Taxpayer-Initiated Change from Improper to Proper Method of Accounting

Witte v. Commissioner, 513 F.2d 391 (D.C. Cir. 1975)

Petitioner, a cash receipts and disbursements taxpayer,[1] reported income in 1962-1964 from installment payments on land sales contracts.[2] Petitioner used the "cost recovery" method[3] of reporting and claimed capital gains treatment for the entire amount of the payments.[4]

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1. Methods of accounting are set out in the Treasury Regulations to Int. Rev. Code of 1954, § 446:

> (1) *Cash receipts and disbursements method.* Generally, under the cash receipts and disbursements method in the computation of taxable income, all items which constitute gross income (whether in the form of cash, property, or services) are to be included for the taxable year in which actually or constructively received. Expenditures are to be deducted for the taxable year in which actually made. . . .

Treas. Reg. § 1.446-1(c)(i) (1957).

2. Taxpayer purchased unimproved real property that he subsequently subdivided into 20 acre parcels. He sold these parcels in 1956 and 1957 under contracts that provided for a ten percent down payment and principal and interest payments of one percent of the sales price per month until the balance of the purchase price was paid. Herbert S. Witte, 41 P-H Tax Ct. Mem. 1186, 1188 (1972).

3. In sales of real property involving deferred payments:

> if the obligations received by the vendor have *no fair market value,* the payments in cash or other property having a fair market value shall be applied against and reduce the basis of the property sold and, if in excess of such basis, shall be taxable to the extent of the excess. Gain or loss is realized when the obligations are disposed of or satisfied, the amount thereof being the difference between the reduced basis as provided in the preceding sentence and the amount realized therefor. Only in rare and extraordinary cases does property have no fair market value.

Treas. Reg. § 1.453-6(a)(2) 1958 (emphasis added).

Taxpayer had initially reported no gain on the sales, but applied the downpayment and installment payments toward the recovery of his basis. Once his basis was recovered he reported the full amount of subsequent installment payments as gain. Herbert S. Witte, 41 P-H Tax Ct. Mem. 1186, 1190 (1972).

Section 1.453-6 applies to cash basis taxpayers reporting income from installment sales not on the installment method. Although the regulation is worded without reference to the taxpayer's accounting method, it is not entirely clear that it applies to accrual method taxpayers. *Compare* C.W. Titus, Inc., 33 B.T.A. 928, 930, *nonacquiescence* XV-1 Cum. Bull. 46 (1936), *appeal dismissed,* 88 F.2d 1007 (10th Cir. 1937), *with* Western Oaks Building Corp., 49 T.C. 365, 372 (1968) *and* Harold W. Johnston, 14 T.C. 560, 565 (1950). The Tax Court in George L. Caster Co., 30 T.C. 1061, 1068 (1958), held that the predecessor of § 1.453-6(a)(1) was in any event inapplicable to sales of personal property.

4. Taxpayer asserted that Int. Rev. Code of 1954, § 1237 permitted him to use

The Commissioner determined that the payments were taxable at ordinary rates,[5] and assessed a deficiency. Taxpayer then asserted, and the Commissioner agreed, that the "cost recovery" method was improper and the "completed transaction" method[6] was proper under the circumstances.[7] The Commissioner insisted, however, that taxpayer could not change his method of reporting the payments without first obtaining his consent under section 446(e) of the Internal Revenue Code of 1954.[8] The Tax Court determined that because taxpayer was merely correcting an error[9] section 446(e) did not apply, and allowed taxpayer to make the change without consent of the Commissioner.[10] The United

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the cost recovery method but he later abandoned this claim. 41 P-H Tax Ct. Mem. at 1191 n.4.

5. The Commissioner determined that part of the income was interest income and the rest was ordinary income from sales of land held primarily for sale. *Id.* at 1190. *See* INT. REV. CODE OF 1954, §1221(1).

6. *See* Treas. Reg. § 1.453-6(a)(1) (1958):

> (1) In . . . sales of real property involving deferred payments in which the payments received during the year of sale exceed 30 percent of the selling price, the obligations of the purchaser received by the vendor are to be considered as an amount realized to the extent of their fair market value in ascertaining the profit or loss from the transactions . . . .

7. The Tax Court determined that the fair market value of each of the contracts at the time of sale was "75 percent of its face amount." 41 P-H Tax Ct. Mem. at 1192. Thus, applying Treas. Reg. § 1.453-6(a) (1958), *quoted in* note 6 *supra*, the part of the sales price representing unreported gain, 25 percent, was used as the percentage multiplier of subsequent payments to determine the gain reported in the year of payment. The part of the payment not so reported, 75 percent, was regarded as return of investment. 41 P-H Tax Ct. Mem. at 1192.

8. 41 P-H Tax Ct. Mem. at 1191. INT. REV. CODE OF 1954, § 446(e):

> Requirement respecting change of accounting method.—Except as otherwise expressly provided in this chapter, a taxpayer who changes the method of accounting on the basis of which he regularly computes his income in keeping his books shall, before computing his taxable income under the new method, secure the consent of the Secretary or his delegate.

9. 41 P-H Tax Ct. Mem. at 1193. Taxpayers and the Commissioner have long battled over what is a "correction of error" as opposed to a "change in accounting method." *See, e.g.*, Hulond R. Ryan, 42 T.C. 386, 393 (1964), and cases cited therein. *See also* Skinner, *Recent Tax Accounting Developments*, 42 TAXES 836, 837 (1964); Mills, *Correction of Error v. Change of Accounting Method: How This Conflict is Being Handled*, 22 J. TAX. 66 (Feb. 1965). In 1970 the Commissioner listed those kinds of changes that the Service considers "corrections of errors" and provided a new guideline for determining "change of accounting method." Treas. Reg. § 1.446-1(e)(2)(ii)(b) (1970). *See* note 21 *infra*.

10. This determination greatly reduced taxpayer's tax liability. *See* note 33 *infra*.

The Tax Court relied on two cases, Thompson-King-Tate, Inc. v. United States, 296 F.2d 290 (6th Cir. 1961), and Howard H. Perelman, 41 T.C. 234 (1963), in addition to Wingate E. Underhill, 45 T.C. 489 (1966), *see* note 18 *infra*, to support its conclusion. In *Perelman*, however, the court held that the Commissioner could not require con-

States Court of Appeals for the District of Columbia, after finding that the change of reporting method was a change of accounting method,[11] reversed and *held*: Under section 466(e), a taxpayer may not change from an improper to a proper method of accounting without the Commissioner's consent.[12]

Section 446(e) requires taxpayers to obtain the consent of the Commissioner before changing methods of accounting, so that the Commissioner can make any adjustments[13] necessary to prevent "distortions of income" that might arise from a change.[14] Although Congress in its

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sent under section 446(e) "since he was the one who caused the change to be made." 41 T.C. at 242. In *Thompson-King-Tate* the taxpayer for two years had deviated from the method of accounting he had elected to use. The court concluded that since taxpayer's deviation had been without the Commissioner's consent it was an error that he could correct. The Court of Appeals for the District of Columbia distinguished these cases observing that neither involved a taxpayer who sought to "deviate from his long-standing albeit erroneous accounting method without obtaining permission from the Commissioner." Witte v. Commissioner, 513 F.2d 391, 394 n.5 (D.C. Cir. 1975).

11. Witte v. Commissioner, 513 F.2d 391, 393 (D.C. Cir. 1975).

12. *Id.* at 394.

13. Treas. Reg. § 1.446-1(e)(3)(i) (1957) provides:

> Permission to change a taxpayer's method of accounting will not be granted unless the taxpayer and the Commissioner agree to the terms, conditions, and adjustments under which the change will be effected. See section 481 and the regulations thereunder, relating to certain adjustments required by such changes, section 472 and the regulations thereunder, relating to changes to and from the last-in, first-out method of inventorying goods, and section 453 and the regulations thereunder, relating to certain adjustments required by a change from an accrual method to the installment method.

Requests to change methods of accounting are "ordinarily" favorably received. Adjustments are generally made over a ten-year period. Rev. Proc. 70-27, 1970-2 CUM. BULL. 509. In any event, taxpayers are entitled to a three-year allocation (two-year spreadback) under INT. REV. CODE OF 1954, § 481(b).

14. The reason for [§ 466(e)] is that a change in an accounting method will frequently cause a *distortion of taxable income* in the year of change; therefore, the Commissioner is empowered to prevent such distortion and consequent windfall to the taxpayer by conditioning his consent on the taxpayer's acceptance of adjustments that would eliminate any distortion.

Woodward Iron Co. v. United States, 396 F.2d 552, 554 (5th Cir. 1968) (emphasis added). *See* Treas. Reg. §§ 1.446-1(c)(2)(ii), (e)(2), (e)(3) (1970). *See also* American Can Co. v. Commissioner, 317 F.2d 604 (2d Cir. 1963), *cert. denied*, 375 U.S. 993 (1964); Commissioner v. O. Liquidating Corp., 292 F.2d 225 (3d Cir.), *cert. denied*, 368 U.S. 898 (1961); Hackensack Water Co. v. United States, 352 F.2d 807 (Ct. Cl. 1965); Advertisers Exchange, Inc., 25 T.C. 1086 (1956), *aff'd per curiam*, 240 F.2d 958 (2d Cir. 1957). Skinner explained:

> When a change of method of accounting is made, recurring items of income and expense are taken into account during the year of change under the new method, whether or not they have been previously taken into account during

report accompanying the Revenue Act of 1954 stated that "method of accounting"[15] in section 446(e) refers not only to the taxpayer's general plan of accounting, but also to his treatment of a material item,[16] courts initially were hesitant to accept such a broad definition.[17] In 1957, however, the Commissioner stated that section 446(e) did apply to the treatment of material items,[18] and eventually the courts uniformly concurred.[19] Still, prior to 1970 neither the Commissioner nor the courts had defined "material item," although decisions indicated that the essence of the test for materiality was quantity.[20] In 1970, the

> a prior taxable year under the old method. For 1954 and subsequent years, special technical rules have been added to the Code to prevent a doubling up or an omission of items of income or deduction in cases involving changes in accounting method.

Skinner, *supra* note 9, at 837. *See also* 303 TAX MANAGEMENT PORTFOLIOS A-12 (1974).

15. The issue whether a taxpayer's change in reporting procedure is a change in method of accounting (and the subissue whether a material item is involved) also arises in cases involving § 481(a). Section 481(a) provides that when taxable income for any year covered by the 1954 Code is computed under a method of accounting different from the method under which income was computed for the preceding year, there shall be taken into account those adjustments determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted. Adjustments for pre-1954 Code years are taken into account only if the taxpayer initiated the change. There is no difference in the courts' treatment of these issues; § 446(e) is the "complementary provision" of § 481(a). H.F. Campbell Co., 53 T.C. 439, 447 (1969), *supplemented,* 54 T.C. 1021 (1970).

16. S. REP. No. 1622, 83d Cong., 2d Sess. 300 (1954).

17. *See* American Can Co., 37 T.C. 198 (1961), *rev'd in part,* 317 F.2d 604 (2d Cir. 1963), *cert. denied,* 375 U.S. 993 (1964); O. Liquidating Corp., 29 P-H Tax Ct. Mem. 178 (1960), *rev'd,* 292 F.2d 225 (3d Cir.), *cert. denied,* 368 U.S. 898 (1961); Advertisers Exchange, Inc., 25 T.C. 1086 (1956), *aff'd per curiam,* 240 F.2d 958 (2d Cir. 1957); Falk, *Definitions of Accounting Method: Reevaluation in Light of American Can Company and Other Recent Decisions,* N.Y.U. 23d INST. ON FED. TAX. 787 (1965).

18. Treas. Reg. § 1.446-1(e)(2)(ii) (1957).

19. *See generally* 2 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 12.19, at 100 (1974), *citing, e.g.,* Graff Chevrolet Co. v. Campbell, 343 F.2d 568 (5th Cir. 1965) (applying § 481, *see* note 15 *supra*); Broida, Stone & Thomas, Inc. v. United States, 204 F. Supp. 841 (N.D. W. Va.), *aff'd per curiam,* 309 F.2d 486 (4th Cir. 1962); George C. Carlson, 36 P-H Tax Ct. Mem. 583 (1967).

20. *See* Woodward Iron Co. v. United States, 396 F.2d 552 (5th Cir. 1968) (state property tax deduction of $187,476.20); American Can Co. v. Commissioner, 317 F.2d 604, 606 (2d Cir. 1963), *rev'g in part,* 37 T.C. 198 (1961), (vacation payments, $5,853,-970.70; state property tax expense, $1,546,751.42; case under the 1939 Code involving Treas. Reg. 118, § 39.41-2(c) (1938), the predecessor of § 446(e)); Commissioner v. O. Liquidating Corp., 292 F.2d 225, 230 (3d Cir.), *cert. denied,* 368 U.S. 898 (1961) (insurance dividends, $114,117.44); Irvine v. United States, 212 F. Supp. 937, 941 (D. Wyo. 1963) (inventory of livestock; no amount given); Broida, Stone & Thomas, Inc. v. United States, 204 F. Supp. 841, 843 (N.D. W. Va.), *aff'd per curiam,* 309 F.2d 486 (4th Cir. 1962) ($6,660 item that would add ten percent to taxable income); H.F. Campbell Co.,

Commissioner promulgated regulations that defined "material item" in terms of the proper time for including the item in income.[21]

Although courts often ruled that changes from improper to proper methods of accounting required the Commissioner's consent,[22] *Wingate*

53 T.C. 439, 446 (1969), *supplemented* 54 T.C. 1021 (1970) (profit or loss from long term contracts, \$145,937.27; a § 481(a) case); George C. Carlson, P-H Tax Ct. Mem. 583, 585 (1967) (\$6,920 in license fees constituting 8.5% of total income); Hulond R. Ryan, 42 T.C. 386, 393 (1964) (dealer reserve account, \$117,720.61; a § 481(a) case); Fruehauf Trailer Co., 42 T.C. 83, 104 (1964), *aff'd*, 356 F.2d 975 (6th Cir.), *cert. denied*, 385 U.S. 822 (1966) (change in trailer inventory treatment resulting in tax difference of \$5,632,533.86; a § 481(a) case), *noted in* DeLeoleos, *Accounting Method Changes: Freuhauf Trailer May Limit IRS Compromise Procedure*, 20 J. TAXATION 322 (June 1964); Dorr-Oliver, Inc., 40 T.C. 50, 55 (1963) (vacation pay expenses, \$4,908.23); Wright Contracting Co., 36 T.C. 620 (1961), *aff'd*, 316 F.2d 249 (5th Cir.), *cert. denied*, 375 U.S. 879 (1963) (retainers for two years of \$265,762.19 and \$101,816.72; a § 39.41-2(c) case).

But see Cincinnati, N.O. & Tex. Pac. Ry. Co. v. United States, 424 F.2d 563, 570 (Ct. Cl. 1970) (finding difference in reported income of \$54,004, which represented 6/100 of one percent of taxpayer's operating expenses, not material).

21. "A material item is any item which involves the proper time for the inclusion of the item in income or the taking of a deduction." Treas. Reg. § 1.446-1(e)(2)(ii) (1970).

At the January 22, 1969, IRS hearing on the proposed § 446(e) regulations the American Institute of Certified Public Accountants voiced its disapproval of this definition and recommended that the definition be expressed, like the judicial standard, in terms of amount. The Institute

> suggested that an item be considered immaterial if the adjustment to make the change is less than \$3,000, or if the adjustment is less than the greater of (a) 1 per cent of the gross income for the taxable year or (b) 5 per cent of the average taxable income for the five preceding years. In any event an adjustment of \$250,000 or more will be considered material.

What's a Change in Method of Accounting?, 127 J. ACCOUNTANCY 72, 73 (1969). Since Congress provided no guidance as to what it meant by "material item," it is understandable that a controversy like this might arise. The common meaning of "material" suggests a definition like the Institute's. Although the Commissioner's definition is also plausible and fits within the meaning of "material," it merely incorporates the concept of distortion of income, which the courts have long understood to be the subject of § 446(e), and thus adds nothing to the section. The Institute's definition has the virtue of adding a lower limit to the dollar amount of items which need be subjected to the trial of § 446(e); this should reduce the large accounting and administrative burden that seems to be necessitated by the Commissioner's definition with relatively little detriment to the revenues.

22. *See, e.g.*, American Can Co. v. Commissioner, 317 F.2d 604, 606 (2d Cir. 1963), *cert. denied*, 375 U.S. 993 (1964); Commissioner v. O. Liquidating Corp., 292 F.2d 225, 230 (3d Cir.), *cert. denied*, 368 U.S. 898 (1961); Broida, Stone & Thomas, Inc. v. United States, 204 F. Supp. 841, 843 (N.D. W. Va.), *aff'd per curiam*, 309 F.2d 486 (4th Cir. 1962); Hackensack Water Co. v. United States, 352 F.2d 807, 810 (Ct. Cl. 1965); John P. Bongiovanni, P-H Tax Ct. Mem. 1182, 1184 (1971), *rev'd on other grounds*, 470 F.2d 921 (2d Cir. 1972); Wright Contracting Co., 36 T.C. 620, 636 (1961), *aff'd*, 316 F.2d 249 (5th Cir. 1963); Advertisers Exchange, Inc., 25 T.C. 1086,

E. Underhill[23] pointed out a possible method of circumventing that rule. The *Underhill* court had to decide whether the taxpayer could change without consent from the completed transaction method of reporting installment payments to the cost recovery method.[24] Instead of focusing on the taxpayer's reporting procedure, the court dismissed the "subtleties of 'method of accounting'" and stated that the issue turned on the character of payments, that is, "the extent to which the payments . . . are taxable or nontaxable . . . ."[25] On that basis the Tax Court held that taxpayer was simply correcting an error and allowed the change without consent.[26]

Witte v. Commissioner[27] presented the same issue in a comparable factual context. The Court of Appeals for the District of Columbia decided the materiality issue by applying both the quantity test

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1092 (1956), *aff'd per curiam*, 240 F.2d 958 (2d Cir. 1957) (application of INT. REV. CODE OF 1939, §§ 41, 42).

23. 45 T.C. 489 (1966).

24. Taxpayer's income in question was from regular payments on notes secured by deeds of trust on real estate. *Id.* at 490. The change that Underhill sought to make was precisely the reverse of the change that the taxpayer in *Witte* had sought to make. *See* text accompanying notes 1 & 2 *supra.*

25. *Id.* at 496. The *Underhill* court provided little explanation for the way in which it framed the issue except to state:

> We are not persuaded that this case involves a situation where the respondent's consent to a change of reporting should be required under section 446(e) to insure that there will not be a distortion of income "to the detriment of the government."

Id. at 497.

26. *Id. See also* Thompson-King-Tate, Inc. v. United States, 296 F.2d 290, 294 (6th Cir. 1961) (taxpayer who elected method which his accountant applied erroneously; taxpayer allowed to correct error); Beacon Pub. Co. v. Commissioner, 218 F.2d 697, 702 (10th Cir. 1955), *rev'g* 21 T.C. 610 (1954) ("[A] taxpayer may, without the consent of the Commissioner, apply the method of accounting which he has adopted, though not theretofore applied to a particular item, when that change will correct errors and clearly reflect income"); Robert M. Foley, 56 T.C. 765, 769 (1971) (taxpayer allowed to change from method that Commissioner disallowed "in the first instance" to permissible method, *i.e.*, change must be from a regular method to call for application of § 446(e)); Silver Queen Motel, 55 T.C. 1101, 1105 (1971) (same); North Carolina Granite Corp., 43 T.C. 149, 167 (1964) (taxpayer omitted his inventory in calculating depletion with result that calculation fluctuated drastically year to year; this fluctuation was "tantamount to mathematical errors" on the part of taxpayer which he could correct). Beacon Pub. Co. v. Commissioner, *supra*, is "not being followed by the Service." Rev. Rul. 59-285, 1959-2 CUM. BULL. 458, 460. Undoubtedly, the Commissioner considers the "particular item" language of *Beacon* (quoted above) as running directly against the "material item" application of § 446(e).

27. 513 F.2d 391 (D.C. Cir. 1975).

developed in earlier cases[28] and the timing test of the new regulations.[29] In reaching its decision the court provided no convincing reasons for holding that the tests for materiality were met. The court distinguished *Underhill* on the ground that the Tax Court had dealt with the character of payments rather than "the proper method or time of reporting an item the character of which [was] not in question."[30] The court then cited with approval the 1970 Regulations that state that even if a taxpayer has adopted an erroneous treatment of a material item, a "change in such practice or procedure is a change of method of accounting."[31] The court concluded that its decision was consistent with the policy underlying section 446(e)—the prevention of distortions of income[32]—since taxpayer would have avoided taxes barred by the statute of limitations.[33] The court's policy argument was strong. Section 446(e) is based upon the objective of preventing income distortions of the kind that taxpayer's change would have produced.[34]

The court, however, failed to consider several problems. First, the *Witte* court made no reference to the disparity between the quantity and timing tests of materiality.[35] Second, although it applied the quantity

28. *Id.* at 393; *see* note 20 *supra* and accompanying text.

29. 513 F.2d at 393; *see* note 21 *supra* and accompanying text.

30. 513 F.2d at 393 n.5, *quoting* Wingate E. Underhill, 45 T.C. at 489, 496 (1966).

31. Treas. Reg. § 1.446-1(e)(2)(iii) (example 7) (1970); Treas. Reg. § 1.446-1(e)(2)(i)(iii)(example 8) (1970).

32. 513 F.2d at 395.

33. Those years when taxpayer was "recovering his basis" and paying no tax at all were closed except to the extent that the provisions of §§ 1311-1315 of the Code were applicable. *See* Herbert S. Witte, 41 P-H Tax Ct. Mem. 1186, 1193 n.7; Brief for Appellant at 14 n.5, Witte v. Commissioner, 513 F.2d 391 (D.C. Cir. 1975). Sections 1311-15 require adjustments in certain instances in which an error has been corrected. If the taxpayer had prevailed on his "correction of error" theory, the Commissioner could have asserted § 1312(3)(B) as authority for an adjustment under § 1314. Such an adjustment, however, would have been limited under § 1311(b)(a)(A) to those years not yet barred by the limitations provision of the Code, §§ 6501-33. Section 6501 might have prevented the Commissioner from reaching any year more than three years before the contested year. In *Witte* the Commissioner could have reached back only to taxpayer's 1962 tax return; the contracts of sale were in 1956 and 1957. *See* Herbert S. Witte, 41 P-H Tax Ct. Mem. 1186, 1190 (1972).

34. *See* note 14 *supra* and accompanying text.

35. Treas. Reg. § 1.446-1(e)(2)(ii)(b) (1970) provides examples of changes that do not involve

> the proper time nor the inclusion of the item in income or the taking of a deduction. For example, correction of items that are deducted as interest or salary, but which are in fact payments of dividends and of items that are deducted as business expenses, but which are in fact personal expenses, are not changes in the method of accounting.

These examples illustrate that by the regulation's definition changes in the procedure of test, the court offered no indication of the minimum measure of materiality,[36] duplicating a similar failing in other opinions on the issue.[37] Third, merely reciting that *Underhill* had dealt with the "character of payments" did little to distinguish the cases. If that rationale was a valid basis for the *Underhill* holding, it is unclear why the *Witte* court rejected its application to the facts before it. The issue in both cases was whether a taxpayer could change from an incorrect to a correct method of reporting installment payments without obtaining the Commissioner's consent. If the significant difference is that the change in reporting methods in *Witte* was the reverse of that in *Underhill*, the *Witte* court did not explain why this difference is sufficient to lead to an opposite result.[38] The court did point out one additional basis for distinguishing the cases: in *Underhill* there was no danger of "distortion of income 'to the detriment of the government.' "[39] In light of the purpose of section 446(e), this distinction is perhaps the most relevant, but it does not explain why taxpayer's change in *Underhill* was not a change in the method of accounting.

Although the *Witte* decision is correct because it faithfully implements Code policy,[40] the failure of the court to deal with issues that needed clarification is disappointing. By employing both the quantity and timing tests of materiality with little accompanying reasoning, the court implied that both must be applied to determine whether an item is material. This procedure would, however, restrict the scope of the timing test to items embraced by the quantity test. It is doubtful that the Commissioner intended this result when he

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reporting "material items" involve duplications or omissions, that is, distortions, no matter what the size of the item. In contrast, by the court definition "material items" do not necessarily involve distortions because the critical factor is amount.

36. Perhaps the courts believe that materiality cannot be measured by a mechanical standard, but that all surrounding circumstances must be considered in the determination. Nonetheless, the courts have given no reasons for their failure to provide a standard.

37. *See* cases cited note 20 *supra*.

38. One theory suggested by the Commissioner was based upon the premise that § 446(e) is one of the "recognition" provisions of the Code. These provisions provide that unrealized or still uncertain gain may not be taxed:

> *Underhill* in allowing the change from pro rata reporting to the cost recovery method implicitly held that the Commissioner could not force taxpayer to continue to recognize unrealized gain simply because he had erroneously reported a part of such unrealized gains.

Brief for Appellant at 16, Witte v. Commissioner, 513 F.2d 391 (D.C. Cir. 1975).

39. *See* Witte v. Commissioner, 513 F.2d 393, 396 n.5 (D.C. Cir. 1975).

40. *See* note 14 *supra*.

promulgated the 1970 Regulations. Also, since it held that a change of reporting method was a change in the method of accounting, the court should have overruled *Underhill* rather than distinguished it.[41]

41. The Commissioner argued that if *Underhill* held that the method of reporting installment payments from the sale of property is not a method of accounting, *Underhill* should be overruled. Brief for Appellant at 15, Witte v. Commissioner, 513 F.2d 391 (D.C. Cir. 1975).