

## BOOK REVIEWS

**HOW TO WIN A TAX CASE.** By Martin M. Lore. New York: Prentice-Hall, Inc., 1955. Pp. xii, 149. \$6.50.

This work, the author states in his preface, is not directed primarily to the tax lawyer. It is directed, rather, to the multitude of men and women who, as company treasurers, comptrollers, heads of businesses, individual taxpayers, accountants or advisors, are concerned with tax problems. In the light of this stated goal, the book achieves its purpose (and perhaps even more) in that it provides invaluable information for the general practitioner who is unfamiliar with taxation as a specialty.

In down-to-earth and simple language, unburdened by copious footnotes and legal citations, the author shows how tax cases start and traces their disposition through the appeal to the United States Court of Appeals. The author's approach is eminently practical, as demonstrated by his insistence that the tax case is often begun with the filing of a poorly documented return by the taxpayer. If the lay reader gathers nothing more from this book than the idea that detailed appendices and schedules attached to a tax return will do more to discourage an audit and to win a tax case before it starts than the most expert (and most expensive) tax counsel once an audit has begun, the reader will have already received his money's worth. Also, the thesis that there is much the taxpayer can do to help win his own case, while not at all novel or unique, is presented in such a way that it appeals to the reader's self-interest. In terms of the immediate expense and inconvenience contrasted against the ultimate cost to the taxpayer in attorney's fees, costs, and tax deficiency, the author makes a convincing case for the taxpayer's early concern with the proper preparation of documents, corporate records, and the keeping of complete records.

In the last seven chapters of this ten chapter discussion the emphasis, it seems to this reviewer, is shifted from the lay reader to the general practitioner. These chapters concern themselves with settlement procedures and evaluation of a case, the jurisdiction of the Tax Court and its procedure, and appeals to the United States Court of Appeals. For the general practitioner with little or no experience in handling tax cases this should be invaluable; the information will at least protect him from making mistakes fatal to his client's case. It is in effect a written interview with experienced tax counsel which attempts to answer the questions of the general practitioner who for one reason or another is called upon to handle a tax matter without the benefit of prior experience. This reviewer has recommended the book to several general practitioners whose cases did not justify the retention of outside tax counsel; in each instance, it was well received.

While the chapters are no substitute for a well annotated volume of the Rules of the Tax Court, they give the practitioner an insight into some of the practical and important differences between tax practice and general practice. For instance, the general practitioner considers a case as good as continued when his opponent consents; also, as a matter of convenience, attorneys in general practice will normally grant a continuance to an adversary upon request. It is therefore of great importance to know that this is anything but the situation before the Tax Court. The government will oppose continuances in at least ninety per cent of the cases, and even if government counsel consents, there is no guarantee that the Tax Court judge will grant the continuance. The test is purely one of the necessity of the circumstances in the Tax Court; the press of other business or the agreement of counsel, unlike state court practice, normally will result in no continuance.

It could be disastrous in most tax cases to find the continuance denied and taxpayer's counsel given only a day to prepare for trial. This very proper warning is conveyed in the chapter entitled *The Tax Court Trial*. This reviewer has often wondered in such cases how equitable the settlements (which usually follow) are in those cases in which counsel is surprised by the denial of his request for a continuance. Certainly, government counsel are human, and an unprepared taxpayer counsel would seem to have lost his bargaining power and be forced to compromise to his client's prejudice.

If any criticism is to be directed toward the author's approach, it would have to be for his rather light treatment of the problem of tax fraud and his failure to distinguish between fraud and non-fraud cases. He notes that one-third of the tax cases involve fraud, yet he makes no differentiation in his generalizations. It is especially in this area that the reviewer's experience indicates that taxpayers need the prophylaxis outlined in the book's early chapters. First, there is nowhere indicated that the taxpayer should request the auditing agent or agents for credentials. When the agent's credentials disclose that he is a Special Agent working out of the Intelligence Unit, this is immediately a warning that the investigation has overtones of criminal fraud and a possible felony indictment. At once the taxpayer should refuse co-operation in the investigation and consult his attorney concerning his right to refuse to turn over the records which might very well incriminate him. The privilege against self-incrimination has been universally recognized in tax cases. In the event the auditing agent is less than honest about his association with the Intelligence Unit or misleads the taxpayer into believing his purpose is not to obtain evidence for a contemplated criminal prosecution, the taxpayer, according to one district court, may have the evidence later suppressed as an unconstitutional search and seizure.<sup>1</sup> Although there is recent authority to the contrary,<sup>2</sup> this important opportunity to learn the true nature of the audit and to protect the taxpayer's constitutional privilege against self-incrimination could well be lost if the author's advice to his lay reader were accepted without regard for the possibility of a fraud investigation. He advises his reader that prompt and full co-operation with the agent is necessary, and that questions should be answered completely and frankly. For the ordinary civil case one can find no quarrel with such advice; unfortunately, however, taxpayers are rarely in a position to determine when a prospective case is strictly civil and when it may lead to the assessment of a fifty per cent civil fraud penalty or criminal indictment for tax evasion. It is safe to say that many a taxpayer has paid a fraud penalty or languishes today in some federal penitentiary because of such a failure to inquire and determine the nature of the inquiry; in this respect the author's generalizations as to the merits of co-operation are misleading in their present unqualified setting. A few paragraphs on the nature of the privilege against self-incrimination and its prompt invocation in tax cases would be consistent with the author's general thesis that there is much the taxpayer can do to help win his own case. This would be even more axiomatic in the area of fraud in which the burden of proof is on the Commissioner, and where too often it is the taxpayer himself who produces the evidence to satisfy that burden.

Secondly, this reviewer believes the author missed a golden opportunity to educate his readers concerning the problem of privileged communications in the tax field. If taxpayers can be educated to the fact that their conversations and disclosures to accountants can be availed of by the Commissioner and that accountants' worksheets are protected by no privilege, the bar in general will be

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1. *United States v. Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953).

2. *United States v. Wolrich*, 119 F. Supp. 538 (S.D.N.Y. 1954).

able to represent them more adequately. At present the best solution to the problem of the taxpayer-accountant relationship is that the attorney employ the accountant to assist him in the preparation of the taxpayer's case and the attorney himself make only necessary disclosures to the accountant and retain the accountant's worksheets as part of the attorney's work product in preparation of his defense.<sup>3</sup> This would best protect the taxpayer against the spectacle of having his own accountant make the government's fraud case, civil or criminal, against him. Here again merely an awareness of the problem by the lay taxpayer can be significant in the final result.

Although this volume will have only little usefulness to the active tax practitioner, this reviewer found it interesting to compare his experiences and conclusions with those of the author. For the well-informed lay taxpayer and the general practitioner the discussion is especially recommended. Subject to the above criticism concerning the author's rather cavalier treatment of the issue of fraud, this reviewer found the book an interesting and informative discussion of modern tax controversies implemented by glimpses of an author's practical experience which cannot readily be found in the tax literature of today.

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3. See *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949).

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