Journal of Multistate Taxation and Incentives (Thomson Reuters/Tax & Accounting)
Volume 26, Number 6, September 2016

PROCEDURE

From the Litigators' Desks: When Taxpayers Should Not Bear the Burden of Proof

The burden of proof is material to every aspect of the state tax decision-making process.

BY ZACH GLADNEY AND CHARLES WAKEFIELD

ZACH GLADNEY is a partner and CHARLES WAKEFIELD is an associate in the New York office of Alston & Bird LLP.

The impact of the burden of proof on state tax appeals cannot be overstated. Taxpayers often lose tax appeals on the basis that they failed to satisfy the seemingly elusive burden of proof. Apart from limited instances in the arena of alternative apportionment, taxpayers bear the burden of proof in nearly every state tax appeal. As the reasoning goes, taxpayers should bear the burden of proof because it is the taxpayers that possess the necessary information and, thus, are in the best position to establish the proper amount of state tax liability. But should this always be the case?

Through this article, we explore three instances where the burden of proof should not be borne by the taxpayer: (i) naked assessments, (ii) alternative theories, and (iii) penalties. We will also explore the federal burden of proof standards relating to these instances at the United States Tax Court ("U.S. Tax Court") as a benchmark for comparison to the standards we experience at the state level.

Background

An understanding of the burden of proof is essential because it instructs the taxpayer on the quantity and quality of evidence that must be produced to obtain a favorable judgment. But many taxpayers—and some lawyers—consider the burden of proof an afterthought, or simply don't consider it at all. Rather, much more time is often spent trying to develop an ingenious legal argument than determining what facts must be established for the argument to take root. And while seemingly straightforward, the burden of proof's nuanced applications in state tax jurisprudence have confounded taxpayers and tax professionals.

Vital as it may be to satisfy the burden when pursuing a case to a decision on the merits, the value of understanding how the burden of proof operates extends beyond trial. Knowledge of the burden is helpful in evaluating whether to protest an assessment of tax or initiate a refund claim. In the audit and administrative appeal phases of a dispute, the ability to settle a case can hinge upon whether the taxpayer or the tax administrator has the burden of producing evidence at trial. As you can quickly begin to see, the burden of proof is material to every aspect of the state tax decision-making process.

Identifying the Burdens

Because the tax laws and appeal systems of the various states are to varying degrees modeled on the tax laws and appeal systems of the federal government, understanding what the burden of proof is and how it has evolved in the federal tax arena provides useful guidance in considering the types of changes states should consider making to ensure fairness in their revenue collection processes.

Contrary to its implication, the singular phrase "burden of proof" does not have a singular meaning. Rather, it incorporates two distinct but related concepts: the "burden of production" and the "burden of persuasion."

The burden of production starts with the notice of deficiency. A valid notice of deficiency in a federal tax dispute represents both the taxpayer's "ticket to the [U.S.] Tax Court"[1] and the final determination of the Internal Revenue Service ("IRS") with respect to a taxpayer's liability. The U.S. Tax Court presumes, in the absence of evidence to the contrary, that the notice of deficiency establishes a prima facie case that the deficiency determination is correct. Accordingly, by presuming the notice of deficiency is correct, the burden automatically shifts to the taxpayer to produce sufficient evidence upon which the U.S. Tax Court could find in the taxpayer's favor.

In addition to the burden of production, the U.S. Tax Court places the burden on the taxpayer to prove that the deficiency determination is incorrect. Thus, in U.S. Tax Court cases, the taxpayer bears the initial burden of production to rebut the presumption of correctness, and the ultimate burden of convincing the court that the deficiency determination is erroneous. State tax appeal systems generally adhere to the U.S. Tax Court's bifurcated understanding of what constitutes the burden of proof.

Naked Assessments

The burden of proof is allocated to the taxpayer from the moment the notice of deficiency is issued. In federal and in most state tax disputes, the notice of deficiency carries with it a presumption of correctness that the taxpayer must rebut if a trial court is to retain jurisdiction over the taxpayer's claim. The Tax Court of New Jersey, for example, requires the taxpayer to produce "cogent evidence that is definite, positive and certain in quality and quantity," to rebut the presumption of correctness, and has made clear that vague assertions that the amount of tax assessed through the notice is "too high" will not suffice.[2]

A vague and broad notice can substantially impair a taxpayer's ability to defend its filing positions because it is difficult to know exactly what evidence is necessary to rebut the presumption of correctness and ultimately prevail in the case if the issues are not clearly defined. In addition, a vague or broad notice generally has the effect of increasing taxpayers' monetary costs of litigating an issue because a broad notice generally leads to broad discovery. This in turn can lead to taxpayers with valid claims choosing to forego litigation solely based on ballooning costs associated with a seemingly ever-expanding scope of appeal.

So what is a taxpayer to do when the notice of deficiency is vague, practically barren, or so broad that a taxpayer is unable to identify with specificity the basis for the assessment? Unfortunately, in many states taxpayers are left to advocate for themselves without much support from case law or other state legal authorities—for two primary reasons: (i) states generally have few rules regarding form and content required to be included in notices of deficiency; and (ii) the presumption of correctness generally attaches to the amount of the assessment (rather than the underlying basis for the assessment) and thus courts are generally satisfied that a notice is adequate if it states the type of tax assessed and the amount.[3]

Further exacerbating the problem, state tax courts are unwilling, or unable, to look behind the notice of assessment to determine whether it is supported by adequate facts or reasoning. State courts' general reluctance to look behind the notice of deficiency is rooted in federal case law, which historically cited to the court's de novo review as justification: "As a general rule, this Court will not look behind a deficiency notice to examine the evidence used or the propriety of respondent's motives or of the administrative policy or procedure involved in making his determinations . . . . The underlying rationale for the foregoing is the fact that a trial before the [U.S.] Tax Court is a proceeding de novo; our determination as to a petitioner's tax liability must be based on the merits of the case and not any previous record developed at the administrative level."[4]

Thus, because the notice of assessment carries the presumption of correctness, because notices of deficiency need only contain the sparest of details to establish validity, and because state courts will generally refuse to scrutinize the behavior of the state taxing authority, state taxing authorities lack any meaningful incentive to develop and consider a taxpayer's facts. In contrast, these three forces can combine to create a perfect anti-taxpayer storm whereby state agencies are permitted to conduct a minimal or wholly inadequate audit investigation, issue the broadest possible notice of deficiency, and then rest on the presumption of correctness to defeat taxpayers' claims.

This concern was recently addressed by the Minnesota Tax Court in *Conga Corp. v. Comm'r of Rev.*[5] In *Conga*, an auditor for the Department of Revenue conducted an indirect sales and use tax audit involving statistical sampling to reconstruct the taxpayer's taxable receipts. The taxpayer challenged the auditor's decision to conduct an indirect audit based on Minnesota case law, which indicates that an indirect audit is only appropriate where a taxpayer fails to maintain adequate books and records. Thus, the taxpayer asked the Tax Court to look behind the notice of deficiency to determine whether the auditor's decision was appropriate.

The Tax Court agreed to examine the auditor's decision-making process under the state's Administrative Procedures Act ("APA"). The Tax Court concluded that, under the APA, the notice of deficiency could be reversed if the substantial rights of the taxpayer were prejudiced or the auditor's decision to conduct the indirect audit was (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by substantial evidence in view of the entire record as submitted; or (f) arbitrary and capricious.

At trial, the auditor conceded that the taxpayer's books and records were sufficient to perform a direct audit. Based on that admission and the Tax Court's independent review of the taxpayer's books and records, the Tax Court found that the auditor's decision to use an indirect audit methodology was inappropriate. The Tax Court then reversed the notice of deficiency, concluding that it would violate the taxpayer's substantial rights to challenge an assessment of tax that was based on an inherently flawed audit: "We conclude that the use of the indirect audit method, if inappropriate, prejudices the substantial rights of the taxpayer by improperly shifting the burden and by improperly limiting the taxpayer's ability to overcome the presumptive correctness of the Commissioner's assessment."

Unfortunately for Minnesota taxpayers, any hope that the Tax Court's decision in *Conga* would represent a sea change in taxpayer rights was subsequently dashed by the Minnesota Supreme Court following the

Commissioner's appeal. The Supreme Court concluded that the APA does not apply to Minnesota Tax Court proceedings, and therefore the Tax Court erred by looking behind the notice of deficiency to evaluate whether the Department of Revenue's audit process violated the taxpayer's substantive rights. Furthermore, the Supreme Court concluded that, by statute, "the order of the commissioner . . . *in every case shall be prima facie valid*" in Tax Court proceedings, and thus the Tax Court had no authority to look behind the assessment.

The Minnesota Supreme Court's decision in *Conga* demonstrates that even when state tax courts perceive unfairness, the presumption of correctness can prove an exceedingly difficult obstacle to providing an adequate legal remedy to correct inequities. Although the Minnesota Supreme Court's decision in *Conga* may reach the technically correct outcome under Minnesota law, one must ask whether it is prudent for a state to deprive its courts of the tools necessary to relieve a taxpayer from poor administrative practices.[6]

Many of the problems with vague or broad notices that plague taxpayers in state tax courts once similarly confounded taxpayers at the federal level. However, through case law, various rounds of legislation, and reforms implemented by the IRS, there have been substantial improvements that provide taxpayers more significant rights at the federal than at the state level.

To prevent the Commissioner from using the presumption of correctness to mask grossly inadequate or nonexistent audit examinations, federal courts have carved out exceptions to the general rule of not looking through the notice of deficiency. In *United States v. Janis*, the U.S. Supreme Court found that a "naked assessment," (i.e., a notice of deficiency "without rational foundation") is "proof that an assessment . . . is arbitrary and erroneous" and, therefore, is "not properly subject to the usual rule with respect to the burden of proof in tax cases."[7] One year after the *Janis* decision was rendered, the 5th Circuit explained the reasoning for establishing a "naked assessment" exception in *Janis:*

"[W]e must consider the burden of proof that lay with taxpayer below and the presumption of correctness that attends the Commissioner's assessments. The burden and the presumption, which are for the most part but the opposite sides of a single coin, combine to require the taxpayer always to prove by a preponderance of the evidence that the Commissioner's determination was erroneous.

The tax collector's presumption of correctness has a herculean muscularity of Goliath like reach, but we strike an Achilles' heel when we find no muscles, no tendons, no ligaments of fact.

In order to give effect to the presumption on which the Commissioner relies, some evidence must appear which would support an inference of the taxpayer's involvement in [the activities alleged by the

Commissioner] during the period covered by the assessment. Without that evidentiary foundation, minimal though it may be, an assessment may not be supported even where the taxpayer is silent.

While we realize the difficulties the Commissioner encounters in assessing deficiencies . . . we nevertheless must insist that the Commissioner provide some predicate evidence connecting the taxpayer to the charged activity if effect is to be given his presumption of correctness."[8]

While the "naked assessment" exception protects taxpayers from carrying the burden when the government has done absolutely nothing to support its notice of deficiency, a broader exception to the general rule requiring taxpayers to bear the burden of proof was established by the 9th Circuit in *Scar v. Commissioner.*[9] In *Scar*, the taxpayers were issued a notice of deficiency through which the Commissioner asserted that the taxpayers improperly deducted losses in connection with their participation in a tax shelter called the Nevada Mining Project. The problem was that the Scars had never invested or participated in the Nevada Mining Project.

The Scars petitioned the U.S. Tax Court and subsequently moved to dismiss the case on the basis that the court did not have jurisdiction over the matter, arguing that a valid notice of deficiency is invalid if the Commissioner does not "determine" a deficiency, as required under Internal Revenue Code ("IRC") § 6212, prior to issuing the notice. Because the notice of deficiency was invalid, the Scars argued that it was ineffective to provide a basis for U.S. Tax Court jurisdiction.

In its memorandum in opposition to the Scars' motion to dismiss, the Commissioner conceded that the Scars were not involved in the Nevada Mining Project, but nevertheless asserted that the notice of deficiency was valid. In the U.S. Tax Court's majority opinion, the court concluded that a valid notice must only set forth the amount of deficiency and the year involved. Because the notice issued to the Scars contained that information, the court refused to look behind the notice to examine whether the Commissioner properly "determined" the deficiency. The majority further concluded that the statutory requirement that the Commissioner make a "determination" held no independent meaning.

In a dissenting opinion, Judge Sterrett speculated that the majority's conclusion that "determination" has no independent meaning would have the perverse effect of forbidding judicial review in situations where abuse has occurred and force the abused taxpayer to court where he would assume the burden of proof to prevail on the merits. Thus, Judge Sterret concluded that the majority essentially endorsed inadequate audit examinations that result in facially wrong notices of deficiency. To illustrate his concern, Judge Sterret drafted an example of a notice of deficiency into his dissent that would be valid under the majority's reasoning:

"Dear Taxpayer: There is a rumor afoot that you were a participant in the Amalgamated Hairpin Partnership during the year 1980. Due to the press of work we have been unable to investigate the accuracy of the rumor or to determine whether you filed a tax return for that year. However, we are concerned that the statute of limitations may be about to expire with respect to your tax liability for 1980. Our experience has shown that, as a general matter, taxpayers tend to take, on the average, excessive (unallowable) deductions, arising out of investments in partnerships comparable to Amalgamated that aggregate some $10,000. Our experience has further shown that the average investor in such partnerships has substantial taxable income and consequently has attained the top marginal tax rate. Accordingly, you are hereby notified that there is a deficiency in tax in the amount of $7,000 due from you for the year 1980 in addition to whatever amount, if any, you may have previously paid. Sincerely yours, Commissioner of Internal Revenue"

On appeal from the U.S. Tax Court, the 9th Circuit agreed with Judge Sterrett that the statutory "determination" requirement imposes an obligation on the Commissioner to provide a considered explanation for the asserted deficiency, reasoning that: "The statute clearly contemplates that before notifying a taxpayer of a deficiency and hence before the Board can be concerned, a determination must be made by the Commissioner. This must mean a thoughtful and considered determination that the United States is entitled to an amount not yet paid. If the notice of deficiency were other than the expression of a bona fide official determination, and were, say, a mere formal demand for an arbitrary amount as to which there were substantial doubt, the Board might easily become merely an expensive tribunal to determine moot questions and a burden might be imposed on taxpayers of litigating issues and disproving allegations for which there had never been any substantial foundation."

Cases like *Scar* and *Janis* demonstrate that federal courts may be less willing to permit taxing authorities to rest on the presumption of correctness than their state tax court counterparts. In addition, through legislation that has made the federal Administrative Procedures Act applicable to U.S. Tax Court cases and through detailed internal guidelines promulgated by the IRS with respect to the form and content requirements for notices of deficiency, federal notices typically give the taxpayer far more useful information than is required in most states.

Alternative Theories

Even if a notice of deficiency is perfectly clear and concise in stating the basis for the assessment, a problem arises when a state taxing authority is permitted to raise alternative theories to support its assessment of tax for the first time in an adjudicatory proceeding. This is the contextual inverse of the problem that taxpayers face with deficiency notices. With deficiency notices, taxpayers have little or no information upon which to mount their legal challenge. With alternative theories, a taxpayer may rely on the stated reason for the assessment to develop the evidence necessary to challenge the assessment and discard other evidence that may not be relevant.

The stated rationale of state and federal courts for accepting alternative legal theories is rooted in the ability to review cases de novo, which, as described above, is the same justification that courts assert for their refusal to look behind the notice of deficiency. In other words, because judges can decide cases on the merits based on evidence presented at trial, they need not hold the taxing authority to its initial reason for the asserted deficiency. Yet, while it is true that tax courts will generally review legal issues de novo, it is the taxpayer that often has the burden of having to disprove each and every alternative theory presented by the government.

In both state and federal tax administration systems, a new or alternative theory will not be allowed if permitting the theory would violate the taxpayer's right to due process of law. However, short of a constitutional violation, state courts will often permit any alternative theory raised by the state taxing authority.

At the federal level, the U.S. Tax Court provides taxpayers with more rights in this area than do state courts generally. There are two primary protections for taxpayers from alternative theories.

First, if the government finds after the notice of deficiency has been issued that its best theory for adjusting the taxpayer's liability was different from its original theory, under Rule 142(a)(1), the government must affirmatively state the alternative basis in the answer or amended answer. This, at the very least, puts the taxpayer on notice that the dispute is broader than the taxpayer initially contemplated and, if the alternative is asserted early, will typically allow the taxpayer to gather the evidence necessary to overcome the alternative.

The second procedural protection for taxpayers is governed by Rule 142 of the U.S. Tax Court, under which the government has the burden of proving "new matters" contained in the answer. There has been considerable debate over what constitutes a "new matter." The most frequently cited description of the requirement is in *Sheldon Tauber*, 24 T.C. 179 (1955), a case in which the Commissioner determined in the deficiency notice that the taxpayer had received dividends from his controlled corporation. By amended answer, the Commissioner argued alternatively that the taxpayer received boot in a partial taxable exchange.

The majority stated: "The Commissioner must properly plead and prove any such alternative issue as the one he has in mind, which is upon a new theory different and inconsistent with his determination of the deficiencies."

In *Sheldon Tauber*, the Commissioner sought to increase the tax assessment pursuant to the new legal theory. That alone would cause the burden to shift to the Commissioner. However, in *Estate of Harry Schneider*, 29 T.C. 940 (1958), the Commissioner departed from the net worth method which he had employed in the deficiency notice and asserted the specific omissions method in an amended answer. The result was to increase the taxpayer's deficiency in two of the audit years and reduce the deficiency in a third year. The U.S. Tax Court held that the Commissioner assumed the burden of proof in all three years.

Thus, under *Sheldon Tauber* and *Estate of Harry Schneider*, the U.S. Tax Court found that the burden shifts to the Commissioner whenever a position is advanced that is inconsistent with the position relied on by the Commissioner in determining the deficiency.

Although state tax courts often have similar pleading rules, rarely, in our experience, do state tax courts strictly hold the government to them. Typically, state taxing authorities will deny each allegation raised in a complaint and broadly "reserve" the right to raise alternative theories later in the litigation. State tax courts generally accept these broad reservations and do not require more definite or amended pleadings. Due to a number of factors that may not be the fault of the taxpayer (e.g., corporate acquisitions, employee turnover, etc.) the type of evidence necessary to meet the taxpayer's burden of proof with respect to an alternative theory raised late in a dispute is often unavailable.

Furthermore, the formal burden shifting mechanism for alterative theories under federal law is virtually nonexistent in state tax administration. For example, the Tax Court of New Jersey will only bar the government from raising alternative theories that would increase tax if the alternative is raised outside of the statute of limitations and the taxpayer's due process rights are violated.[10] However, in New Jersey, so long as the statute of limitations is open and due process is met, the taxpayer has the burden of proof in all circumstances to show that an alternative theory is wrong, even though the alternative may contradict the notice of deficiency on its face.

Although permitting taxing authorities to raise alternative arguments is the norm in state tax jurisprudence, some states have significantly revised their tax appeal systems to reset the balance between taxpayers and tax authorities. Missouri, for example, has adopted a statutory burden shifting mechanism that balances the state taxing authority's need to efficiently collect tax with the taxpayers' interest in a fair administration system. Mo. Rev. Stat. § 136.300 provides:

"With respect to any issue relevant to ascertaining the tax liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer. The director of revenue shall have the burden of proof with respect to any factual issue relevant to ascertaining the liability of a taxpayer only if:

(1) The taxpayer has produced evidence that establishes that there is a reasonable dispute with respect to the issue; and

(2) The taxpayer has adequate records of its transactions and provides the department of revenue reasonable access to these records."[11]

Thus, if a taxpayer complies with the audit and presents proof and satisfies the initial burden of production to establish a "reasonable dispute," Mo. Rev. Stat. § 136.300 shifts the burden of proof to the commissioner to develop facts necessary to support the assessment.

As evidenced in the recent Missouri Supreme Court decision in *Office Depot, Inc. v. Dir. of Rev.*, Dkt. SC95029 (Mo. 2016), this burden shifting provision is most important where the taxing authority presents an alternative theory. In that case, the taxpayer sought a refund of use tax paid with respect to catalogs that it mailed to Missouri customers. The Administrative Hearing Commission determined that the taxpayer was entitled to the refund because it did not exercise any right, power or control over the property in Missouri. On appeal, the taxing authority attempted for the first time at oral argument to show a right to exercise control or ownership over the catalogs by arguing that the catalogs would have been returned to Office Depot if they could not be delivered.

However, the Supreme Court refused to consider this argument under Mo. Rev. Stat. § 136.300: "This argument was not raised below. Equally important, it is not supported by the record. Nowhere in the record or the briefs can the Court find mention of what type of mail service was used for the catalogs. It was the Director's burden to show control, as '[t]he director of revenue shall have the burden of proof with respect to any factual issue relevant to ascertaining the liability of a taxpayer . . . .' § 136.300.1. The Director failed to do so."

From a purely practical analysis, the federal and Missouri burden shifting rules make sense because an alternative theory, by definition, tends to cast doubt upon the validity of the taxing authority's original findings. If a taxing authority, after conducting a thorough audit upon which a reasoned determination of the taxpayer's liability is made, finds that the original basis for the assessment of tax was erroneous, the taxpayer should not generally bear the burden of proof regarding both the erroneous initial finding and the alternative finding.

Penalties

One of the most confounding aspects of state tax administration is the application of penalties. Penalty provisions exist to encourage voluntary compliance with state tax laws. Therefore, it stands to reason that state taxing authorities should only assert penalties under circumstances in which the taxpayer willfully violates the tax law, or was, at the very least, negligent in reporting a tax liability. Unfortunately, we have seen the assertion of penalties become the rule rather than the exception.

In state tax cases, the burden of proof is allocated to the taxpayer to show that the imposition of penalties is improper. However, unlike tax, which generally requires the taxpayer to establish by a preponderance of the evidence that the notice of deficiency is erroneous, avoiding penalties typically requires taxpayers to prove that the state taxing authority's imposition of penalties was "arbitrary and capricious" in order to have them removed.

While tax liabilities are supposed to reflect a mechanical operation of law to a given set of facts, penalties go to the taxpayer's state of mind. If penalties are intended to punish bad actors, then it is difficult to envision a scenario in which taxpayers that have made a good faith effort to comply with a state's laws should be penalized.

At best, imposing penalties simply because a taxpayer miscalculated its tax liability contravenes the basic notion of fairness. At worst, including penalties as a pro forma addition to virtually all notices of deficiency suggests an institutionalized paranoia that taxpayers are actively cheating the system. Thus, penalties, if made too difficult to avoid or if not imposed in the proper context, carry the potential to alienate taxpayers and thereby undermine a state's revenue collection efforts.

Nowhere is this principle more evident that in the case of *Equifax v. Dep't of Rev.*[12] In *Equifax*, the taxpayer filed its tax return in accordance with the statutorily mandated apportionment methodology. The Department of Revenue thereafter recomputed the taxpayer's Mississippi income under the state's alternative apportionment provisions and imposed penalties. The state supreme court upheld the imposition of penalties despite the taxpayer's good faith attempt to comply because the taxpayer failed to prove the Department of Revenue's decision to impose the penalties in question was arbitrary and capricious.

At the federal level IRC § 7491(c) provides that the IRS has the burden of production with respect to penalties asserted against an individual taxpayer. This means that the IRS must initially come forward with evidence that is appropriate to apply a particular penalty to the taxpayer.[13] If the IRS fails to produce such evidence, the penalties are removed. However, if the IRS produces evidence upon which a court may find that penalties are appropriate, the penalties will be sustained unless the taxpayer can demonstrate reasonable cause.

By shifting the initial burden to the IRS when penalties are asserted against an individual, the federal system essentially removes the presumption of correctness that generally attaches to the imposition of tax and, therefore, provides an incentive for the IRS to conduct a more thorough audit investigation through which it develops the facts that it will need to have the penalties sustained. The result of increased audit diligence means that penalties are less likely to be asserted when the facts do not support a penalty finding and penalties are more likely to be asserted when penalties are appropriate.

Although we believe codified burden shifting mechanisms for penalties like IRC § 7491(c) are essential to fair tax administration, there is a strong case to be made that IRC § 7491(c) does not go far enough because its protections only extend to individual taxpayers.

Conclusion

Because of its crucial importance, states should continually evaluate how their particular application of the burden of proof affects taxpayers' appeal rights to ensure fairness. In the meantime, taxpayers must advocate for themselves by understanding the nuanced applications of the burden of proof in the states where they are litigating cases and be aware of the instances in which they should not bear the burden of proof.

[1] *Comm'r v. Shapiro*, 424 U.S. 614, 630 n.12 (1976).

[2] *See, e.g.*, *Coliseum Pizzeria, Inc. v. Dir., Div. of Taxation*, 24 N.J. Tax 369 (2008).

[3] *See, e.g.*, *Helvering v. Taylor*, 293 U.S. 507 (1935).

[4] *Greenberg's Express, Inc. v. Comm'r*, 62 T.C. 324 (1974).

[5] 8264 R. (Minn. T.C. 2014), *rev'd,* 868 N.W.2d 41 (Minn. 2015).

[6] It is worth noting that the Minnesota Tax Court's decision in *Conga* may have been affirmed in a comparable U.S. Tax Court proceeding because federal legislation has made the federal Administrative Procedures Act applicable to U.S. Tax Court cases.

[7] 428 U.S. 433, 441-442 (1976), citing *Helvering v. Taylor*, 293 U.S. 507, 514-515 (1935).

[8] *Carson v. United States*, 560 F.2d 693, 695-697 (5th Cir. 1977) (emphasis added).

[9] 914 F.2d 1363 (9th Cir. 1987).

[10] *See, e.g., Middlesex Water Co. v. Dir., Div. of Taxation*, 3 N.J. Tax 223 (1981).

[11] IRC § 7491 contains substantially similar requirements for shifting the burden of proof to the government in federal tax cases. However, IRC § 7491 has limited applicability in the federal tax context because it is only available to certain classes of taxpayers (*i.e.,* low net worth individuals and small businesses).

[12] 125 So. 3d 36 (Miss. 2013).

[13] *See Wheeler v. Commissioner*, 127 T.C. 200 (2006) (the IRS failed to satisfy its burden of proof as to failure to pay tax penalty where it did not introduce evidence that the taxpayer had not filed a return on which a tax was reported due).

© 2016 Thomson Reuters/Tax & Accounting. All Rights Reserved.