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DISCOVERY OF GOVERNMENT'S DEFICIENCY COMPUTATION IN TAX FRAUD CASES

DANIEL R. DIXON*

I. INTRODUCTION

This article is concerned with those occasions in which the government, for reasons best known to itself, attempts to withhold from the taxpayer information pertaining to the details of the deficiency computation prior to trial. In such instances the 90 day letter or the indictment will contain language to the effect that taxpayer's taxable net income for a given year was a certain specified amount whereas taxpayer fraudulently reported a specified lesser amount. All of the authorities agree that taxpayer is entitled to know the "theory of the case" and it is probable that he will have been informed as to the theory on which the deficiency computation was made; viz., whether the income and deduction method, or the net worth plus expenditures method, or the expenditures method, or the bank deposits method, or some other method was used. This may be all the information the government is willing to disclose.

A deficiency notice or an indictment of this type will leave counsel for taxpayer in a dilemma as to how best to proceed in defending his client from the threatened deficiency or prosecution. Undoubtedly, additional information is needed and questions arise as to what further information taxpayer is entitled to procure from the government and what methods are available for its procurement.

The method of approach is by way of motion. If the proceeding is in the Tax Court, taxpayer can file a motion for a further and better statement of the pleadings under the provisions of Rule 18 of the Rules of Practice Before The Tax Court. The motion should be filed after answer has been filed and preferably before filing of the reply; or, if the petition is amended then after answer to the amendment and before

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1 "The Court, upon motion of either party in which good cause is shown, or upon its own motion, may order a further and better statement of the nature of the claim or defense, or of any matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the details desired."

2 "It is well to note that respondent's principal objection was that the motion was untimely filed since it was filed after the filing of the reply to the answer."
filing reply to the amended answer. Where the proceeding is a criminal one in a district court, taxpayer can file a motion for a bill of particulars under the provisions of Rule 7(f) of the Rules of Criminal Procedure for the United States District Courts. Such motion should be filed after indictment and a reasonable time before trial.

The question as to what information can be procured by a proper motion for further specification is a matter of more serious proportions. A deficiency assertion, removed from its confusing tax aspects, is a money demand, and like other such demands assumes that the party charged is adequately informed as to the nature and reason for such demand. As an original proposition, it is difficult to understand in a civil case how the government could reasonably expect payment of an asserted deficiency without disclosing to the taxpayer its deficiency computation with sufficient supporting detail to enable taxpayer to verify its accuracy. Although payment is not a part of the criminal proceeding, less favorable consideration of a taxpayer as a defendant does not seem justified. The accuracy of the deficiency computation is the foundation of the government’s case in either instance and opportunity to test its accuracy is essential for preparing a proper defense. As pointed out in the case of United States v. Empire State Paper Corp., disclosure of the computation imposes no inequity on the government:

If the government is in possession of figures derived from sources which are reliable, tending to show that defendants have manipulated income tax returns for the purpose of defeating and defrauding the government, such charges are ordinarily not weakened by making them specific in advance of trial.

A search of the authorities discloses that most of the litigation on this subject has developed on the criminal side of the picture. It has become generally recognized that the concept of fraud as developed under the criminal provision6 (“willfully attempt to evade and defeat any tax”) and the concept of fraud as developed under the civil provision8 (“intent to evade tax”) are essentially equivalent.7 Recourse

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2 "The court for cause may direct the filing of a bill of particulars."
5 INT. REV. CODE § 145(b): "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."
6 INT. REV. CODE § 293(b): "If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency)
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has accordingly been made to substantive principles developed in regard to bills of particulars as being equally applicable to motions before the Tax Court.

The exercise of the power of the trial court to require litigants to disclose necessary information has historically been regarded with great latitude by appellate courts. This attitude is regularly asserted in the common law principle that, "the granting or refusing of a bill of particulars to the accused is a matter resting in the sound discretion of the trial court, and that only a clear abuse of that discretion constitutes error." Essentially, the same concept is implied in the Rules of the Tax Court which state that, "motions will be acted upon as justice may require and may in the discretion of the Court, be placed upon the motion calendar for argument." The most appropriate description of this power is that found in the case of United States v. Association of American Railroads:

A ruling upon such a motion is so far within the discretion of the court that it will not be disturbed or reversed upon appeal in the absence of clear abuse of power or discretion. ... The discretion thus favored is not caprice or the arbitrary exercise of authority, but rather a mature judicial discretion, resting in rational understanding of the elemental governing principles of law and impartial appraisal of objectives of the pleading under scrutiny.

Although the content of an "abuse of discretion," the expressed limitation on the court's power to grant or deny a motion for a bill of particulars, is a variable that changes with each particular fact situation, judicial precedent has established certain criteria which have become recognized as just reasons for granting the motion.

The office of a bill of particulars in criminal prosecutions is to give the adverse party information which the pleadings by reason of their generality do not give. Its purpose is to enable accused to prepare his defense and to avoid surprise at the trial, to plead his acquittal or conviction in bar of another prosecution for the same offense, and to compel the prosecution to observe certain limitations in offering evidence. It is not the function of the bill to furnish accused with evidence of the prosecution.

shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2)."

7 BALMER, FRAUD UNDER FEDERAL TAX LAW 15 (2d ed. 1953).
8 27 A.M. JUR., INDICTMENTS AND INFORMATIONS, § 111, p. 671 (1940).
9 Rule 19, Rules of Practice Before the Tax Court of the United States.
The ground stated above relative to the need for a bill of particulars to enable accused to prepare his defense primarily supports the argument hereinafter set forth that the government should be required to disclose the deficiency computation to the extent that taxpayer is enabled to verify its accuracy. As more particularly stated:

A defendant is entitled to a bill of particulars where the indictment or information although sufficient in law to charge an offense, is so wanting in particularity or information or is so extremely general in language that the defendant is not given a fair and reasonable opportunity to prepare for his defense or trial. 12

This principle is reiterated constantly in the cases on this subject. 13

II. Authorities Supporting A Motion To Discover The Deficiency Computation

(a) Income and Deduction Method

The standard method of determining taxable net income as employed in preparing a return is hereinafter referred to as the income and deduction method. Reduced to its simplest equation, this method is the aggregate of the gross income items reduced by the aggregate of the allowable deductions. Under this method, the need for additional information arises when the government gives no details of the computation or presents a computation showing large amounts under an "omnibus" heading such as "other income" or "additional income." Where specification has been sought by the taxpayer as to the nature and sources of the items constituting such "other income" or "additional income" under the income and deduction method, the courts have generally recognized the need for further analysis and granted the motion for a bill of particulars. 14

Similarly, bills of particulars have generally

12 27 Am. JUR., Indictments and Informations, § 113, p. 673 (1940).
been allowed to procure specification as to items lumped under a classification such as "other deductions" or "additional deductions." 15

The case of Cafe Traymore 16 offers a good illustration of the treatment of this situation by the courts. The indictment in that case alleged defendant's correct net income to be $29,095.38, determined as follows:

Unreported cash receipts ................. $32,427.00

Less:
Net loss per return ..................... $ 499.90
Additional deductions ................... 2,831.72 3,331.62

Correct net income ...................... $29,095.38

The court allowed a bill of particulars saying, "the items 'Unreported cash receipts' and 'Additional deductions' may be too indefinite to allow defendants to properly prepare their defense."

As restricted to the income and deduction method, requests for further specification are supported by ample authority as shown by the cited cases. The rationale of these cases is clear. Particularization will usually be required where large amounts are indiscriminately lumped under a non-descriptive heading such as "other income," or "other deductions." The wide latitude allowed the trial court in the exercise of its discretion prevents any conclusions as to the position a court will take, but it is to be noted that there are apparently only three decisions involving this method that have denied the motion. 27

In each of these cases the denial of the motion is subject to explanation. In the Maxfield case, the motion was denied for the reason, inter alia, that the figures were "intelligibly broken down." In the Himmelfarb case, the motion was allowed in part and denied in part. There the defendant requested "the items, sums, figures and facts showing the basis of the alleged income and income tax and the sums from which the government derived such facts, items and figures from which it made its calculations." This request clearly went beyond the essential elements of the computation. As regards the Wexler case, the conclusions announced therein are to be compared with the more recent pronounce-

27 Himmelfarb v. United States, 175 F. 2d 924, 934 (9th Cir. 1949), cert. denied, 338 U. S. 860 (1949); Maxfield v. United States, 152 F. 2d 593, 596 (9th Cir. 1945), cert. denied, 327 U. S. 794 (1945); United States v. Wexler, 6 F. Supp. 258 (S. D. N. Y. 1933), aff'd, 79 F. 2d 526 (2d Cir. 1935), cert. denied, 297 U. S. 703 (1935).
ments of this same court which have been very liberal in granting such motions.\textsuperscript{18}

(b) \textit{Net Worth Plus Expenditures Method}

The so-called "net worth plus expenditures method" or "net worth method" is probably used more frequently than any of the other non-standard methods of income determination. Authority for the use of such non-standard methods is derived from Section 41 of the Code.\textsuperscript{19} The net worth plus expenditures method has been specifically approved by several court decisions.\textsuperscript{20}

This method is essentially a variation of the expenditure method. Reduced to its simplest equation, taxable net income determined under this method is the net aggregate of non-deductible expenditures made during the taxable year (adjusted for depreciation and cash increase or decrease). Net disbursements for the purchase of assets as measured by the increase in net worth reflect the net amount \textit{expended} to acquire the assets. Disbursements for personal expenditures are also non-deductible and when added to the net worth increase constitute taxable net income under this method. It is to be noted that an expenditure method of determining income rests upon the \textit{assumption} that the funds flowing into such non-deductible expenditures (adjusted) are equal to taxable net income. The infirmities of this assumption are frequently disclosed on trial, but as applied to the matter of securing additional specification of the computation, its mechanics are frequently ignored with a consequent confusion of the problem and resulting denial of the motion.

To repeat, the net worth plus expenditures method determines \textit{expenditures}, not income. The indictment or deficiency notice \textit{alleges} the amount of expenditures to be income and the past approval of this method of income determination relieves the government of the necessity of reconciling its conclusions with any specific amount derived from a particular source or item of income. By seeking specification as to the nature and sources of the items of income, counsel is unwittingly seeking


\textsuperscript{19} INT. REV. CODE § 41:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income."

\textsuperscript{20} Brodella v. United States, 184 F. 2d 823 (6th Cir. 1950), \textit{app'd dism'd}, 184 F. 2d 976 (6th Cir. 1950); Bell v. United States, 185 F. 2d 302 (4th Cir. 1950), \textit{cert. denied}, 340 U. S. 930 (1951).
to throw the case back under the income and deduction theory. Usually
the government does not have and is unable to provide information as
to the “nature and sources of the items of income.” Motions seeking
such information are as effective as the quixotic tilting of windmills.
Taxpayer’s attack should be made directly on the computation employed
by the government by seeking specification as to the nature and amounts
of the assets and liabilities at the beginning and end of the taxable year
and as to the nature and amounts of the items included in personal
expenditures.

The dilemma created by a motion seeking information as to the
nature and sources of the items of income in a net worth case is well
illustrated by the Chapman case.\(^2\)

Appellant asked for and the court allowed a bill of particulars as to the item of ‘other income.’ The Government thereupon
filed a bill stating that it was prepared to prove that appellant
\textit{expended} the amount alleged in the indictment over reported
income but that it did not possess the information necessary to
specify in detail the amount of every item making up the aggregate of $282,115. . . . Subsequently, the Government was per-
mitted to amend its bill of particulars to state that appellant
\textit{expended} during the year 1943 an amount in excess of the total
of his available declared resources, and to file supplemental bill
to the effect that the source of the ‘other income’ was the illegal
sale of meat at over-ceiling prices, the details of which trans-
actions were matters peculiarly within the knowledge of appel-
lant. (Italics added.)

Because of the underlying similarity of the two methods of compu-
tation—viz., the net worth method being the total of non-deductible
expenditures and the income and deduction method being the difference
in the totals of gross income items and deductible items—it would
seem that the courts allowing specification as above described in the
income and deduction situation would, if properly apprised of this
basic similarity, allow comparable specification in a net worth situation.
The authorities cited in support of the first method\(^2\) are accordingly
fully applicable to this latter method. As compared with the omnibus
items previously discussed, in the instant situation the Commissioner
adds an amount to income which may similarly be called “other in-
come as determined from increase in net worth.”

\(^2\) United States v. Chapman, 168 F. 2d 997, 998 (7th Cir. 1948), \textit{cert. denied},
335 U. S. 853 (1948); \textit{accord}, Remmer v. United States, 205 F. 2d 277 (9th Cir.
1953), \textit{cert. granted}, 74 Sup. Ct. 144 (1953); Bryan v. United States, 175 F. 2d
223 (5th Cir. 1949), \textit{aff’d}, 338 U. S. 552 (1950).

\(^2\) See notes 14 and 15 \textit{supra}.
The Tax Court has gone at least part of the way in holding a taxpayer is entitled to know the details of the net worth computation. In the case of Charles Samuel Coleman the court issued its order as follows:

Ordered, that respondent is directed to file an amended answer on or before June 30, 1953, in which facts shall be stated to substantiate the allegations of fraud; and set forth the source of the unreported income and the deductions allowed or disallowed, if any; and, further, if the net worth method is used, then set forth the alleged amounts of the assets at the beginning and end of each taxable year and the general categories which make up those assets and any other facts necessary to ascertain the alleged income. (Italics added.)

This position of the Tax Court is significant in that it clearly recognizes that there is a need for giving petitioners further information. However, it is difficult to understand why the court drew an arbitrary boundary line with the phrase "set forth the general categories which make up those assets." What petitioners seek and need is not a net worth statement broken down only into general categories but a statement broken down into specific amounts allocated to specific assets.

(c) Expenditure Method

The so called "expenditure method" is also frequently resorted to by the government as a method of income determination and has received court approval. As previously indicated, the net worth plus expenditure method is essentially an expenditure method. Both methods rest upon the assumption that the funds flowing into the non-deductible expenditures are derived from taxable sources of income. Consequently, the comments previously set forth relative to the proper drafting of a motion in a net worth case are fully applicable to the drafting of a motion in an "expenditure method" case. Details should be sought as to the items and amounts of expenditures which are alleged to constitute income.

The principal cases involving the use of the expenditure method where motions for bills of particulars were denied are the Skidmore and Caserta cases. The Caserta case aptly demonstrates the need for an appropriate bill of particulars in that instance, even though the

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25 Caserta v. United States, 199 F. 2d 905 (3rd Cir. 1952); United States v. Skidmore, 123 F. 2d 604 (7th Cir. 1941), cert. denied, 315 U. S. 800 (1941).
court held it was not prejudicial error to deny such motion. It is interesting to note that the court "reluctantly" found it necessary to reverse and remand because of error in the method of computation. It was determined that the government's computation was erroneous only after the case reached the circuit court on appeal. A proper bill of particulars would have disclosed the error in advance and given taxpayer opportunity to exploit the error in the trial court and thereby avoided the necessity of remanding the case for retrial. In the Skidmore case the motion was denied for the principal reason that taxpayer allegedly "called for calculations based upon his own books of account which were in his own possession." This is more fully discussed in Part III (b), infra.

(d) Bank Deposits Method

The "bank deposits method" of income determination is to be compared with the "net worth plus expenditures method" and the "expenditures method" in that it is a direct measure of a special class of expenditures. Care should be exercised in specifying the information sought by motion for further details, for here again the government has made an assumption it need not directly prove, viz., in this instance that deposits are derived from taxable sources of income. Details should be sought as to items and amounts included in deposits that are alleged to constitute income.

The principal cases involving the use of the bank deposits method where motions for bills of particulars were sought are the Kelly and Paschen cases which denied the motions and the Gleckman and Singer cases which granted the motions. In the Gleckman case the government furnished a complete analysis of the deposits for the benefit of the defendant:

In response to an order for a bill of particulars, the District attorney presented in great detail an itemized list of all the deposits made in Gleckman's accounts at the two banks during the years 1929 and 1930 and explained that the government had been able to ascertain that some deposits made by Mr. Gleckman during these years did not represent income and were, therefore, eliminated. . . . But it was repeated throughout the bill of particulars that the nature of the transactions whereby they (the various items of receipt and deposits) were received are more peculiarly

26 This method received court approval in Goe v. Commissioner, 198 F. 2d 851 (3rd Cir. 1952), cert. denied, 344 U. S. 897 (1953).

27 United States v. Kelly, 10 F. R. D. 191 (W. D. Mo. 1950) and companion case United States v. Kelly, 92 F. Supp. 672 (W. D. Mo. 1950); Paschen v. United States, 70 F. 2d 491 (7th Cir. 1934).

28 Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935), cert. denied, 297 U. S. 709 (1935); Singer v. United States, 58 F. 2d 74 (3rd Cir. 1932).
within the knowledge of the defendant than the government, and cannot, therefore now be stated.29

The results achieved in the *Gleckman* case are to be compared with the results achieved in the two *Kelly* cases. In the first *Kelly* case the government was ordered to furnish a bill of particulars as to the "nature or kind of each item claimed by it as making up the total gross income claimed to have been received by the defendant." The government in obeying the order for a bill of particulars set out for each year separately the following condensation:

Commingled net bank deposits reflecting income from liquor, meat and grocery business, farming and real estate rentals . . . 30

A request for further specification was denied. Obviously, verification of such an omnibus item is virtually impossible. Greater success in procuring the needed details might have been achieved if the original request had been directed to the details of the bank deposits rather than to the details of the nature and sources of the items of income. Here again confusion results from failure to grasp the elementary mechanics of the government's computation and from failure to request details for the computation actually used. In the *Kelly* cases the government neither knew nor cared about the "nature, source and amount of each item separately going to make up the total gross income" as requested in the bill of particulars.

The *Singer* case31 is frequently cited by counsel in support of motions for bills of particulars. Although the case is a good exposition of the applicable principles of law on this point, it has been more frequently "distinguished" and ignored than followed.32 A study of the cited cases allegedly 'distinguished reveals that though they are admittedly distinguishable on their literal facts, it is extremely difficult to distinguish them on their logic and reasoning as responsive to the question of the underlying necessity for further detail.33

The *Paschen* case relied on the discretionary power of the court to deny the motion, holding that the denial was not error for the reason the defendant was not prejudiced.

29 *Gleckman v. United States*, 80 F. 2d 394, 397 (8th Cir. 1935).
31 See note 28 supra.
33 For further comment on the *Singer* case see Part III (d) infra.
III. RESTRICTIVE CONCEPTS ON USE OF MOTIONS TO DISCOVER THE DEFICIENCY COMPUTATION

(a) Disclosure of the Government's Evidence

The courts have repeatedly held that it is not an abuse of discretion to deny a motion for a bill of particulars where such motion would require a disclosure of the government's evidence. This principle has been frequently announced as a rigid principle of law instead of as a flexible guide to help the court in its exercise of discretion. This conclusion once reached terminates any further "discretionary" consideration and automatically denies the motion. A more enlightened use of this principle would seem to be that expressed in the Kessler case:

The fact that the government may be required in advance of the trial to disclose its evidence in and of itself is not a ground for denial of a motion for a bill of particulars in a criminal action if such information is necessary to enable defendant to prepare for trial and to meet the charges made against him.

It is to be further noted that as a practical matter, particularly in non-criminal cases, the government will have milked the last shred of evidence from the taxpayer as a required condition precedent to consideration of the case for settlement purposes. Thus, the government goes to trial in most instances fully aware of every element of the taxpayer's case while the taxpayer is forced to grope and fumble for the essential elements of the charge against which his defense should be directed.

However, assuming that the government should not be required to disclose its evidence before trial, there should be no objection to a proper motion to procure the computation. The computation is the principle subject matter of the investigating revenue agent's report. It has been held that revenue agent's reports are not proof of the facts stated therein and are not evidence except for the purpose of showing the basis upon which the Commissioner predicated his action in determinations.


mining the deficiency. In no instance would a proper motion for further specification go beyond the information contained in the revenue agent's report.

(b) Motion Should Not Be Allowed Where Person Seeking Facts Is In Possession of Means of Ascertaining Them.

As applied to the tax fraud situation the doctrine that bills of particulars should not be furnished when the person seeking facts is in possession of the means of ascertaining them was apparently first applied in *U. S. v. Skidmore.* The principle has been employed with considerable frequency since then.

The simple answer to this contention is that in no instance will a properly worded motion seek facts which taxpayer is in possession of the means of ascertaining. The facts sought by the motion are those *alleged* by the government. The opinions of the cited cases imply that taxpayer was seeking certain *true* facts. Obviously taxpayer has essentially the same sources of proof as the government. But what is needed are the facts *alleged* by government which may or may not be true, for it is only by proving error in such alleged facts that the prima facie case of the government can be overcome. The necessity for obtaining the information alleged by the government is well demonstrated in the *Empire State Paper Corp.* case:

The difficulty of the defendants in their defense appears to have arisen from the fact that the figures set forth in the indictments as going to make up the true income of the defendants were not to be reconciled with the books of the defendants to which they always have since had access. Counsel for the government admit that the compilations which appear in the indictment are not made up of figures which are taken from the books of the defendants. The defendants are, therefore, in the more or less difficult situation of being confronted with aggregate amounts set forth in the indictment alleged to represent income and deductions from which a true return should have been made without knowing in advance of a trial what details have been used by the government expert accountants in making up these gross figures. As it appears to me, this will be a situation most embarrassing to the defendant's upon the

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37 Alliance Milling Co., 10 B. T. A. 457 (1928).
38 United States v. Skidmore, 123 F. 2d 604 (7th Cir. 1941), *cert. denied*, 315 U. S. 800 (1941).
trial, and in addition placing them in a position of lacking entire opportunity to prepare defenses for the charge embodied in the indictments as to sources of receipts and expenditures with which under the statement of counsel for the government they may be entirely unfamiliar.

The validity of this principle was also recognized in the Caserta case even though the court there held that the denial of a motion for a bill of particulars was not error.

(c) The Taxpayer Knows Whether or Not the Asserted Deficiency Is a Fact or Is Not a Fact.

In the case of U. S. v. Mangiaracina the court included the following somewhat remarkable statement in its opinion denying a motion for a bill of particulars:

The second count of the indictment was that the defendant attempted to defeat and avoid a large part of his income tax for the year 1947 by filing a return showing a net income of $7,151.53 whereas in truth and in fact his net income was $13,876.37. The defendant knows whether this was a fact or whether it was not a fact. (Italics added.)

This doctrine has since been reasserted in the case of Remmer v. United States It is an insidious assertion that is in part irrefutable, but, as applied to the problem of justification for a motion for further specification, it is meaningless. Normally, every person knows whether a charge made against him is true or not. Suppose the charge made against a taxpayer is not a fact. Is his defense strengthened thereby in any way? Does this enable him to show to the court where and how the Commissioner is in error? Can taxpayer naively assume that his unsupported denial will persuade the court as to the error in the assertions made by the Commissioner?

Further, even if a deficiency exists, the amount of deficiency as originally determined by the Commissioner is almost invariably subject to correction when audited by accountants of the taxpayer. The existence of the profession of certified public accountants is mute evidence of the difficulty of obtaining accuracy in making a determination of income under the most favorable conditions. The probabilities of accuracy are more remote when the determination is made by a party in the position of an adversary to the taxpayer and is usually based on admittedly incomplete records and information. Judicial recognition

41 Caserta v. United States, 199 F. 2d 905, 910 (3rd Cir. 1952).
43 Remmer v. United States, 205 F. 2d 277, 282 (9th Cir. 1953), cert. granted 74 Sup. Ct. 144 (1953).
of the practical difficulties of arriving at an accurate accounting was lucidly set forth in the previously cited case of United States v. Empire State Paper Corporation:

The court has in mind, from observation and experience in income tax cases, that the figures of expert accountants even from the same department often vary greatly in conclusions arrived at, so that it is frequently most difficult for the taxpayer not skilled in the art of expert accountancy to ascertain what a specific charge, either civil or criminal may be on the part of the government.44

(d) Delay of Trial

The Singer case which is frequently cited as supporting authority to procure motions for bills of particulars, held that a conviction should be reversed for the reason that the refusal of the trial court to grant the motion was prejudicial. In sustaining its conclusion of prejudice to the defendant, the court pointed out, inter alia, that the trial was marked by considerable delay resulting from improper figures contained in the government's computation.

All this could and would have been avoided by a proper bill of particulars which would have shown the falsity of the allegations and enabled the defendant to eliminate untrue and prejudicial charges from the indictment and irrelevant and harmful evidence from the jury.46

The Singer case has been frequently distinguished on the grounds that in the instant case no delay occurred in the trial court proceeding.46

Without implying that the motions should have been allowed in the cited cases, it is to be noted that while delay at trial indicates a need for a bill of particulars, non-existence of delay or confusion in the trial court proceeding is, in itself, immaterial to the problem of initial justification for the motion. In the Singer case, defendant was fortunately able to amass sufficient evidence at the trial to show error in the government's computation without the aid of a bill of particulars. It is more logical to assume that there are many instances where denial of a bill of particulars has frustrated defendant's efforts to procure pertinent evidence to show error in the government's computation. And without

45 Singer v. United States, 58 F. 2d 74, 75 (3rd Cir. 1932).
46 Remmer v. United States, 205 F. 2d 277, 281 (9th Cir. 1953); Himmelfarb v. United States, 175 F. 2d 924, 935 (9th Cir. 1949); Rose v. United States, 128 F. 2d 622, 624 (10th Cir. 1942).
the necessary disproving evidence, no delay or confusion could occur in the government's presentation of its case.

(e) Taxpayer Is Only Entitled to the Theory of the Government's Case

In 1948 the case of United States v. Chapman,47 came out with the disturbing pronouncement that the taxpayer is only entitled to the theory of the government's case. This concept, if generally accepted, would deprive the court of any "discretion" regarding a motion for a bill of particulars and essentially nullify the use of such motions in a tax fraud case. Defendant had requested and had been allowed a bill of particulars as to the item "other income" by the trial court. Defendant alleged error on appeal in relation to the bill of particulars. Said the court:

The bill of particulars as amended and supplemented sufficiently apprised appellant of the theory of the charge against him and of the general character of the evidence the government expected to rely upon to sustain that charge. He was not entitled to more. United States v. Skidmore, 7 Cir. 123 F. 2d 604; United States v. Gorman, D. C., 62 F. Supp. 347. (Italics added.)48

The doctrine was repeated in the Caserta case in the following language:

In United States v. Chapman, 7 Cir., 1948, 168 F. 2d 997, the court pointed out that in a case in which the government proposed to use the expenditure theory, the most that the defendant could be entitled to prior to trial was the fact that the prosecution was to proceed upon this theory.49

And again in Remmer v. United States, the doctrine was repeated in the following statement of the court's opinion:

No such prejudice to appellant (as that determined in the Singer case) is evident in the instant case. The offense charged was specifically stated in the indictment. Appellant was in a position to know whether the facts alleged were true. The most to which appellant was entitled prior to trial was disclosure of the theory of the Government's case. United States v. Caserta, 3 Cir., 1952, 199 F. 2d 905. That the Government was proceeding upon a net worth theory was made known to appellant during the course of argument on the motion for a bill of particulars.50

47 United States v. Chapman, 168 F. 2d 997 (7th Cir. 1948), cert. denied, 335 U. S. 853 (1948).
48 Id. at 999.
49 Caserta v. United States, 199 F. 2d 905, 910 (3rd Cir. 1952).
50 Remmer v. United States, 205 F. 2d 277, 282 (9th Cir. 1953).
The above quotations show that Remmer relied on Caserta as authority for the proposition in question and that Caserta in turn relied on Chapman. Chapman apparently developed the doctrine from the cases of Skidmore and Gorman cited therein.

A careful reading of the Skidmore case fails to disclose any statement or authority therein supporting this novel proposition. The entire discussion of bills of particulars in Skidmore involved the points that taxpayer was in possession of the means of ascertaining the facts sought and that the court acted within the bounds of its discretionary power in denying the motion.\textsuperscript{51}

In the Gorman case, however, we find this statement:

In the decision of the motion in the Wexler case, reference was made to United States v. Miro, 2 Cir., 60 F. 2d 58, at page 60, also an income tax case, in which the court remarked: 'In revenue offenses, the particular means need not be alleged in the indictment. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819.'\textsuperscript{52}

In United States v. Wexler\textsuperscript{53} the indictment charged that the defendants were engaged in the "enterprise of manufacturing, selling, and distributing beverages and in enterprises related thereto" and also set forth various figures representing "income from enterprise of manufacturing, selling, and distributing beverages and related enterprises, and expense allowable in operation of the enterprises." Items 1 to 4 of the motion for a bill of particulars sought a detailed statement of the items in the various counts of the indictment representing income from beverage business and related enterprises and of the items representing expenses. Items 5 to 8 of the motion sought a detailed statement of the beverages and nature thereof and of what constituted related enterprises. The court denied the motions as to items 5 to 8 in the following language:

There is no occasion, either in the indictment or by bill of particulars, to define the specific means employed in committing the offense. For that reason the defendant is not entitled to have the details called for by items 5 to 8. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Miro (C. C. A.) 60 F. (2d) 58.\textsuperscript{54}

As previously noted, the Wexler case has been substantially overruled by more recent decisions of the District Court for the Southern Dis-

\textsuperscript{51}United States v. Skidmore, 123 F. 2d 604, 607 (7th Cir. 1941).
\textsuperscript{54}United States v. Wexler, supra note 53 at 259.
trict of New York which have allowed bills of particulars under similar circumstances.\(^5\)

In the *Miro* case which did not involve the problem of a bill of particulars but only the problem of the sufficiency of the indictment we find this statement:

> In revenue offenses, the particular means need not be alleged in the indictment. *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819.\(^6\)

Thus by tracking backward it is apparent that the doctrine expressed in the *Remmer, Chapman* and *Caserta* cases to the effect that the taxpayer is only entitled to the theory of the government’s case stems entirely from the *Simmons* case.

In the *Simmons* case the fourth count of the indictment charged that the defendant “did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the internal revenue laws of the United States, with intent to defraud the United States of the tax on the spirits distilled by him.”

> Said the court:

> This count seems to us sufficient to authorize judgment thereon. It was not necessary to state in the indictment the particular means by which the United States was to be defrauded of the tax. The defendant is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice. (Italics added.)\(^7\)

Needless to say, if the test of the sufficiency of an indictment has been shifted forward as a proper criterion for testing the need for a bill of particulars, the office of such bills of particulars has been completely obliterated in tax fraud cases and the time honored function of the bill as developed in the common law becomes meaningless:

Accused is generally entitled to a bill of particulars where the charges of a *valid* indictment are nevertheless so general in their nature they do not fully advise him of the specific acts with which he is charged, *so that* he may properly prepare his defense and avoid surprise at the trial; . . . (Italics added.)\(^8\)

> “A motion for a bill of particulars does not challenge the sufficiency of the indictment or information to state an offense.”\(^9\)

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\(^5\) See note 18 *supra*.

\(^6\) *United States v. Miro*, 60 F. 2d 58, 60-61 (2d Cir. 1932).

\(^7\) *United States v. Simmons*, 96 U. S. 360, 364 (1877).


Moreover the court in the *Simmons* case in holding that the indictment need not allege the specific means by which the government was defrauded, could hardly have contemplated that this pronouncement would become a restriction on the ancient and time honored use of a bill of particulars. Under most criminal statutes the nucleus and substance of the prosecution's case is the proof necessary to show the commission of certain specified illegal acts. This explains the development of the use of bills of particulars requiring disclosure of facts surrounding the commission of the wrongful acts to enable the defendant to localize his efforts and prepare his defense.

Modern tax enforcement has necessitated a modification of this concept in order to prevent wide spread tax evasion. The deficiency computation is the nucleus and substance of the government's case for tax evasion and the same care of the defendant's rights should be exercised by the courts in enlightening defendant as to the details of this computation as is allowed in other cases regarding the details of the specific acts which make out the crime. The liberalization of the rules governing the sufficiency of indictments is no justification for the abandonment of the principles governing the granting of motions for bills of particulars. In contrast, the courts should be more zealous to give a defendant every opportunity adequately to prepare his defense. For example, showing by the government of increase in net worth makes out a prima facie case of unreported income which, unless rebutted, will establish the deficiency and under certain circumstances sustain a conviction.\(^6\) Courts permitting "conviction by inference"—which inevitably results where there is an absence of direct proof of the commission of the crime—should be alert to require the strictest accuracy and closest scrutiny of the computations upon which such convictions are based.

IV. THE CONSTITUTIONAL PROBLEM OF DUE PROCESS OF LAW

It has been held that the denial of a motion for a bill of particulars is not a denial of due process of law.

In *Van Dam v. United States*\(^4\) the court said:

Respondent claims he was rushed into trial without opportunity to prepare his defense upon an indictment which was very vague and general and upon which he had been refused a bill of particulars, and that thus he was denied due process of law.

We do not doubt that a sufficiently extreme case in these re-


\(^4\) *Van Dam v. United States*, 23 F. 2d 235, 237 (6th Cir. 1928).
spects would be deprivation of due process, . . . ; but the inquiry is not important in this case. It is evident from the course of trial that, if a bill of particulars had been given, it would have been confined to the overt acts alleged.

However, without pursuing the inquiry suggested in the above quotation it appears that the due process question is raised before the motion is made by the act of the government representatives in refusing taxpayer access to the essential elements of the revenue agent’s report.

There is a well established and widespread practice of submitting these reports to the taxpayer, either voluntarily or upon request, soon after the first demand is made for payment of an asserted deficiency. The entire settlement machinery of the Bureau is predicated upon the assumption that an enlightened taxpayer will prefer to pay a just demand without going to court. A demand clothed in obscurity may well deprive the taxpayer of the opportunity to determine the validity of the government’s claim and thereby make litigation unavoidable. As a matter of justice and fair play there is little doubt that a taxpayer who is given no opportunity to check the government’s computations is at a decided disadvantage when compared with a taxpayer who has had full opportunity to discover inaccuracies in the government’s figures and prepare his defense accordingly. The question is, therefore, is the withholding of the computation itself a denial of due process?

It is to be noted that we are here dealing with the problem of administration of laws, not the interpretation of a law. The applicability of the due process clause to the executive branch of government is fundamental and requires no extensive elaboration.

Directly derived from the law of the land clause of Magna Carta, the due process of law provision of the Fifth Amendment was destined to have a much broader application than its progenitor. The English law of the land had almost universally been recognized as a limitation on the executive alone; its American equivalent became, even before the Civil War, a restriction upon all branches of government, legislative as well as executive and judicial.62

There is probably no field of law more litigated than that of due process of law. However, the principles involved are well established and fundamental in American jurisprudence and recourse need not be had to voluminous authority.

Due process of law and the equivalent phrase, ‘law of the land’ have frequently been defined to mean a general and public

law operating equally on all persons in like circumstances . . . Due process is denied when any particular person of a class or of a community is singled out for the imposition of restraint or burdens not imposed upon and to be borne by, all of the class or community at large, unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community. 63

To satisfy the requirements of due process of law, the legislature must have power to act on the subject matter, the power must not be exercised in an arbitrary, capricious or discriminatory manner. . . . 64

Our whole system of law is predicated on the general fundamental principle of equality of application of the law. (Italics added.) 65

The substance of the above conclusions is reiterated copiously by the authorities treating this subject. Their applicability to the present problem is a matter of judicial determination. Two questions remain. First, is there any basis for treating taxpayers charged with fraud, either civil or criminal, differently from taxpayers charged with simple deficiencies? To do so would be to pronounce guilt prior to trial. Different treatment based on an unproven charge would thus be a flagrant violation of the principle of equality before the law and discriminatory per se.

The second question arises when we consider whether or not all taxpayers charged with fraud are given substantially equal treatment in this respect by representatives of the Internal Revenue Service. It is a matter of common knowledge among tax practitioners that in many instances the entire subject matter of the revenue agent's report which contains full and comprehensive details of the deficiency computation are made available to the attorney or accountant for study and verification. In other instances substantially no information regarding such detail is made available. If all taxpayers charged with fraud are not similarly treated in regard to this vitally important aspect of pretrial preparation, the conclusion of discrimination seems inescapable.

V. CONCLUSIONS

There is ample legal authority to support a properly worded motion to obtain essential specification of the deficiency computation. The need for such information is made evident by the government's withholding

64 16 C. J. S., Constitutional Law § 569, p. 1156 (1939).
details that would enable taxpayer to discover errors in the computation and thereby weaken the government's case.

Counsel must be careful to seek specification on the computation actually used by the government. Efforts to procure information on the sources and nature of the items of income will prove unavailing in cases where the income and deduction method is not used. In such cases a motion which attempts to secure a listing of items of income must inevitably be denied, as the information is not available to the government. However, the motion should be denied for this reason and not because of an asserted lack of power on the part of the court to order any bill of particulars.

The doctrine announced in the Chapman case, to the effect that the taxpayer is only entitled to the theory of the government's case is a serious threat to the proper use of discovery motions. It is to be hoped that this restrictive doctrine will not prevail.

Finally, the greatest sense of injustice in respect of this matter lies in the inconsistent treatment accorded different taxpayers by the representatives of the Internal Revenue Service. The most ancient and time honored guardian of American rights, the Due Process of Law clause of the Bill of Rights to the Constitution, has been invoked to give the needed protection. It is conjectural as to whether or not the doctrine retains enough of its original vigor and substance to persuade the courts of today to condemn this unjust and inequitable practice now followed in some cases by the Internal Revenue Service.