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# **What Happens to the Tax Return After It Is Filed?**

## **Procedure Before the Bureau of Internal Revenue and the Board of Tax Appeals**

**By R. P. HERTZOG\***

*(Continued from March Issue)*

All cases not disposed of by settlement and not carried on the board's reserve calendar are set for hearing at the place designated therefor. In the larger cities frequent hearings are held, while in the smaller cities hearings are usually held for a period of one or two weeks about every year—sometimes twice a year, depending upon the number of cases on the circuit calendar at each particular place. Comparatively few hearings are now held in Washington. The hearings are conducted by one member of the board except in unusual cases where two or three members may sit to hear a particular case. With the exception of those rare instances only one member of the board conducts hearings.

The proceedings of the board are conducted in accordance with such rules of practice and procedure as the board may itself prescribe and in accordance with the rules of evidence applicable in the Federal courts. The case is heard *de novo* by the board and the files of the bureau, including the return and any documents which may have been submitted to the bureau during its consideration of the case do not become a part of the record unless actually introduced and admitted in evidence at the hearing. The proceeding is initiated by the taxpayer, who is the moving party in the proceeding. The deficiency notice is considered *prima facie* correct and the burden of proof is upon the taxpayer except in cases involving the fraud penalty or cases involving transferee liability; that is, where a petitioner is considered liable as a transferee of property of a taxpayer without assets or in the case of affirmative issues (including claims for increased deficiencies) raised in the answer, where such burden is by statute placed upon the commissioner.

It is incumbent upon the taxpayer, except in the cases mentioned, to show that the commissioner's determination is invalid, regardless of

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the correctness of his theory or the reasons which he may have assigned for the increase in tax liability proposed. Due to the well-established presumption of correctness attaching to the commissioner's action, many cases have been dismissed for failure on the part of the taxpayer to overcome that presumption or to prosecute his appeal after filing a petition. The board has also stricken the fraud penalty and has refused to sustain transferee liability or increased deficiencies because of the failure of the commissioner to sustain his burden in many cases.

At the time of the hearing before the board, the attorney representing the taxpayer should be prepared in an opening statement to explain the issues which have been raised and which he desires the board to pass upon, as well as give a brief summary of the facts to be introduced by testimony in support of the position taken. In cases where witnesses are located at distant points or are unable to be present at the hearing to give their testimony in person, provisions are made in the board's rules for the taking of depositions, if application is made therefor more than thirty days prior to the date of the hearing, or by agreement with Government counsel. As a matter of general practice, cases are not argued orally before the board at the conclusion of the hearing and a decision is not usually rendered at that time. In practically all cases the arguments of the parties are presented in written briefs which are filed within stated periods after the close of the trial.

After a case has been submitted to the board, it is required to make a written report which contains findings of fact and an opinion. The written opinion of the board member who heard the case becomes the opinion of the board within thirty days unless during that period the chairman of the board directs that the report shall be reviewed by the entire board. The chairman also has authority to direct the publication of opinions, but all opinions whether or not published are public records open to inspection. The handing down of an opinion by the board does not constitute its final decision. The law provides that the board's decision shall be held to be rendered on the date that an order specifying the amount of the deficiency or overpayment is entered in the board's records. The result of the board's opinion is reflected in its final order of redetermination, which, if the commissioner's determination is modified, is based upon recomputations filed under Rule 50 of the board's rules of practice.

The board has its own rules regarding admission to its bar. The mere fact that an attorney is a member of the bar in his local community or is enrolled to practice before the Treasury Department does not of itself entitle him to appear before the Board of Tax Appeals. Although the commissioner is always represented by a member of the chief coun-

sel's office, who, as before stated, is under the immediate supervision and direction of the division counsel, the taxpayer may either appear *pro se* or be represented by an attorney or a certified public accountant who has satisfied the requirements under the board's rules. In the early days of the board's history, a large number of taxpayers were represented by certified public accountants, but since then the number has diminished considerably. The trial of a case before the board is now quite generally recognized as being the task of the lawyer or at least one trained in the law who is familiar with court procedure and the rules of evidence.

When the board renders its decision, either party may within thirty days thereafter request a rehearing or reconsideration or a review of the decision by the entire board if the decision was not previously considered by the full board. Decisions of the board are reviewable as a matter of right by the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia. Either party may petition for review within three months after the decision is rendered. Such review is obtained by the filing of a petition for review with the clerk of the board, who transmits such petition to the clerk of the court to which the review is taken. Generally the board decisions may be reviewed only by the Circuit Court of Appeals for the circuit wherein is located the collector's office in which the return was filed, or if no return was filed, then by the Court of Appeals for the District of Columbia. The taxpayer and the commissioner, however, may, by written stipulation, agree to have the board's decision reviewed by any other circuit court of appeals or by the Court of Appeals for the District of Columbia. Each of the reviewing courts has power to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of proceedings upon such review.

It is well established that the findings of the board will not be disturbed by the reviewing court unless as a matter of law there is insufficient evidence on which such findings may be based. Generally, then, the reviewing court concerns itself with a review of the board's decision as to the law of the case. Upon review, the court has power to modify or reverse the board's decision with or without remanding the case for a rehearing. Decisions of the reviewing court are in turn reviewable by the Supreme Court on petition for *certiorari*.

In view of the necessarily infrequent appearance of the Board of Tax Appeals for hearings in the smaller cities (which includes Denver) there is a certain provision of the board's rules of practice and procedure I would like to call to your particular attention. In a large number of the cases before the board, there is no real dispute between the parties as to the primary facts involved, the only dispute being either the conclu-

sions to be drawn therefrom or a strictly legal question involving interpretation of the revenue statute. After such cases are set for hearing, they are usually submitted to the board on a stipulation of facts and no oral evidence is submitted. All the hearing before the board consists of is a statement of the issues by the taxpayer and the respondent and the later submission of written briefs. In such cases, a hearing is not necessary and the board's rules provide for submission without such hearing. I refer to Rule 30, which provides as follows:

"Any proceeding not requiring a hearing for the submission of evidence \* \* \* may be submitted at any time by notice of the parties filed with the Board. The parties need not wait for the proceeding to be calendered and need not appear in person. The Chairman will then assign the proceeding to a Division for report, which Division, upon request of the parties, will fix a time for filing briefs or for oral argument."

When cases are submitted in this manner, the delay otherwise encountered in waiting for the board to set the case for hearing is avoided. The stipulation can also be worked out without the rush and confusion which sometimes exists after a case is actually set for hearing. We are always glad to cooperate in attempting to reach an agreed statement of facts for submission of cases in this manner, as well as at a hearing before the board. I believe this procedure in appropriate cases warrants your consideration.

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### **Lectures in Legal Psychiatry**

The fourteenth annual series of psychiatric clinics for lawyers and senior law students by Dr. Franklin G. Ebaugh and his associates, of the Colorado Psychopathic Hospital, will be offered on Wednesdays at 7:45 p. m. on March 26, April 2, 9, 16, 23 and 30. These six clinics are offered gratuitously by Dr. Ebaugh and are held at Colorado Psychopathic Hospital, at Eighth Avenue near Ash Street.

These clinics, established in 1927-1928, originally for the senior class of the University of Denver School of Law, were attended last year also by the senior class of the University of Colorado School of Law. Dr. Ebaugh also kindly extends a special invitation this year to members of the bar who may be interested.

In the course of the six clinics the principal types of mental ailments are explained and illustrated. The clinics will begin at 7:45 p. m., sharp, each Wednesday.