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## The Board of Tax Appeals and the Certified Public Accountants\*

BY J. GILMER KORNER, JR.

For three years next preceding the creation of the board of tax appeals I was connected with the office of the solicitor of internal revenue, and during that time I made the acquaintance of your profession and worked more or less with you. The advent of the board of tax appeals continued that acquaintanceship and at the same time created a new relationship between us. It is concerning this new relationship that I desire to talk with you this afternoon.

The policy with respect to the admission of certified public accountants to practise before the board of tax appeals was adopted after careful consideration. I was one of the original appointees of the board and took part in that consideration and in the adoption of that policy. Neither I nor any member of the board has had occasion to regret the action taken. The certified public accountants of our country have met this new situation in a manner which merits the admiration and respect of all who have observed it. What I have to say, then, should not be taken to be a criticism of your work before the board, nor as an indication that the board feels that its policy just referred to was not a wise one. Neither is true. Furthermore I do not wish to be understood as holding a brief for my own profession in the matter of practice before the board. This is equally far from my thoughts.

During the course of my membership on the board, I have on frequent occasions had members of your profession ask me how and in what way a certified public accountant can best serve the

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\* An address before the New York State Society of Certified Public Accountants, New York, October 14, 1925.

interest of his client in handling an appeal before the board. Such a question covers too much territory for me to answer even if I felt able to do so. However, this question has been the subject of a great deal of discussion among the members of your profession and on many occasions I have discussed it with them. There appears to me to be a feeling among many who stand high in your profession, and in the councils of your societies, that there is a danger of your extending the sphere of your professional practice into a field where it cannot do full justice to itself and that thereby the welfare of the client is in possible danger of being jeopardized.

Those discussions have been of a character most frank and earnest and I am impressed that there are many among you who entertain some real concern along this line. Not being a member of your profession I do not feel at all qualified to offer any advice and it is not my intent to do so. At the same time I have been impressed with the seriousness of the thought given to this subject by those of you who have so frankly discussed it, and at their suggestion I have undertaken to outline briefly a few observations that have been evolved in these discussions.

As a premise I may lay down the proposition that the client's interest is your first concern. All other considerations should be subordinated to that. As I view it there are two parallel courses leading to this ultimately desired end. These two courses are not divergent but convergent. To this extent they are not precisely parallel but do go hand in hand. One is the compilation, analysis, and marshalling of all the facts constituting the whole truth of the taxpayer's case. The other is the presentation of these facts in orderly and logical array, under certain prescribed rules of practice, to the tribunal hearing them. This latter constitutes advocacy. Each of these duties requires a particular and special training. But to my mind there is a more fundamental difference than merely that of training.

If I understand aright it is the duty and aim of your profession to ascertain every fact and every truth bearing on the tax liability of a client—irrespective of whether or not such facts and truths are favorable or unfavorable to his own contention. I am advised that the ethics of your profession demand that every fact be exposed and that none be concealed, and that your profession stands back of the work of each member who observes these ethics, as a guarantee of the fairness and accuracy of the

## *The Board of Tax Appeals*

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profession. No higher standard could be set for any profession than this. The aim of such an exalted standard is of course to invite and command the confidence and respect of all men in the work of every certified public accountant. Such a consummation is devoutly to be wished and any act or thing which would tend to blunt or even slightly to dull this fine edge of confidence and respect should not be lightly undertaken.

Now on the other hand, the duty imposed upon an advocate is different. His is the duty to see that his client's case is fairly and accurately presented in its favorable aspects, leaving to his opponent the duty of detecting and exposing its weaknesses and of presenting in a similar manner the favorable aspects of his side of the case. So long as an advocate does not resort to deceit, unfairness or treachery, his duty is accomplished when he has presented his client's case as above outlined, and in so doing he has practised within the ethics of his profession. No invidious comparison can be made as between the two codes of ethics. Each profession has a different function to perform and the faithful and honest performance of that function fulfills the requirements and the ethics of that profession.

The apprehension, which has been expressed to me by prominent members of your profession, is that the certified public accountant by becoming an advocate will of necessity feel constrained to adopt the practice and the ethics of the advocate and in that process lose sight of the obligations and ethics of his own profession to which I have just alluded. The question is, Can any man fill two capacities with separate and distinct requirements and do justice to himself and his client in both? With the corollary query, can he, under these conditions, do justice to both professions which for the time being at least he represents? The apprehensions are not, as I gather it, due to solicitude for the standard of the profession of advocacy but for the maintenance of that severe ideal sought for the profession of accountancy.

By reason of the high standard of ethics that your profession has set for itself, it has established such a reputation for accuracy, probity and full disclosure of all facts, that the certified statement of one of your members is relied upon and accepted without reservation by bankers and other extenders of credit. This is evidence not merely of an ideal, of something to strive for, but of an actual accomplishment, a goal reached. It is jealousy of this confidence and respect, this accomplishment, which is causing the

apprehension of some of your members to which I referred a while ago.

I have often heard the jocular inquiry as to which has the better chance of success—a good case poorly presented or a poor case ably and skilfully presented. I do not know the answer. On the whole, perhaps it is an even break. I can say this, however: There may be an excuse for the latter but there can be nothing but regret and disappointment growing out of the former. The board of tax appeals has had the experience of hearing all kinds. There have been good cases well presented, good cases poorly presented, poor cases well presented and poor cases poorly presented. Whether the board has been able to find the right answer in all of them is a matter on which I do not here express an opinion. If it has not done so in the first situation it is the fault of the board. As to the other three, the board has at least a defensible ground for failure. You will note that of the four given, there is only one in which the board has the full opportunity to do justice to itself. It may do justice to the parties even in the other three but it is at the expense of great labor and even uncertainty, at best.

And now, aside for a moment from the consideration of any effect on the standards of the profession of accountancy which may be involved in certified accountants acting as advocates, let us consider the case purely from the standpoint of the taxpayer. He is your client and to him, of course, is your first duty. To see that your client gets exact justice is your aim. He goes to you because you are a specialist in the complicated economic structure within which we live. He goes to you for the further reason that he has confidence in your skill and attainments to tell him with exactness what taxes he should pay. Assuming he is an honest client, you advise him fully of his liability and show him all the details—the details which work in his favor as well as those which do not. If he is not an honest client and you are not able to satisfy yourself that you know the truth and the whole truth, you would of course decline his case. Having fully satisfied yourself of the true condition of your client's liability and so advised him, what is your next duty? It is to present it to the tribunal designated to hear it. If you are not fully equipped for that duty, then no matter how carefully and accurately you have prepared his case, the client is in danger of sustaining a loss of his appeal. It is just here that I feel the certified public account-

## *The Board of Tax Appeals*

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ant should carefully weigh in his mind his responsibility to his client.

I have been told by some certified public accountants that since the organization of the board of tax appeals, they feel the need of the study of the law of evidence, and that they intend to enroll in a law school and take special courses in pleading and evidence. That is all right as far as it goes, but I fear that it does not go far enough. A knowledge of pleading and evidence is very helpful, but a mastery of them is difficult and comes only with long experience and practice. There are men who are native advocates, who by instinct have the flair of advocacy. But, as I view it, there is a more fundamental necessity in the presentation, argument and briefing of a case. Let us advert again to the point where you are weighing in your mind your responsibility to your client. If his case, in addition to the facts of accountancy of which you have the mastery, involves the interpretation of a contract under a statute or the common law of a given state, or perhaps involves the even more difficult problem of real property, your knowledge of pleadings and evidence would perhaps not serve to protect your client's rights.

The experience of the board shows that comparatively few appeals involve issues of pure accountancy. By that I mean issues in which no questions of substantive law are presented. Well-nigh every appeal involves such law questions and these run the whole gamut of law—corporations, trusts, domestic relations, banking, torts, partnerships, contracts, real property, negotiable instruments, receivership and bankruptcy, and even criminal law in cases in which fraud is involved. Each and every one of these enumerated branches of the law has been presented to the board not once but repeatedly. Any advocate who is not thoroughly grounded in these subjects is at a grave disadvantage in presenting cases in which they are involved. You can see from this, that a superficial or even a thorough training and understanding in pleadings and evidence would not enable you to do justice to yourself, your profession or your client.

As I stated at the outset, what I have said here is not in criticism nor is it intended in a spirit of gratuitous advice. That is neither my province nor my intent. But, I am interested in the success of the board of tax appeals. I am anxious beyond measure for it to fulfill in every possible way the functions for

which it was created. I want to see its decisions respected for their merit and justice. The care and accuracy with which a case is prepared contributes immensely to the ability of the board to render such decisions, and the same is true of the clarity and skill with which it is presented. It is therefore of great interest to me to see cases both well prepared and well presented. As I said a while ago, each requires a special kind of training. There is ample room and reason for men of both classes of training to work together for the desired end, viz.; the better trial of tax cases.

Of late I have talked with the heads of accounting firms and also of law firms and I am struck with the similarity of the realization brought home to both, viz.; that in the preparation and trial of tax cases both are at a grave disadvantage without the help of the other. Only a short time ago the head of one of the largest law firms engaged in the tax practice said to me that his firm had long since realized the absolute necessity of associating with themselves certified public accountants in the preparation and presentation of every tax case in which they are employed. He said that the first advice given by his firm to a client is that such an accountant should be employed. If the client does not want to do this, the firm does it on its own responsibility. He then called my attention to the success which his firm enjoyed in the practice both before the board and in the bureau of internal revenue and stated that he attributed such success largely to this policy. On the other hand, I have had conversations with certified public accountants, both individual practitioners and members of prominent accounting firms, and they have stated in almost exactly the same language that their experience had taught them the necessity of associating legal counsel in tax cases before the board, as well as in the bureau of internal revenue. One of them remarked to me that he had come to believe that nothing could present a more helpless picture than a certified public accountant attempting to present a real tax case without the assistance of a lawyer, or a lawyer attempting to present a tax case which he had attempted to prepare without the advice and assistance of a certified public accountant.

Personally, I feel that these two important professions are of necessity complement to each other in the tax practice. I have seen the combination work so satisfactorily to both professions and to the board (and, I might add, to the client as well) that I

## *The Board of Tax Appeals*

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am reminded to quote from Hiawatha (without fully adopting the ultimate conclusion):

“As unto the bow the cord is,  
So unto the man is woman:  
Though she bends him, she obeys him,  
Though she draws him, yet she follows,  
Useless each without the other!”

And now let me take a few minutes more of your time and turn to the matter of what the board is doing. As you know, the board was organized on July 16, 1924. The first case was heard about the middle of August of that year. However, it was approximately the middle of October before we began hearing cases with any degree of regularity because of the few cases coming to issue in the formative stages of our existence. It was not until about the first of this year that the board really took its stride. There were twelve members of the board until April 1st of this year, at which time four new appointees took office. The resignation of one member at that time made the board membership fifteen. This number remained constant until September 1st, when one new member took office. A week later, however, another member resigned, so that the number remains at fifteen.

Since our organization and until October 1st of this year, 7,664 appeals have been filed. Of this number, to the same date, approximately 3,000 have been heard and disposed of. This is almost fifty per cent. As I said a while ago, the board did not begin at once the hearing of cases after its organization. A vacation period of approximately six weeks was observed from the middle of July to the first of September of this year, so that the work indicated above covers approximately  $9\frac{1}{2}$  months of activities, or about 400 cases a month. It has not been easy to accomplish this amount of work and it has been possible only by dint of the utmost exertion and industry on the part of the members as well as of the entire personnel of the board.

The board is calendaring appeals for hearing approximately four months from the date of issue and is hearing and disposing of them as they come on for hearing. In view of the intricacy of the problems presented and the care and thought required in their solution, this is perhaps not an unreasonable period in which to reach appeals after their coming to issue. When a case can be heard approximately four months from the date of issue, it is in a real sense current—or practically so. Our experience shows

that the average taxpayers, indeed most taxpayers, desire a period of from four to five months in which to prepare for trial. And even at that there are numerous delays brought about by continuances requested by taxpayers. Many appeals could be, and would be, reached sooner if the parties were at all times ready to go forward.

There have come to my attention lately stories and rumors to the effect that the board is four or five years behind in the hearing of its calendar, and that to date approximately 600 cases out of over 7,000 have been disposed of. From what source this misinformation originates, I do not know. All of the records of the board are open to the public and there would seem to be no reason for inaccurate and misleading statements to become current when exact information is so readily obtainable.

You may be further interested in the work of the board from the standpoint of dollars. Some time ago I caused a compilation to be made of 1,500 appeals. These were not picked cases but were taken bodily from the files in accordance with their docket numbers—the run of the mine, so to speak. A review of these appeals shows that the average deficiency per appeal is \$15,264. On this basis the total number of appeals filed to October 1, 1925 (7,664 in number), involve deficiencies of \$116,983,296. And on the same basis the appeals heard and disposed of involve \$58,000,000. As I said before this represents approximately 9½ month's work or an approximate average of \$6,000,000 a month.

The board and every member of it are conscious of the magnitude of the task in hand. The income-tax law is necessarily intricate because of its breadth of scope and universality of its application to a wide diversity of subjects and persons. The problems it presents are many and difficult of solution. The board is striving hard to solve these problems correctly but it need not be said that to do so it must have the assistance of a high degree of technical skill. This assistance the certified public accountants are able to give us. With the quality of assistance, which a profession with such exalted and severe standards as yours can give us, our task will be made easier and the complex problems of taxation may be brought to a more exact science, to the satisfaction of all the taxpayers of our country and to the government of which they are a part.