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Relation of Lawyer and Accountant in Tax Practice*

By J. Harry Covington

I think I shall risk telling a very old story, but one that seems to me peculiarly applicable at this time. Bishop Whipple, who was the Protestant Episcopal Bishop of Virginia, had a great sense of humor. On one occasion there was sent down into his diocese a young minister to make an address at a Richmond church. He had come from the classic regions of New England where, while an Episcopalian, he had no doubt absorbed some of the Congregationalist idea of long sermons, and he asked the bishop how long he was expected to preach. The bishop, being a very polite, courtly old Virginian, said, "My dear sir, that is entirely with yourself in the state of Virginia, but my observation after a long period of service is that no souls are saved after fifteen minutes."

It seems to me, after listening to Mr. Trobridge's address, that very little can be said as to the lawyer's relation to the accountant in tax practice. He has after all stated it rather clearly and succinctly. I should like to make a primary observation, however, on behalf of the lawyer, and that is that no thoroughly experienced lawyer ever undertakes to enter the labyrinth of a complicated tax case without at the inception of it calling into association a competent certified public accountant, and no careful lawyer will undertake to prepare the tax returns of clients engaged in extensive business. The tax return itself always embodies statements to be deduced from a critical examination of the books of the corporation or of the individual. While some lawyers, in their vanity, may imagine themselves capable of performing that sort of service, the simple truth is that they are not. That sort of work is most emphatically an accountant's matter.

The truth is that with the coming of tax practice in the United States—and when I refer to tax practice I refer primarily to federal tax practice—there has been developed a new and a complicated field occupied by both the accountant and the lawyer. There are many tax cases in which, from their very inception—

*Discussion following an address by Charles R. Trobridge at the annual meeting of the American Institute of Accountants, Washington, D. C., September 17, 1929.

that is to say, from the time when the bureau of internal revenue first sends its well known letter to the taxpayer, notifying him of an additional tax—it quite obviously appears that the questions involved are accounting problems. No lawyer can safely undertake that sort of a case without calling in the accountant. But it is quite likely that while the problems involved are primarily accounting problems, there are also problems which involve a very exact construction of the more or less complicated sections of our extended revenue laws, raising questions with which no accountant can hope to deal intelligently. No accountant, with any such case presented to him, is rendering proper service to his client if he does not insist upon the employment of a competent lawyer to advise him and to participate with him in the presentation of that sort of a case before the bureau of internal revenue. In other words, he should have the lawyer with him from the start.

The fact is that the professions of law and accountancv have become complementary the one to the other in tax practice. All the lawyers with whom I talk who have an appreciation of the steady advance in the science of accounting have come to realize that accountancy today is a learned profession, just as the law is a learned profession. They have no hesitancy in calling in the accountant to deal with the problems of the taxpayer because they know that there are certain complicated aspects of the usual tax case which are accounting in character and with which they as lawyers are incompetent to deal, just as the accountant should know that there are also problems that are legal in character and with which he is incompetent to deal.

After all is said and done, therefore, the lawyer and the accountant stand very largely upon a common ground in the presentation of the cases of taxpayers, either before the bureau of internal revenue or before the board of tax appeals, as the case may be. Of course, after a case gets beyond either of those two jurisdictions, it goes without saying that the accountant simply can not any longer conduct the case but must leave its presentation to a competent lawyer.

My observation has been that, particularly in the more remote places of the United States where the smaller accounting firms or individuals practising accountancy are situated, the one difficulty which the accountants perhaps have not appreciated up to this time is that the problems confronting them are often

legal problems and that they ought to have the association of lawyers at an early stage of many cases. This is not so with the larger concerns engaged in practising accountancy. At the present time the fact seems to be that in the metropolitan areas where the larger tax problems arise accountants have been very properly ready to realize the inherent difficulties of dealing with certain cases without the assistance of lawyers. When the accountants in the remote sections undertake to present their cases entirely without the coöperation of lawyers, they are often unable to make possible intelligent legal service to their clients later on when their cases come up before the courts. It isn't fair to a taxpayer to go along with a case involving primarily legal problems without calling in the service of a lawyer until the time comes when there conceivably has been an adverse decision in the bureau of internal revenue and an affirmance of that adverse decision by the board of tax appeals, and it is determined to go to the courts.

In considering the practice of the board of tax appeals it must be understood that a review of an adverse decision of that body means the review of questions of law which have been there determined upon the transmittal of the record either to a circuit court of appeals or to the court of appeals of the District of Columbia. This record must in appropriate fashion concretely present the questions of law so that the appellate court may see that there are in fact such questions improperly decided. In all such cases the accountant's client ought to have the services of a lawyer in the presentation of the case before the board of tax appeals as well as in the later proceedings in the courts. Only in that way can a proper record be assured.

Moreover, as you of the Institute know as well as I, there is an alternative method of treating a tax case. The taxpayer is not compelled to go from the bureau of internal revenue to the board of tax appeals at all. There are frequently considerations of a legal nature which determine the question whether it is appropriate to go through the board of tax appeals with the right of an eventual review on questions of law by a circuit court of appeals or to pay the proposed tax and bring suit for its recovery in a court of the United States. The accountant must realize that there are really legal problems involved in deciding which of these courses his client should pursue, and he should speedily call in the services of a lawyer.

There are various problems, which I have sketched in rather brief form, indicating that the accountant, when he is undertaking to deal with his client, must advise him that there are situations in which the services of a lawyer in association with the accountant are required in the proper and effective presentation of the tax case. These problems are in fact numerous.

Take for illustration the case of a taxpayer who has received his sixty-day letter. He first has to determine whether it is the wiser thing to go to the board of tax appeals or to a court. You probably know as well as I do that there are certain classes of cases in which the view of the board of tax appeals, while it is an administrative agency entirely independent, nevertheless is the viewpoint of the treasury. Some of the members of that board have had prior treasury experience and in certain classes of cases, when they are heard by the board, it is the fact that the viewpoint of that body is likely to be that of the treasury itself. In dealing with a case which has been adversely decided in the bureau one has to consider whether or not the questions involved are those questions on which the board is more likely to take a treasury viewpoint than the courts. The courts are entirely removed from the treasury, and by and large they are composed of extremely competent lawyers. In our industrial centers they are very likely to be composed of lawyers who have in their days of practice been familiar with large corporate enterprises. They are able to approach many questions with that proper breadth of view which goes with thorough understanding.

So at the threshold of many cases in which a review is necessary there is the problem to determine: shall the client go to the board of tax appeals or shall he be advised, if he or it is financially able to pay the tax, to pay and then institute a suit for a refund directly in the district court of the United States? No accountant can competently determine that question because it involves the weighing of a variety of delicate problems. It involves the examination of decisions of the district courts of the United States on questions as nearly kindred to the question involved as are available, and balancing those decisions with the decisions of the board of tax appeals. There, obviously, the counsel of the lawyer is needed.

There is another question that is always to be determined—whether or not the taxpayer needs a speedy disposition of his case. In the clogged condition of the board of tax appeals, he

is quite likely to get a speedier decision of his case in a district court of the United States than before the board of tax appeals, and in consequence there may be considerations which should be presented to the client with a picture of what may happen in the courts and a picture of what may happen in the board of tax appeals, so as to determine correctly whether the cause ought to be taken to the one tribunal or the other.

There is yet another question, often involved in the determination of whether a case ought to go to the board of tax appeals or to a district court of the United States, which no accountant can competently determine. This is the effect of the judicial procedure in the jurisdiction where the taxpayer must bring his suit. The judicial code of the United States provides that the district courts of the United States shall conform as nearly as possible to the practice, pleadings and procedure in force in the several states in which the federal courts are situated. It is also provided that the district courts shall likewise regard as law the decisions of the state courts in trials at common law unless the federal constitution or a statute of the United States requires otherwise. To illustrate, a federal court in the state of New York adheres to the practice existing in the state of New York, a peculiar, highly complicated and meticulous code procedure; the district court of the United States in the state of California adheres to the peculiar code procedure obtaining in the state of California; the district court of the United States in the state of Maryland adheres to the common-law procedure in Maryland. The questions of how evidence may be adduced in one or another jurisdiction, what avenues of proof are open and what are the rules of construction of contracts and the like, if one is thinking of going to court rather than to the board of tax appeals, are consequently questions which have a serious bearing upon what course to pursue to establish the case in the courts. Those questions are obviously only capable of determination by the lawyer.

If it is decided to go directly to court, there is another question to determine—whether or not the suit should be instituted in the court of claims of the United States or in the district court of the United States. The practice in the court of claims is decidedly at variance with the practice in the district courts of the United States. The court of claims is a court taking its testimony through commissioners who go to various parts of

the United States, if the necessity exists. Moreover, the court of claims sits in the city of Washington. It gets many more tax cases than any single district court of the United States, save possibly the district court in the southern district of New York, and gradually has acquired a more than ordinary degree of understanding of tax matters. So one has to determine whether his cause ought to be instituted in a district court of the United States or in the court of claims, having regard for the locality of the district court which would hear the case.

To illustrate what I have just said, I should think that there would be very little difference in selecting a United States district court in the southern district of New York or the court of claims of the United States for the purpose of instituting a suit for a refund in the event that it was determined to go directly to the court, because the judges sitting in the southern district of New York have a constant flow of tax cases for determination. They have become quite expert in such matters and have, as their decisions show, acquired quite a broad and comprehensive view of our tax statutes. On the other hand, if the case is one which, if instituted in a district court of the United States, must be instituted in some remote section where tax cases are few in number and where it is quite conceivable that a narrow view might exist, it would perhaps be more desirable, even though the litigant is at a great distance from the city of Washington, to institute the suit in the court of claims of the United States.

Moreover, there is another question which may have to be determined; that is, whether or not the case is one in which the prior decisions of the court of claims (if it is decided to sue in the court of claims) are apparently favorable, for one always has to consider the situation relating to review of the decision of the court of claims. While after suing in a district court of the United States the plaintiff has under the statute the right of appeal to the circuit court of appeals in the circuit in which the district court is situated, if suit is instituted in the court of claims there is only a restricted form of review. If the decision in the court of claims is adverse the only way in which that adverse decision may be reviewed is by filing a petition for a writ of certiorari, as it is called, in the supreme court of the United States and by making a showing that the decision is so completely at variance with the uniform construction of the tax statutes,

and moreover that it so largely involves a question of great public importance to the taxpayers all over the United States, that it is important for the supreme court to review it. While it may not be quite realized by persons who are not lawyers, one of the things that we learn as lawyers is that the failure of the supreme court to grant a writ of certiorari is by no means an indication that they approve the decision of the court below. The supreme court can decide only so many cases in the course of a year without unduly crowding its calendar and thus impeding the administration of justice. There are certain classes of cases that must be reviewed by the supreme court, and, as to the remainder, from among the great volume of petitions for the writ of certiorari that tribunal must select for review cases in which great injustice has manifestly been done, cases which are obviously of great public importance and cases in which there are squarely conflicting decisions in the circuit courts of appeals in different circuits. It does not by any means follow that a mistaken decision of the court of claims in an ordinary case of no importance except to a particular taxpayer will be reviewed by the supreme court.

Therefore, in going into the court of claims to institute suit one does so with the knowledge that unless the question involved is of general importance, or results in a real conflict of decisions, if decided wrongly, the decision in the court of claims is likely to be a final decision.

These matters which I have discussed in rambling fashion are some of the considerations that always come up in determining when and how one ought to go to the courts rather than to the board of tax appeals. Obviously, accountants need the services of lawyers in matters of that sort, and they are not rendering the best service to their clients if they do not employ counsel in those circumstances.

In addition to the procedural questions I have referred to there are numbers of questions that come up in tax practice so completely legal in character that no accountant can undertake properly to deal with them. In the matter of inheritance taxes the question of gifts made in contemplation of death, one of the most interesting that I know of, is in no sense an accounting problem. Whether there has or has not been a corporate reorganization, and in consequence the creation of taxable income, is often a close question of law. Many cases arising

under section 220, the accumulated-income section of the revenue act, involve not only accounting problems but problems of law. These are only random illustrations of the matters primarily legal in character which may develop in a tax case.

In adhering measurably to the Bishop Whipple injunction, let me say to you, in conclusion, this: all the lawyers with whom I come in contact have welcomed the advance of the accountancy profession. With the development of the field of tax practice there has come to the lawyer a realization of the fact that his clients are having problems constantly presented to them for the ultimate solution of which no lawyer is competent. The lawyers are realizing that they must themselves always have at hand the services of the very best accountants who can be obtained. On the other hand, the more experienced accountants with whom I come in contact are realizing that the problems involved in a great many of their tax cases are problems that are legal in character and that they are not rendering to their clients the best service of which they are capable if they do not in the early stages of the case have competent counsel called into consultation.

The two professions today which, as the result of our complicated industrial organization, are being drawn closer and closer together are the professions of law and accountancy, and it is a distinct pleasure to me individually to recognize the great advance that has been made by the accountants of the country in the appreciation that they are in fact professional men. They are actuated by ethical considerations, and they are adhering more and more to the same ethical notions of practice with respect to their clients and the conduct of their causes to which the lawyers are expected to adhere. The public accountants have in truth today arrived at that position which has been their aim for a long time, that of a recognized profession engaged in practising an applied science which is as abstruse as the law and requires as competent training. In the future it is my hope to see these two professions go along hand in hand in the service that they render to the great businesses of the country, each of them understanding that it has a field which it peculiarly occupies, each of them recognizing that they are complementary one to the other, and each of them knowing that in a great mass of cases, affecting the very material interests of their clients, neither one of them can do without the other.