Presumptions — Kissing the Camel

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What we've got here is a failure to communicate.

Luke, Cool Hand Luke, movie, Warner Brothers, 1967

Someone once described insanity as repeating the same act but expecting different results. By this witty observation, people who attempt to avoid the income tax through legal argumentation must be insane. Not once has a single legal argument prevailed in halting or avoiding this tax. There is good reason: politicians, bureaucrats, attorneys, and judges all derive their salaries from this tax. They are not about to kill their golden egg. Hardly surprising is that the concept of due process of law is noticeably absent throughout the administrative process. Instead the process is based almost entirely upon presumptions.

What is due process of law? Fundamentally, the minimal standard is the opportunity to be heard before depriving a person of life, liberty, or property. What is an opportunity to be heard? A meaningful exchange and confrontation to introduce evidence and challenge allegations. What is evidence? Any probative document, thing, or testimony that supports or affirms an allegation.

Due process of law is significantly unimportant to many people because the income tax system is based upon self-confession. File a return, report income, calculate the tax, and the bureaucrats and judges pay little mind. Fail or refuse to file a return, or juggle the numbers in a doubtful manner, and the hounds are released.

Because the system is one of self-confession and few people think about due process of law, most people never think about any rules of evidence. After all, why are any such rules needed when most people routinely confess and submit to this tax? For the remainder who do not file a return, however, the rules of evidence become paramount — but only to the non filer. Because the system is based upon self-confession and presumptions rather than facts and hard evidence, the bureaucrats, attorneys, and judges involved care little about any rules of evidence. In this discussion the Federal Rules of Evidence apply.

A presumption is an attitude or belief based upon possibility or probability instead of fact; accepting something without evidence or basis in fact. A presumption is merely a legal device of convenience. If not rebutted timely then any possible defects associated with a presumption are perfected. Presumptions make the job of a bureaucrat, attorney or judge much easier. Such people are unlikely to abandon a system of presumption and instead embrace a system of hard rules of evidence. That would be too much work. So convenient are presumptions that the Federal Rules of Evidence are written acknowledging that a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.[1] With such a rule, fighting the income tax arguably becomes an exercise

displaying insanity. Bureaucrats, attorneys, and judges need not prove anything, they need only presume.

Understanding this game requires understanding how the administrative process works. The income tax administrative process consists of four broad categories or stages: 1) the examinations phase, 2) the collections phase, 3) the appeals phase, and 4) the enforcement phase. Although certain due process protections seem to be embedded into the administrative process, those protections are sleight-of-hand because through numerous presumptions the administrative process is flawed. Not once in any stages of the administrative process are hard facts or evidence established. Through the decades court judges and attorneys have rubber-stamped this process such that today those presumptions are considered immutable. To allow such a challenge would immediately topple the process and defeat the tax. Therefore all such challenges are ignored or swept under the judge's bench.

From the very beginning the administrative bureaucrats presume that a person is liable to pay this tax. The presumptive process grows with each step of the administrative process. Reflect upon the challenge any person faces with resisting this process. A canon of the principles of logic is that a person cannot prove a negative or prove the non-existence of something. To rebut a presumption in such a situation, that is, to rebut that something does not exist or did not occur, to introduce doubt, a person initially can only deny the presumption. Objective evidence must be introduced to establish a reasonable belief or cause why a person denies or rebuts a presumption. Introducing doubt does not mean the original presumption is true or false, but only that there is doubt and that the presumption must be supported with facts in order to sustain the presumption. But administrative agents, attorneys, and judges routinely ignore such challenges.

Consider an essential cornerstone of the income tax system: what is income? This seemingly simple question never has been satisfactorily answered, unless one accepts the pompous ivory-towered approach from court judges. The word is not defined in the Internal Revenue Code and never has been defined in the statutes at large. Scholars writing and debating the topic in the early 20th century when the 16th Amendment was proposed and allegedly ratified could not agree on the meaning either.[2]

Consider another essential cornerstone of the income tax system: who is liable for this tax? No statute exists in the modern Internal Revenue Code explicitly identifying who is liable for this tax. Such texts do exist in the original statutes at large from 1913 to 1938, but beginning with the first codification of the tax statutes, this straightforward cornerstone all but disappeared. Legislators have had more than six decades to remedy the problem, but they have not. Who is liable to pay this income tax? According to the original statutes, almost everybody. According to the codified version of the statutes, almost nobody. Do the bureaucrats, attorneys, and judges care? Hardly. They merely presume.

Regardless of location or origin, all court rules of evidence are designed upon similar principles. Although there are exceptions, the overall concept of evidence requires that all testimony be

derived from first-hand knowledge[3] and that all documentation admitted be authenticated or verified by somebody with competent knowledge.[4] Hearsay or second-hand knowledge is not allowed.[5] There are some exceptions to the hearsay rule, but certain authentication precautions must be satisfied before admitting that evidence.[6]

The administrative process begins when somebody files an informational return against another person, alleging the receipt of income. These informational returns are more commonly known by a form number: 1099, W-2, etc. The information is entered into a computer database. No questions are asked, no testimony required, no evidence needed. With this first action the rules of evidence have been discarded. These allegations are not contested by administrative agents, are allowed to stand, become part of the overall presumptive process, and become evidence.

Section 6061 of the Internal Revenue Code requires that all returns and documents be signed. Section 6065 requires all such documents to be signed under penalties of perjury. These informational returns are not signed in any such manner. Pursuant to the rules of evidence there is no accompanying statement or jurat that the information is derived from first-hand knowledge. The person filing the informational return is not required to provide any competent testimony that the information is true, complete, and correct. There are no statements or jurats citing the actual statutory requirement for filing the informational return. People filing these informational returns sometimes do sign a statement but the nature and intent of that statement is cloudy at best.[7]

These informational returns provide no information about the statute under which the information is reported. There is only presumption.

The clerk who enters the data from an informational return possesses no first-hand knowledge about the information. That person is not qualified to testify about the nature of the data. But the database itself provides no clue about who that clerk might have been even if testimony was desired. Those obscure statements that sometimes are signed and accompany the informational returns are discarded after the data is entered into the database. The only remnant that remains is a single database entry identifying the name of the company and mailing address from where the informational return was filed. Without satisfying sections 6061 and 6065, and the rules of evidence, these informational returns never should be admissible as evidence.

When administrative agents are challenged by income tax opponents, those agents often provide the challenger a computer print-out of this data. Agents presume that the data represents income received, which they believe establishes a tax owed. The agents never send a copy of the original allegation — the information return and they cannot because those documents no longer exist. The agents do not care because if pushed into a corner, they merely demand duplicate copies be printed by the person originally filing the informational return. But the rules of evidence require that original documents be used as evidence.[8] Because the documents merely reflects underlying original computer data, proponents argue that according to the “best evidence rule” that a facsimile copy is admissible. Proponents then argue that computer print-outs should be treated as original evidence. Yet a facsimile copy is not original evidence but secondary

evidence. Duplicate copies of records may be admitted as evidence but are regulated by the rules of evidence in that all such duplication must be accompanied by testimony to authenticate the document and there also must be ample documentation and testimony about why the original documents no longer exist such that duplicates must suffice.[9] A facsimile copy must be authenticated by someone with personal knowledge. None of these standards are satisfied at any stage of an income tax dispute.

Proponents then shift gears to argue that the print-outs should be admitted as exceptions to the hearsay rules. To qualify as a business records exception to the hearsay rules, administrative agents must establish a proper foundation showing routineness, must produce evidence that the document was made at or near the time of the event, and was created or produced by an employee with personal knowledge. Agents routinely fail to produce evidence or establish any foundation that the documents were created "in the regular course of the third party's business." They fail to produce any evidence to establish what is known as a proper chain of custody.

Are these computer print-outs admissible as evidence? The March 6, 1996 Government Accountability Office testimony to Congress, document GAO/T-AIMD-95-56 titled "IRS Operations: Significant Challenges in Financial Management and Systems Modernization," explicitly identified that IRS administrative agents had no trustworthy records because of an inability to authenticate and secure computer records. Without an authentication process, agents cannot submit or use such documentation as admissible evidence.

Producing such evidence continues to be a challenge. The March 2006 GAO Report to the Commissioner of Internal Revenue, document GAO-06-328 titled "Information Security: Continued Progress Needed to Strengthen Controls at the Internal Revenue Service" affirmed that the IRS computer systems continue to provide inadequate security to ensure and maintain data. In other words, there is no method in place to authenticate the data derived from the allegations contained with an informational return. The computer print-outs fail in all manners to satisfy Rules 602, 803(6), 901, or sections 6061 and 6065 of the Internal Revenue Code. Nowhere in this process is there established a custodial chain of evidence. There are only presumptions.

The presumptive process and lack of due process continue. Patient administrative agents might correspond with challengers but the agents do not care. Agents know that eventually they can simply issue a Notice of Deficiency — an administrative procedural device that paints any challenger into a corner.

Yet before agents can issue a Notice of Deficiency, they must fool their computers into creating a computer tax module for the year in dispute. The computers have been programmed such that no tax module is created unless a tax return is filed. Thus, for non filers administrative agents face the challenge of not being able to proceed administratively because no tax module exists to enter data.

Such an obstacle is no problem for administrative agents. They simply lie to create a tax module. They do this by misinterpreting section 6020(b) of the Internal Revenue Code to produce what is incorrectly but commonly known as a Substitute for Return. Agents use the data obtained from the original informational returns to create a facsimile tax return, which they then enter into their database. Of course, the return is not signed, either by the non filer or the administrative agent and therefore does not qualify as a bona fide return pursuant to sections 6061 and 6065 of the Internal Revenue Code. Do judges care? Hardly.

For many years administrative agents merely produced what was commonly known as a "dummy return." They simply submitted a blank tax return with the alleged taxpayer's name and address and that created the necessary tax module to proceed. Eventually this fraud was stopped, but replaced by another fraud. Agents today must actually perform some basic calculations to create something that actually looks like a tax return, but again based solely upon the presumptions that the original data is true, complete, and correct; that a tax return must be filed; and that a tax is owed. Agents now are required to attach a form to this facsimile return that alleges "certification." But the statements on the certification form do not and cannot satisfy the rules of evidence.

Reading section 6020(b)(1) identifies several components needed to file a "substitute return":

The person who did not make a return must be required to make a return.
A specific internal revenue law or regulation must identify the requirement to make a return.
The return must be subscribed.
The return is to be made based upon personal knowledge.
The return is to be made based upon information obtained through testimony or otherwise.

Nowhere does the certification identify the statutory nexus requiring a person to file a tax return. There is only presumption. Nowhere does the certification identify the tax imposed. There is only presumption. Nowhere does the certification satisfy the requirements of section 6065 of the IRC, which requires a signature under the penalties of perjury. Nowhere does the certification contain a jurat or statement that the information is true, complete, and correct. Nowhere does the certification contain a jurat or statement that the information is provided based upon personal knowledge and belief to satisfy the rules of evidence. The certification is accompanied with no statements how the information, if derived from external sources or testimony, was derived from personal knowledge of a third party. The form is accompanied with no statements how the information, if derived from external sources or testimony, satisfies the hearsay exceptions of the rules of evidence. The certification package appears to be little more than a ruse and a cloak to cover the fact that "dummy returns" are still being used and that agents refuse to comply with the actual requirements of section 6020. This certification form is a ruse but judges uphold the ruse.

After creating a tax module in the computer system, administrative agents then continue their correspondence with alleged taxpayers based upon presumption, obfuscation, and deceipt. Rarely do agents respond to challengers with actual facts. Instead, they cloud their correspondence with

misdirection and non-answers. They "inform" alleged taxpayers not with actual citations of statutes, but cleverly written pamphlets and booklets, all designed to obscure any due process protections that might exist. An example of how this desire not to inform and help people includes the Publication 1, also known as "Your Rights as a Taxpayer." The 1990 version of that document contained a flow chart that helped people understand the administrative process without having to read a lot of legal jargon. The flow chart disappeared with the next revision of that publication.

By statute, issuing a Notice of Deficiency requires an alleged taxpayer to pay the tax and then challenge the decision in district court, or to petition the Tax Court to litigate the dispute before paying the alleged tax. Most people choose the latter option, but failure to do either within 90 days results in a statutory default, which means the challenger no longer has standing in a court of law. Nowhere throughout the entire administrative process to that point is evidence established pursuant to the rules of evidence. Court judges then routinely uphold this administrative ploy by introducing their own presumption. They declare that a Notice of Deficiency is presumptively correct.[10] The administrative process behind a Notice of Deficiency typically is not reviewed in a trial. The judges presume that administrative agents diligently observed and provided due process of law, sufficiently established facts and evidence as required by statute and regulation, and that the Notice of Deficiency is legitimate in that a valid deficiency exists as defined by law. That tactic introduces Rule 301 which shifts the burden of proof to the challenger.

The obfuscation continues. A Notice of Deficiency actually is a Notice of Proposed Deficiency. That is, a statutory deficiency does not exist until after a statutory assessment occurs.[11] For non filers, that assessment does not occur until after a Notice of (Proposed) Deficiency dispute is resolved. Therefore any challenge in court is merely a component of the administrative process. The action at bar is whether the proposed deficiency is credible and if so, whether administrative agents possess standing to thereafter proceed administratively with assessing an alleged tax owed.

The notice does not identify any statute that makes the alleged taxpayer liable for a tax. The notice is not accompanied with any evidence. Then, because court judges conveniently presume the notice to be correct, challengers are left proving a negative.

Challengers can shift the burden of proof,[12] but judges routinely ignore most attempts because they believe that to satisfy the criteria of shifting that burden, challengers first must file a tax return. The presumption is that everything reported is subject to taxation and without filing a return, challengers fail to satisfy the requirements needed to shift the burden of proof.

Consider some additional presumptions in this process:

That the amount reported is "gross income" and thereby subject to taxation.
That identifying "the source" of a payment means only identifying the payer rather than a statutorily defined taxable activity or the property source from which income was derived.

That the person filing an informational return was statutorily required to file the documents.

That the person filing an informational returns understands that the term "income" is limited in meaning with respect to the Internal Revenue Code.

That all payments reported through an informational return constitute income in the sense that "everything that comes in" is income.

That income is "everything that comes in" rather than being limited to profits and gains.

That agents do not identify or establish a cost basis associated with any amount reported but instead presume a cost basis of zero.

That the person filing an informational return is infallible.

That the person filing an informational return is not erroneously and incorrectly filing a report on non-taxable payments.

That the amount reported in an informational return is conclusive rather than presumptive. Agents therefore treat informational returns as evidence rather than a mere report.

Presumptions. That is how the administrative process functions. Sadly, worst of all, most people, including many tax accountants and attorneys, are completely unfamiliar with the actual statutes. They presume they know. That opens the door to much ignorance, obfuscation, and deception.

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Endnotes

[1] Rule 301 of the Federal Rules of Evidence.

[2] For example, The Income Tax by Edwin R. A. Seligman, (1911) and The Federal Income Tax, Robert M. Haig, editor (1921).

[3] Rule 602 of the Federal Rules of Evidence.

[4] Rules 901 and 902 of the Federal Rules of Evidence.

[5] Rules 802 of the Federal Rules of Evidence.

[6] Rule 803 of the Federal Rules of Evidence.

[7] Commonly known as a 1096 and W-3 transmittal form.

[8] Rule 1002 of the Federal Rules of Evidence.

[9] Rules 1001–1004 of the Federal Rules of Evidence.

[10] Refer to United States v. Janis, 428 U.S. 433 (1976); Helvering v. Taylor, 293 U.S. 507 (1935). Generally, Tax Court judges accept this presumption and will not look behind this

presumption into whether the notice is valid. Read Rule 142(a) of the Tax Court rules and Welch v. Helvering, 290 U.S. 111 (1933).

[11] Refer to Bull v. United States, 295 U.S. 247 (1935), at page 259.

[12] 26 U.S.C. 6201(d) and 7491.