, 8-3 n.3.
214. Id.
dering of an increased tax burden by honest or at least nonlitigious taxpayers. The increased tax burden might result from increased inefficiency in tax collection or from an increased tendency to let the IRS attempt to prove its case with the burden of proof hurdle raised.

**Conclusion**

Shifting the burden of proof to the IRS is an appealing idea. Unreflective enthusiasm over the adoption of such a rule, however, may well obscure the importance of the tax burden of proof. Placing the burden of proof on government would increase government litigation costs, escalate government intrusion into taxpayers' affairs through increased reporting requirements, and contribute to an increased lack of compliance with existing revenue laws. In short, the apparently attractive notion of making the tax collector's job more difficult is short-sighted and simplistic.

Plato's observation that "[w]here there is an income tax, the just man will pay more, and the unjust less" would become an unfortunate reality should Congress decide to shift the burden of proof to the IRS.

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