Buffalo Law Review

Volume 15 | Number 3 | Article 8

4-1-1966

Burden of Proof in Tax Litigation: Offset and Equitable Recoupment

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COMMENTS

BURDEN OF PROOF IN TAX LITIGATION: OFFSET AND EQUITABLE RECOUPMENT

In tax litigation, one issue or more will generally be decided against or dropped by the party charged with the burden of proving it. Although the allocation of the burden of proof is a procedural rule it can dramatically affect the substantive rights of the parties.[1] Consequently, every advocate endeavors to avoid being saddled with the burden of proof. The Commissioner of Internal Revenue is well aware of this and as a result has remained alert to any possibility of avoiding such a burden. Conversely, the taxpayer constantly endeavors to place as much of the burden of proof as he can upon the Commissioner. Although the concern here is with burden of proof in the tax court as well as the district court and the court of claims, the primary focus of this comment will be on the allocation of the burden of proof in refund claims litigated in the district court and the court of claims. It will also discuss the unique situation that arises when the Commissioner interposes against taxpayers' timely refund claim a setoff barred by the statute of limitations.

Burden of proof is taken in its broadest sense to include the burden of persuasion as well as the burden of coming forward with the evidence. The latter merely requires the production of *some* evidence—in a jury case, an amount sufficient to enable a reasonable jury to find in proponent's favor. The burden of persuasion, the more onerous one, is that of convincing the trier of fact that the proponent's claim is supported by a preponderance of all the evidence.[2]

There is a presumption that the Commissioner's assessments of tax are correct.[3] This presumption will carry the Commissioner's case unless the other party comes forward with some competent evidence to rebut it. If some competent evidence is produced the presumption disappears and both parties are then in the same position as if there had been no presumptions to begin with.[4] Once this initial hurdle is satisfied the burden of persuasion still remains upon whichever party it fell to originally.[5]

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1. Burnet v. Houston, 283 U.S. 223, 228 (1931). "The impossibility of proving a material fact upon which the right to relief depends simply leaves the claimant upon whom the burden rests with an unenforcible claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof."
2. See McCormick, Evidence pp. 635-63 (1954); IX Wigmore, Evidence §§ 2490-93 (3d ed. 1940).
3. The presumption of correctness is a rebuttable presumption and will support a finding in favor of the Commissioner only in the absence of any substantial evidence to the contrary. When the presumption has been overcome by evidence the presumption vanishes. Cullers v. Comm'r, 237 F.2d 611 (8th Cir. 1956).
4. United Aniline Co. v. Comm'r, 316 F.2d 701 (1st Cir. 1963); U.S. v. Pulver, 54 F.2d 261 (2nd Cir. 1931); See 9 Mertens, Law of Federal Income Taxation §§ 50.70 and 50.71 (1965).
5. "This presumption is what is often termed a 'true' presumption and is not evidence itself, but merely shifts the burden of *going forward with*, as distinguished from the *actual burden of*, proof; and once the burden of *going forward with* the proof is met, it is as

As has been noted, allocation of burden of proof is a procedural rule. Its policy considerations are to place the burden of proving an item on the person best able to produce the evidence as well as to generally force the one who raises an issue to bear the burden of proving it. Accordingly, as plaintiff must allege and prove his claim, so must the defendant allege and prove a counterclaim if he raises one.

In tax litigation the taxpayer has two avenues open to him if he is convinced that he has been unfairly dealt with by the Commissioner. The taxpayer can pay a deficiency assessment levied against him and bring an action[6] for refund in either the court of claims[7] or the district court,[8] or he can refuse to pay the deficiency assessment made by the Commissioner and litigate the matter in the tax court.[9] However, as more fully indicated below the burden of proof[10] varies between the two avenues.[11] In a deficiency suit in the tax court the burden of proof on the taxpayer is only to show that the Commissioner's determination is erroneous and he need not show the extent of error except in the case of a claimed deduction.[12] In a refund suit, however, the taxpayer must bear a heavier burden in that not only must errors be shown, but the correct amount of the taxpayer's liability as well.

BURDEN OF PROOF IN THE TAX COURT

In the tax court "the burden of proof shall be upon the petitioner [taxpayer], except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer it shall be upon the respondent."[13] The Supreme Court has stated that there is nothing in this rule

> to suggest an intention to require the taxpayer to prove not only that a deficiency assessment laid upon him was arbitrary and wrong but also to show the correct amount . . . . The fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the Board to set it aside.[14]

In practice the Commissioner issues a ninety day letter in which he lists deficiency assessments. If the taxpayer refuses to pay the assessment and enters the tax court, the burden of disproving the validity of the Commissioner's deficiency assessment is on the taxpayer. If thereafter, in his answer to taxpayer's

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though the presumption had never existed." 9 Mertens, Law of Federal Income Taxation, § 50.71 (1965).

6. Int. Rev. Code of 1954, §§ 6532, 7422.
7. 28 U.S.C. § 1491 (1964).
8. 28 U.S.C. § 1346(a)(1) (1964).
9. Int. Rev. Code of 1954, § 6213.
10. Congress has specifically allocated the burden of proof on a few issues. *E.g.*, Int. Rev. Code of 1954, §§ 7454 (fraud), 6902(a) (transferee liability), 534a (accumulated earnings).
11. Helvering v. Taylor, 293 U.S. 507, 514-515 (1935).
12. Burnet v. Houston, 283 U.S. 223 (1931).
13. Tax Court Rule 32.
14. Helvering v. Taylor, 293 U.S. 507, 513-14 (1935).

pleadings, the Commissioner has any second thoughts as to "new matter"[15] and raises them in his answer the burden of proving the new matter falls on the Commissioner just as the burden of proving a counterclaim falls on a defendant in any other type of action. Therefore, under the tax court rule, the Commissioner must be certain he has determined every theory of deficiency before the taxpayer moves to the tax court if he is to minimize his burdens.

Under the *Helvering v. Taylor*[16] doctrine the general presumption of correctness of the Commissioner's determination will fall whenever the taxpayer proves the determination to be arbitrary and excessive. If the taxpayer is not seeking to obtain a refund or to sustain a deduction the taxpayer has won his case and need not prove the correct amount of the liability. If the Commissioner wishes to salvage anything he will then have the burden of proving the exact amount the taxpayer owes just as if he were alleging new matter, as his original determination has been nullified.[17]

Claims for Refund Brought in the Court of Claims and the District Courts

Claims for refund must be made by the taxpayer within three years from the date the return was required to be filed or two years from time of payment whichever is the longer,[18] unless the taxpayer and the Commissioner have agreed to extend the statute of limitations[19] in which case the time for filing a refund claim is extended for six months beyond the closing date of the extension.

Once the taxpayer is in the court of claims or the district court, the burden of proving his net overpayment for refund is squarely upon him.[20] As part of the burden the taxpayer must prove the correctness of all deductions and credits claimed on his return.[21] The fact that the Commissioner may have overlooked a deduction or failed to disallow it does not shift the burden of proof as to such deduction or credit.[22] This is so because a suit for refund of taxes erroneously paid, although technically an action in law for money had and received, is equitable in nature. In *Stone v. White*,[23] the Supreme Court stated:

> The action, brought to recover a tax erroneously paid, although an action at law, is equitable in its function . . . .
>
> Its use to recover upon rights equitable in nature to avoid unjust

15. See Forman, *The Burden of Proof*, 39 Taxes 740-42 (1961) for an analysis of what comprises new matter.
16. 293 U.S. 507 (1935).
17. See also Helvering v. Tex-Penn Oil Co., 300 U.S. 481 (1937) (holding that this same rule prevailed when the Commissioner abandoned and thereby repudiated the position he had taken in the 90 day letter).
18. Int. Rev. Code of 1954, § 6511a.
19. Int. Rev. Code of 1954, § 6501(c)(4).
20. United States v. Mitchell, 271 U.S. 9 (1926); United States v. Anderson, 269 U.S. 422 (1926).
21. Helvering v. Taylor, 293 U.S. 507 (1935); United States v. Anderson, 269 U.S. 422 (1926).
22. Niles Bement Pond Co. v. United States, 281 U.S. 357 (1930).
23. 301 U.S. 532, 534-35 (1937); Champ Spring Co. v. United States, 47 F.2d 1 (8th Cir. 1931).

> enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in *Moses v. Macferlan*, 2 Burr 1005 (K.B. 1750), have long been recognized in this Court. . . . It is an appropriate remedy for the recovery of taxes erroneously collected. . . . The statutes authorizing tax refunds and suits for their recovery are predicated upon the same equitable principles that underlie an action in assumpsit for money had and received. . . . Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right.

In essence the taxpayer has put his entire return for that year in question and as part of his burden he must prove that he has in fact overpaid his taxes for that year.

Consistent with this principle the government may credit a deficiency against a refund claim arising out of the same year even though an assessment based on the deficiency would otherwise be barred by the statute of limitations. The landmark case establishing this result is *Lewis v. Reynolds*.[24]

> It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new tax assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax . . . .
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> While the statutes authorizing refunds do not specifically empower the Commissioner to re-audit a return whenever repayment is claimed, authority therefor is necessarily implied. An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.[25]

As the Supreme Court more succinctly stated it in *Helvering v. Gowran*, if the assessment of tax is right on any theory it must be sustained.[26]

Thus entered into the law an equitable doctrine that allowed the bar of the statute of limitations to be disregarded.[27] The government may find itself in the position of having the statute of limitations run against further assessments if the taxpayer files a timely refund claim within six months after the extension for deficiency assessments has closed. The same problem arises if the taxpayer

24. 284 U.S. 281 (1931).
25. *Id.* at 283.
26. 302 U.S. 238 (1937).
27. In United States v. Pfister, 205 F.2d 538, 541 (8th Cir. 1953) the Court states, "It is true, as the court said, that the challenged deduction is not mentioned in any of the Commissioner's jeopardy assessments, nor is it made the basis of a counter claim in any pleading filed by the United States. But all this is entirely beside the point. The validity of any deduction claimed by the taxpayer in his income tax return is inevitably in issue in his action to recover alleged overpayments of income tax . . . ."

files a timely refund claim on the last day of the statutory period, as the administrative procedure necessary to process such a claim may take many months, thereby barring deficiency assessments for collection purposes.[28]

The doctrine referred to above is known as set-off and should not be confused with the doctrine of equitable recoupment.[29] Set-off involves the right of the government to interpose a barred assessment to the taxpayer's timely refund claim when both the refund claim and the barred assessment involve the same tax return or a related and dependent tax return for the same year by the same taxpayer. As the assessment is untimely it can only be used to reduce the taxpayer's timely claim and not for collection purposes. Set-off is based upon the broad principle that a taxpayer is not entitled to a refund unless he has in fact overpaid his tax for that year.

Equitable recoupment[30] involves attempts to set-off tax liability from one year against that for another year after the statute of limitations has run[31] or where attempts are made to set-off the tax liability of one taxpayer against that of a second taxpayer.[32] In these situations, where different parties are involved, or where the challenged item arose in a year other than the one in suit, the government can only maintain the equitable recoupment defense where a single or the same transaction is involved.[33] Equitable recoupment is based upon the principle that a party should not gain the protection of the statute of limitations where he has given a different tax treatment to the same transaction in different years. The doctrine is limited by judicial decision[34] as well as sections 1311-15 of the Internal Revenue Code of 1954.

Sections 1311-15 of the Internal Revenue Code are a partial codification of the equitable recoupment doctrine. If these provisions are applicable they preclude resort to the doctrine of recoupment.[35] Generally, sections 1311-15 provide for an adjustment in certain cases of the tax for years barred by the statute of limitations or other rules of law. In general, the adjustment may only be made where the taxpayer or the Commissioner has treated some item inconsistently as between open and closed years, and stands to profit from such inconsistent treatment. For example, if the taxpayer deducted an item in a closed year and then deducts the item a second time in an open year, and the deduction for the second year is determined to be correct, the Commissioner is allowed to eliminate

28. See Dysart v. United States, 340 F.2d 624 (Ct. Cl. 1965) for an example of how one arose.

29. See 10 Mertens, Law of Federal Income Taxation, §§ 58.41, 58.42, 60.05 (1965).

30. Bull v. United States, 295 U.S. 247 (1935) is said to be the originator of this doctrine. Compare Stone v. White, 301 U.S. 532 (1937) (modified 302 U.S. 639 (1937)), *rehearing denied*, 302 U.S. 777 (1937). For limitations on the doctrine see Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946).

31. *E.g.*, McEachern v. Rose, 302 U.S. 56 (1937).

32. *E.g.*, Stone v. White, 301 U.S. 532 (1937).

33. Bull v. United States, 295 U.S. 247 (1936); see esp. pp. 261-63.

34. Rothensies v. Electric Storage Battery Co., 320 U.S. 296 (1946); McEachern v. Rose, 302 U.S. 56 (1937).

35. Gooding v. United States, 326 F.2d 988 (Ct. Cl. 1964); Wells Fargo Bank & Union Trust Co. v. United States, 245 F.2d 524 (9th Cir. 1957).

the deduction for the closed year. An inconsistent position must be taken in all but two of the cases listed under section 1312.[36]

It seems clear from the cases thus far noted that a taxpayer in a suit for refund must prove that he has overpaid his tax before he can successfully collect a refund. This involves a redetermination of his entire tax liability for the year in issue including proving the legality and "amount of a deduction claimed."[37] Under *Lewis v. Reynolds*,[38] the government can set-off barred assessments against the taxpayer's timely refund claim if both relate to the same return. A major question left open in *Lewis v. Reynolds*, however, was which party had the burden of proof as to the validity or invalidity of such an assessment. The problem is pertinent to equitable recoupment as well as offset as the party who has the burden is apt to find his case lost before he starts because records substantiating deductions and payments thereof may only have been kept during the period that the statute of limitations remained open.

Assume that the taxpayer files his return in 1950 and that during audit the Commissioner finds a deduction that he does not believe is justified. As far as the Commissioner is concerned and as far as the taxpayer is aware, the balance of the return has passed audit in that no other items are being questioned by the Commissioner. Assume further that rather than assess deficiencies at the time, perhaps due to a need for further audit on the items in question, the Commissioner has the taxpayer agree to sign a form 872 thereby extending the running of the statute. The Commissioner can request additional waivers if he decides he needs them and the taxpayer normally signs in the hope that the re-audit on the item in issue will be resolved in his favor. Assume it is now 1965 and the Commissioner decides the assessment should be paid. The taxpayer does so and within six months after the expiration of the last waiver he files a formal claim for refund. Subsequently, taxpayer timely commences suit upon the claim. The Commissioner is at this point barred from assessing any additional deficiencies for the year in question (1950). But under the offset doctrine the government is not precluded from raising such deficiencies as set-offs, to reduce the amount of taxpayer's refund claim if he is ultimately successful. Assume further that the government, in response to taxpayer's timely refund claim, raises as a set-off an item in the return never heretofore raised by the Commissioner and which taxpayer had been lulled into believing was not going to be questioned. Chances are that the taxpayer has saved his records pertaining to the item that was in issue, but the records supporting the balance of his return not in question were probably disposed of long ago. Taxpayer is now, for the first time, called upon to prove the facts of an occurrence that took place fifteen years ago for which he no longer has any records. In this situation can the government, under the

36. Int. Rev. Code of 1954, §§ 1311(b)(1)(A) and (b)(2)(A), Regs. § 1.1311(b)(2); Int. Rev. Code of 1954, §§ 1311(b)(1)(B) and (b)(2)(B).

37. Helvering v. Taylor, 293 U.S. 507, 514 (1935).

38. 284 U.S. 281 (1931).

rationale of *Lewis v. Reynolds*,[39] put the taxpayer to the task of proving the validity of a barred item which it is for the first time claiming was improperly deducted? Or are such barred offsets to be treated as new matter under the rationale of Tax Court Rule 32, thereby placing the burden on the Commissioner?

The question was squarely met by the court in *Missouri Pacific Railroad Co. v. United States*,[40] which was called upon to decide who had the burden of proving a set-off claim barred by the statute of limitations in which both the set-off and the refund arose out of the same tax return. In discussing the issue the court also dealt with the question of who had the burden of proof in equitable recoupment claims "with respect to the tax treatment accorded an item found . . . in the same year involving a different type of tax which is independent of and unrelated to the tax involved in the suit for refund, [and] in another year involving any type of tax whether related or unrelated."[41] As to barred items raised under the doctrine of equitable recoupment the burden of proof was thought to be on the government throughout the entire proceedings, while in the case of barred items raised under the offset doctrine it was held that the burden of proving the incorrectness of the government's disallowance of the challenged item was *ultimately to be on the taxpayer.*

The court's rationale for so holding is that under the equitable recoupment doctrine the challenged items in no way affect taxpayer's tax liability under the return connected with the suit for refund, while under the set-off doctrine the challenged item is directly involved with the final computation of taxpayer's tax return under which the refund is sought. In essence, on the question of barred set-offs the court held that the burden of disproving the government's claim, once shown to be bona fide, was upon the taxpayer.

> By this we mean that the government has to demonstrate that it has *some concrete and positive evidence*, as opposed to a mere theoretical argument, that there is some substance to its claim and is not a mere fishing expedition or a method of discouraging taxpayers from seeking refunds on meritorious claims because of the cost that would result in proving each and every item involved in a tax return. In a case where the taxpayer raises specific issues as to a tax, and there is no good reason for the government to challenge the remainder of the items going to make up the tax, the government should not be able to cast the burden on the taxpayer of proving each and every item. The right of allowing an offset under these situations is an *equitable* right given to the government based on *equitable principles* and, as such, should not be abused. If properly used, it should provide the government with a "shield" to prevent the unjust enrichment of a taxpayer, but if used

39. See also Globe Gazette Printing Co. v. United States, 13 F. Supp. 422, 82 Ct. Cl. 586, *cert. denied*, 298 U.S. 682 (1936) wherein the Court of Claims reiterated the doctrine of *Lewis v. Reynolds*. "It is a fundamental that when a suit is brought for the recovery of taxes, the taxpayer must show that he has overpaid his tax and that involves a redetermination of his entire tax liability." *Id.* at 425, 82 Ct. Cl. at 591-92.

40. 338 F.2d 668 (Ct. Cl. 1964).

41. *Id.* at 670.

> as a "sword" it would under certain circumstances have the contrary effect . . . . If after an examination of the pleadings and materials furnished by the government at pretrial, the trial commissioner determines that the contention raised by the setoff has substance, then the burden is on the taxpayer to prove the validity of the challenged item raised by the answer in setoff.[42]

However, the taxpayer is aided by a series of presumptions that attach to all the actions of the Commissioner. The allowance of deductions, as well as the disallowances on which deficiency assessments were made, are favored by a presumption of validity.[43] This presumption will satisfy the taxpayer's initial burden of producing evidence as to each item of the return which he is accepting as correct. Further, it will satisfy the taxpayer's ultimate burden of proof as to each of the items in question unless the government comes forward with "some concrete and positive evidence" establishing that it has a valid set-off. If the government does, then its burden of coming forward with the evidence is completed, the presumption of validity of the Commissioner's findings as a result of auditing taxpayer's return is removed, and the burden of proving (burden of persuasion) that the government's offset is improper falls on the taxpayer. In sum, although the taxpayer has certain presumptions working in his favor, these are easily overcome if the government has a reasonable basis in law or in fact upon which to raise a barred offset claim. Once this is established, the taxpayer is heavily put upon not only to prove his own timely claim for refund but also to disprove the government's untimely offset. In *Missouri Pacific Railroad Co. v. United States*,[44] an offset case, the taxpayer had to prove the payment and deductibility of a foreign tax paid in 1950. For an even more glaring inequity raised by the offset doctrine in light of the purpose of the statute of limitations, see *Dysart v. United States*[45] wherein the taxpayer had cast upon him the burden of proving "the details of a transaction that had its origin more than forty years ago."[46]

These results hardly seem equitable. Since the offset doctrine is equitable in nature in that it is based upon a theory of unjust enrichment, should not its application be subject to the basic clean hands philosophy of equity? Should not the delays and negligence of either party in not timely pleading an offset be considered before it is allowed to be used once the statute of limitations has run? Under the doctrine of equitable recoupment, equitable considerations such as the Treasury's delay, the burden on taxpayer and hardship of disproving the

42. Missouri Pacific Railroad Co. v. United States, 338 F.2d 668, 672 (Ct. Cl. 1964). (Emphasis added.)

43. Trapp v. United States, 177 F.2d 1 (10th Cir. 1949); J. M. Perry Inc. v. Comm'r, 120 F.2d 123 (9th Cir. 1941); Embry v. Gray, 145 F. Supp. 383 (D.C.W.D. Ky. 1956), *appeal dismissed on consent* 244 F.2d 718 (6th Cir. 1957); see notes 3 and 5 *supra*.

44. 338 F.2d 668 (Ct. Cl. 1964).

45. 340 F.2d 624 (Ct. Cl. 1965).

46. *Id.* at 634.

set-off are given weight before the doctrine is allowed to be applied.[47] Yet, the majority opinion in *Dysart v. United States*[48] stated:

> Although the origin of these defenses may be traced to equitable principles, the right to raise a *setoff* is not subject to equitable considerations as taxpayers contend. We believe that both the government and the individual taxpayer have the legal right to raise a setoff without having to appeal to the court's discretion or to its evaluation of the particular equities.[49]

However, in *Missouri Pacific Railroad Co. v. United States*[50] the same judge stated: "The right of allowing an offset under these situations is an equitable right given to the government based upon equitable principles and, as such, should not be abused."[51] It would seem that if either the government or the taxpayer is to be allowed to lift the bar of the statute of limitations and interpose offsets, that equities should be considered on both sides. There is sound reasoning behind the policy of having litigation come to an end. The statute of limitations was designed to promote this policy. Further, people do rely upon the statute of limitations and once it has run, records may not be retained.

The Supreme Court in *Rothenses v. Electric Storage Battery Co.*,[52] an equitable recoupment case, put the argument succinctly:

> . . . a statute of limitations is an almost indispensable element of fairness as well as of practical administration of an income tax policy.
> We have had recent occasion to point out the reason and the character of such limitation statutes. 'Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.'[53]

Unless equities are considered in offset as they are in equitable recoupment cases, it is conceivable that the statute of limitations may remain open and litigation be carried on indefinitely. Assume that the Commissioner has had taxpayer return under audit for ten or fifteen years by the use of waivers, and that the Commissioner has only been questioning one or two items. The balance of the return has not been questioned. Assume further that at the end of the fifteen years taxpayer gives up arguing with the Commissioner, pays the tax and

47. Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946); United States v. Bowcut, 287 F.2d 654 (9th Cir. 1961).
48. 340 F.2d 624 (Ct. Cl. 1965).
49. *Id.* at 627-28. (Emphasis added.)
50. 338 F.2d 668 (Ct. Cl. 1964).
51. *Id.* at 672.
52. 329 U.S. 296 (1946).
53. *Id.* at 301.

thereafter files a timely refund claim (i.e., within six months after the expiration of the last waiver). In response the government interposes as a barred offset an item in the return the Commissioner had never previously questioned. Assuming that the government has shown that it has a reasonable basis in law or in fact for its offset, which should not be difficult, the burden of disproving the government's offset falls on the taxpayer. The taxpayer may not be able to disprove the government's offset, perhaps due to the fact that witnesses have died. In the case of a corporation, witnesses may have quit or retired and moved away, or the records pertaining thereto may have been destroyed when it became clear years ago that the Commissioner was not interested in the items now questioned. But suppose further that the taxpayer, upon checking the records and witnesses he does have available, discovers he has additional claims for refund which he had also neglected to file timely. There seems to be nothing to prevent the taxpayer from proving these claims as an offset to the government's offset and thereby free his original timely refund claim for payment. May the government then research its records and offset the taxpayer's offset to its original offset and so on? All of this is predicated upon the doctrine enunciated by the Supreme Court in *Lewis v. Reynolds*[54] which in essence states that as taxpayer's entire return is in question, barred claims arising out of that return may be used to show whether in fact the taxpayer has overpaid his taxes for the year in question. The above hypothetical may appear to be far-fetched but such appears to be the law if "both the government and the individual taxpayer have the legal right to raise a [barred] setoff without having to appeal to the court's discretion or to its evaluation of the particular equities."[55] Absolute justice is an elusive goal. With it in mind however, it seems the better reasoning to adhere to the purpose and policy of the statute of limitations unless equitable considerations strongly mitigate otherwise. To allow offsets as a matter of right without regard to the statute of limitations does not seem to promote justice.

From a purely pragmatic point of view, what is the best way to close out the tax year? As the income tax law is strictly statutory in nature it would seem reasonable to expect the Code to define situations allowing deviations from the statute of limitations. Sections 1311-15 provide one such example.

Old common law notions of equity provide the government with more of a "sword" than a "shield" to be used against the unwary taxpayer. Therefore, the tax year should close at the time Congress intended it to. If by that time the Commissioner or the taxpayer have not asserted their claims they should lose them. However, under the current law a taxpayer would be well advised to retain all of his records pertaining to any return under which he believes he will be filing a claim for refund.

In summary, it appears that the burden of proof is upon the taxpayer in

54. 284 U.S. 281 (1931).
55. Dysart v. United States, 340 F.2d 624, 628 (Ct. Cl. 1965).

all[56] cases of tax litigation except for items raised under the doctrine of equitable recoupment and where new matter is raised by the Commissioner in the tax court. It would seem, in order to be consistent, that if the Commissioner raises "new matter" in the form of an untimely offset in a refund suit he should have the burden of proving it as well. Our tax structure is based upon a self assessing system, yet we reward, with a lighter burden of proof, the man who refuses to pay his taxes and litigates his grievances in the tax court, and penalize, with a heavier burden of proof, the man who pays his taxes on time and sues for refund in the court of claims or the district courts.

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THE AMERICAN MOTORIST IN CANADA

Every year the Canadian highways are used by thousands of Americans enjoying the recreational and vacation areas to the north. Vehicular traffic, composed of private as well as commercial vehicles, uses Canadian routes daily as a short cut between the northeastern and midwestern United States. This international travel is further facilitated by the reciprocal waiver of the requirement for a passport or visa when crossing the border between the two countries.[1] Inevitably, a certain number of American motorists will be involved in motor vehicle accidents in Canada. The following is an attempt to present some of the legal problems arising from such accidents and to provide an analytical framework for solving these problems.

Because of the breadth of this undertaking, it necessarily will deal in general terms, sacrificing the detail that is desired in considering each of the issues. However, this comment will collect and cite references where this detail will be found, and serve as a touchstone for a more extensive analysis of any particular factual situation.

In treating this subject the scope has been limited to the jurisdictions of New York State and the Province of Ontario. These jurisdictions will serve as a model for factual situations involving two other jurisdictions in the United States and Canada respectively.[2]

When an American motorist has been involved in an automobile accident in Canada, a resulting law suit will take one of three possible forms: American Plaintiff v. American Defendant, Canadian Plaintiff v. American Defendant, or American Plaintiff v. Canadian Defendant.[3] In each of these situations the party

56. Except where Congress has specifically allocated the burden of proof; see note 6 *supra.*

1. Immigration and Nationality Act § 212(d)(4)(B), 66 Stat. 191 (1952).
2. The Canadian provinces are common law provinces with the exception of Quebec, which has retained a civil law system.
3. Cross claims and counter claims will be disregarded for the purpose of this analysis, since they are merely combinations of these categories.