THE RESOLUTION OF TAX DISPUTES OVER THE TAXPAYER'S CHOICE OF ACCOUNTING METHOD

1. INTRODUCTION

(a) *The Statutory Obligation to Keep Accounts*

The Income Tax Act [1] (hereafter the Act) of Singapore imposes a statutory obligation [2] on a taxpayer earning income from a trade, business, profession or vocation to keep records of his income — generating activity. Such records include "books of account recording receipts or payments or income or expenditure."[3] The rationale for this obligation is clear. It enables the enforcement of the income tax as records are necessary for the accurate determination of the taxpayer's ability[4] to bear taxes. The Comptroller[5] of income tax may by notice in writing to the taxpayer prescribe the 'form' that such records should take,[6] and the taxpayer would be bound to comply

[1] Cap. 141, Singapore Statutes, Rev. Ed. 1970. Hereafter, ITA.

[2] The ITA provides thus:

> 67.— (1) Subject to the provisions of subsection (2) of this section, every person carrying on or exercising any trade business, profession or vocation —
>
> (a) shall keep and retain in safe custody sufficient records to enable his income and allowable deductions under this Act to be readily ascertained by the Comptroller or any officer authorised in that behalf by the Comptroller.

[3] S.67(4) of the ITA reads:

> For the purposes of this section "records" includes —
>
> (a) books of account recording receipts or payments or income or expenditure;
>
> (b) invoices, vouchers, receipts, and such other documents as in the opinion of the Comptroller are necessary to verify the entries in any books of account; and
>
> (c) any records relating to any trade, business, profession or vocation carried on or exercised on or after 1st January 1947.

[4] The 'ability-to-pay' approach is inherent in the Singapore tax system in deciding the distribution of the tax burden. The progressive rate structure, even more so than a proportionate or flat-rate tax, is premised on the principle that those with higher income can shoulder more of the tax burden. This is different from the 'benefit' approach where the tax burden is distributed according to how much each taxpayer benefits from the Government's expenditure of revenues.

[5] In s. 2 of the Act, 'Comptroller' means "the Comptroller appointed under section 5 of this Act and includes, for all purposes of this Act except the exercise of the powers conferred upon the Comptroller by subsection (5) of section 45 and sections 67, 95, 96 and 99 of this Act, a Deputy Comptroller or an Assistant Comptroller so appointed."

[6] S. 67(2) "The Comptroller may by notice in writing to any person carrying on or exercising any trade, business, profession or vocation, or by a notice in the *Gazette* in respect of any class or description of any such person, prescribe —

> (a) the form of the records to be kept under the provisions of paragraphs of paragraph (*a*) of subsection (1) of this section, and the manner in which such records shall be kept and retained; and
>
> (b) the form of the receipts to be issued and the duplicates to be retained under the provisions of paragraph (*b*) of subsection (1) of this section, and the manner in which such receipts shall be issued and such duplicates shall be retained,

with such notice. Where the Comptroller has not prescribed any form, the statute is silent and it is arguable that the taxpayer is free to choose what form his records should take.[7] Thus, he is free to adopt his own method of accounting. This is of course subject to the overriding requirement, as evidenced in the spirit if not the letter of section 67(1) of the Act, that whatever method of accounting is adopted, the records must accurately reflect the taxpayer's financial position for tax purposes.[8]

Accountants know that there is no single method of keeping records or accounts of transactions involving flow of money.[9] It is a matter of common sense that there can exist a number of equally useful methods, all of which are, in commercial accounting terms, sound. They only vary because the object of keeping the accounts may vary. The individual taxpayer who runs the corner provision shop cannot be expected to keep the same records as the corporate taxpayer that manufactures electronic equipment. And even as between corporate taxpayers, a company dealing in only one stage of production will have different accounting needs from a company which is vertically integrated. Thus, accounting methods will differ depending on what the account seeks to reflect or to highlight, proper regard being paid to disclosure. That being the case, it seems obvious that a taxpayer may choose any one of a number of accepted methods of accounting, depending on which is most appropriate in relation to the particular nature of his business.[10]

(b) *The Taxpayer's Choice versus the Comptroller's Choice*

Where the records kept according to the taxpayer's choice of accounting method give an accurate picture of the taxpayer's financial position for tax purposes, and as such, it allows his tax liability to be readily ascertained, the Comptroller should have no reason to complain. It is only where the taxpayer's choice of accounting method produces records which, while accurate in displaying his financial position for business purposes,[11] presents a distorted picture for tax

and every such person shall be bound to comply with such notice."
The provision does not define the scope of the word 'form'. Arguably, form here goes beyond the medium or display of the record, and could possibly include accounting methods used to prepare records.

7 *Cf.* The amendment to s. 26 of the ITA, enacted in s. 9 of the 1982 Income Tax (Amendment) Act (No. 1 of 1982), by adding a new subsection:

> "(2A). In the case of an insurance company engaged primarily in the business of export credit insurance, the gains or profits on which tax is payable shall be ascertained by such underwriting accounting method as the Comptroller may approve."

8 S. 67(1)(a) expressly requires "sufficient records" to enable the taxpayer's income and allowable deductions under the ITA "to be readily ascertained by the Comptroller".

9 See for example the case of *Willingale v. International Commercial Bank Ltd.* [1978] 1 A.E.R. 754 H.L. where it was judicially noted that there was more than one acceptable method for drawing up the bank's accounts. See also the cases discussed in Part V *infra* on competing methods of accounting.

10 "So the real question is what method best fits the circumstances of a particular business" *per* Lord Reid, *Duple Motor Bodes Ltd.* v *Ostime* [1961] 2 A.E.R. 167 at 175.

11 "Moreover, what may be prudent accountancy is not necessarily the correct method of ascertaining the proper assessment for income tax." *Per* Lord Porter, *Ryan* v. *Asia Mill Ltd.* 32 T.C. 275 at 296. The case of *Patrick* v. *Broadstone Mills Ltd.* [1954] 1 A.E.R. 163 C.A., discussed in Part V, is a good illustration

purposes that the Comptroller should have cause to object. That this should be the legal position seems irrefutable as the general statutory obligation to maintain records prescribe no particular form, and section 67(2) envisages a particular form only when the Comptroller exercises his specific power of prescription.[12] To proceed on any other basis is administratively impossible: either the Comptroller would have to find one standard method of accounting which can serve the commercial needs of any kind of business — clearly an impossible task — or the Comptroller would have to vet each and every business and prescribe a method for each taking into account the peculiar nature of the business. The legislature has been wise enough to recognise that this is an area best left to businessmen and their accountants. Far easier to prescribe the limit than the method/methods — thus, the overriding constraint on all records is the requirement of accurate reflection of tax liability. The rest is left to the variety of business needs and the inventiveness of accountants.

(c) *Changing Accounting Methods*

To bring the case a little further, it is entirely conceivable that a taxpayer's business may, in course of time, undergo various changes that may render an existing accounting method no longer appropriate. Using an accounting basis where no profits are brought into account until completion of a contract may become totally inappropriate when a business no longer deals in 3 or 6-month contracts but is involved in 35-month contracts.[13] Thus, as a business proposition, it is sometimes necessary for a taxpayer to change from one method of accounting to another.

As a legal proposition, this need for change may be somewhat constrained by the tax laws. Since tax liability is computed with the use of records and accounts, it is obvious that a change may involve certain tax consequences.[14] The question then is what limits are

of the fact that certain accounting methods which may be most appropriate for business or commercial reasons may not necessarily be acceptable for tax purposes. For similar judicial observations on this point, see also *Minister of National Revenue* v. *Anaconda American Brass Ltd.* [1956] A.C. 85 P.C. See also D.C. Wilkins, The Accounting and Tax Concepts of Net Income, 5 A.T.R. 252 (1976) which discusses the essential differences between financial accounting and tax accounting.

[12] It is the writer's contention that this power of prescription must be exercised in a *reasonable* manner and not with caprice. Thus, if the taxpayer's method of accounting produces accurate records for tax purposes, it is doubtful that the Comptroller can prescribe another method merely on the ground that the Comptroller prefers the latter method. In a situation where there are competing methods producing equally accurate records, the power of prescription can only be *reasonably* exercised when the slate is clean *i.e.* when the taxpayer commences business and starts keeping records for the first time. Once the taxpayer has used a method for sometime it would be an unreasonable exercise of the power of prescription to make the taxpayer change the existing method to another method which produces no greater accuracy. The disruptive effect of an accounting change midstream can only be justified by the Comptroller if the new method prescribed leads to greater accuracy of record for tax purposes. *Cf.* s. 111(b) below.

[13] A good illustration is to be found in *Pearce* v. *Woodall Duckham Ltd.* [1978] 1 W.L.R. 832 C.A. where just such a change in the nature of its business made it necessary for the taxpayer to change its accounting method from the 'on-cost' method to the 'accrued-profit' method.

[14] For an analysis of the effect of changing accounting methods in the *Woodall Duckham* case *(supra,* n. 11), see L. Frank Chopin, "The Tax Consequences of Accounting Changes" (1978) B.T.R. 313.

imposed by the tax laws on the taxpayer's ability to change from one accounting method to another in an ongoing business.

On principle, it again seems clear that where a taxpayer's existing method of accounting has become obsolete in that it no longer produces records which accurately reflect his financial position for tax purposes, whatever his business considerations may be, he *must* change his accounting method so as to comply with his statutory obligation under section 67(1). If he does not do so, the Comptroller may certainly compel him to do so either by using his prescriptive powers under section 67(2) or simply by assessing him based on appropriate records prepared through a more accurate accounting method.[15] There is no doubt at all that the taxpayer will fail should he attempt to challenge such an assessment.[16] The converse is also true: that where the taxpayer attempts to make a change to a new method which does not accurately reflect his profits for tax purposes, such a change may be successfully resisted by the Comptroller.[17]

What is not immediately apparent however, is the legal position where the taxpayer wishes to change from one accounting method to another which, though different, in no way distorts his financial position for tax purposes and is equally effective in reflecting his taxpaying ability. In such a situation, is there any reason for the Comptroller to object to such a change? What must the taxpayer show in order to justify such a change? Must he show that the previous method is wrong or only that the new method is as accurate for tax purposes? This article proposes to examine tax disputes over the taxpayer's choice of accounting methods to determine who has the burden of proof and what is the substance/content of proof required to discharge such a burden. The object of such a determination is to rationalise the approach to be taken in the resolution of these kinds of tax disputes.

II. THE BURDEN OF PROOF IN TAX DISPUTES GENERALLY

(a) *The Procedure in Raising Tax Disputes*

It is a fundamental principle that he who alleges must prove. This is faithfully reflected in the Singapore Evidence Act.[18] In tax disputes, this general rule is not departed from and the position is more specifically dealt with by the Income Tax Act. In any dispute the roles of the taxpayer and of the Revenue authorities, as represented

[15] See the *Broadstone Mills* case *(supra,* n. 10) where the Court of Appeal upheld the Revenue's right to reject the taxpayer's accounting method on the ground that it did not accurately reflect the taxpayer's full profits for tax purposes. See also discussion in Part V.

[16] See, *e.g. Wetton, Page & Co.* v. *Attwooll* [1963] 1 A.E.R. 166 where the taxpayer failed in challenging the Revenue's assessment. See also discussion in Part V.

[17] See the *Anaconda American Brass Ltd.* case *(supra, n.* 10) discussed in Part V.

[18] Cap. *5,* Singapore Statutes, Rev. Ed. 1970.

"S. 101. — (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

"S. 102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

by the Comptroller of Income Tax, are invariably the same. It is always the taxpayer who must commence the offensive. This is because of the tactical advantage that the Comptroller has as a result of the interplay of the income tax collection procedures. When a taxpayer files a return, the Comptroller may either accept or refuse the return.[19] If he refuses to accept the return, the tax law gives him the power to nevertheless determine the tax liability of the person and make an assessment accordingly.[20] If the taxpayer is unhappy with the assessment, he can dispute it and apply to the Comptroller, by notice of objection in writing, to review and revise the assessment.[21] On review, the assessment may be revised to the satisfaction of the taxpayer, and there the matter ends. If, however, the Comptroller and the taxpayer cannot agree on a revised figure, the taxpayer can ask the Comptroller for a notice of refusal to amend the assessment.[22] Armed with this notice of refusal to amend, the taxpayer may then appeal to the Income Tax Board of Review.[23] Hence, the taxpayer must always take the initiative and assume the role of appellant for the simple reason that, notwithstanding his objection against the assessment, his obligation to pay taxes is not deferred or suspended.[24] This

[19] S. 72(2) ITA (*supra,* n. 1): Where a person has delivered a return, the Comptroller may —

(a) accept the return and make an assessment accordingly; or

(b) refuse to accept the return and, to the best of his judgement, determine the amount of the chargeable income of the person and make an assessment accordingly.

[20] S. 72(2)(b) ITA (*supra,* n. 1). See also n. 16 *supra.*

[21] S. 76(2) ITA *(supra,* n. 1): "If any person disputes the assessment, he may apply to the Comptroller, by notice of objection in writing, to review and to revise the assessment made upon him. Such application shall state precisely the grounds of his objections to the assessment and shall be made within thirty days from the date of the service of the notice of assessment:
Provided that the Comptroller, upon being satisfied that owing to absence, sickness or other reasonable cause, the person disputing the assessment was prevented from making the application within such period, shall extend the period as may be reasonable in the circumstances."

[22] S. 76(4) ITA *(supra,* n. 1): "In the event of any person who has objected to an assessment made upon him —

(a) agreeing with the Comptroller as to the amount at which he is liable to be assessed, the assessment shall be amended accordingly, and notice of the tax payable shall be served upon that person; or

(b) failing to agree with the Comptroller as to the amount at which he is liable to be assessed, the Comptroller shall give him notice of refusal to amend the assessment as desired by that person and may revise the assessment to such amount as the Comptroller may determine, according to the best of his judgment, and the Comptroller shall give him notice of the revised assessment and of the tax payable together with notice of refusal to amend the revised assessment."

[23] The right to appeal is conferred by s. 79(1) ITA.
"79. — (1) Any person who, being aggrieved by an assessment made upon him, has failed to agree with the Comptroller in the manner provided in subsection (4) of section 76 of this Act may appeal to the Board by —

(a) lodging with the clerk, within seven days from the date of the refusal of the Comptroller to amend the assessment as desired, a written notice of appeal in duplicate; and

(b) lodging with the clerk, within thirty days of the date on which such notice of appeal was lodged, a petition of appeal in quadruplicate containing a statement of the grounds of appeal."

The Board of Review is constituted under s. 78 of the Act for the purpose of hearing appeals from the assessment of the Comptroller. It is a tribunal of fact and law.

[24] S. 86 ITA *(supra, n.* 1*):* "Subject to the provisions of section 91 of this Act, tax for any year of assessment levied in accordance with the provisions of section 42 or 43 of this Act shall, notwithstanding any objection or appeal

'pay now, dispute later' policy is no doubt to assist the Comptroller in the collection of taxes, but it puts the taxpayer at a 'tactical' disadvantage. He must pursue the matter or he has effectively paid taxes as assessed. Being the appellant before the Board of Review, section 102 of the Evidence Act[25] indicates the burden of proof is on the taxpayer. The tax Act puts it beyond doubt: 'the onus of proving that the assessment is excessive lies on the appellant,'[26] the taxpayer.

(b) *Legal Burden versus Evidential Burden*

The statute has placed the burden of proof squarely on the taxpayer. What exactly does this require the taxpayer to do? At this point, it may be useful to note that in the law of Evidence a distinction is drawn between the 'legal burden' and the 'evidential burden'. To put it simply, the legal burden is discharged if at the end of the trial, taking into account evidence on both sides, the evidence by a preponderance is in favour of the proponent.[27] By contrast, the 'evidential burden' just as its label may suggest, is discharged by adducing sufficient evidence to raise an issue as to the existence or non-existence of any fact in issue.[28] The legal burden always rests on the proponent because, by definition, he bears 'the risk of non-persuasion.'[29] Thus at the end of the day all the proponent's evidence must outweigh the opponent's before this legal burden is said to have been discharged and the proponent to have won. By contrast, the evidential burden can and will shift: once the proponent has adduced the evidence to support his case and his evidence is believed by the tribunal of fact, the trial can only move forward by calling upon the opponent to present his countervailing evidence. At this stage, although the legal burden is still with the proponent, the evidential burden has shifted[30] to the opponent. Assuming the evidence adduced by the proponent is accepted by the judge as sufficient to prove his case, then if the

against the assessment on which the tax is levied, be payable at the place stated in the notice given under section 76 of this Act within one month after the service of the notice:
Provided that the Comptroller may in his discretion extend the time limit within which payment is to be made."

25 *Supra,* n. 16.

26 S. 80(3) ITA *(supra,* n. 1).

27 Thayer's definition of the legal burden: "The peculiar duty of him who has the risk of any given proposition on which parties are at issue — who will lose the case if he does not make this proposition out, when all has been said and done." Preliminary Treatise on Evidence at the Common Law, p. 355. See generally Cross on Evidence (5th Ed.) p. 85 *et seq.*

28 Thayer's equivalent of the evidential burden: "The duty of going forward in argument or in producing evidence, whether at the beginning of a case, or at any later moment throughout the trial or discussions" (*supra,* n. 25).

29 This is Wigmore's terminology which Cross *(op. cit.* at 87) finds objectionable because "both parties may bear such a risk on the same issue." However, the writer thinks it is quite appropriate when it is used in the sense of reinforcing the fact that it is the proponent who is ultimately at risk because it is after all *he* who wants to establish the proposition in question.

30 This is a "legal shifting" as opposed to a "tactical shifting". See *Cross on Evidence* (4th Ed.) at 79 which draws this distinction. A "tactical shifting" occurs when the evidence adduced by the proponent is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense, he is not obliged to do so. By contrast, a "legal shifting" occurs when the evidence adduced by the proponent is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence.

opponent adduces no countervailing evidence, the Court must hold that the legal burden has been discharged and the proponent wins.

The distinction between the legal burden and the evidential burden, and the fact that the evidential burden shifts in the course of trial are important points to be borne in mind if a meaningful analysis of section 80(3) of the Act is to be attempted. Thus, when the taxpayer appears before the Board of Review, the legal burden is on him to show that the assessment is excessive. He commences by discharging his evidential burden, *i.e*., adducing sufficient evidence to put in issue the correctness of the Comptroller's assessment. This he may do by showing, *e.g*., that his tax liability, say $X, is determined from *accurate* records prepared by an *accepted accounting method.* Thus, the amount to which he is assessed by the Comptroller, say $Y, (where Y is greater than X) is excessive. Once he has done this, the evidential burden shifts to the Comptroller to adduce countervailing evidence. Assuming the taxpayer's evidence is believed by the Court, then if the Comptroller adduces insufficient evidence to counter the taxpayer's evidence, *i.e*., he has not shown that the taxpayer's accounting method is not in accordance with commercial accounting practice or produces misleading records for tax purposes, the taxpayer must win.

(c) *The Substance/Content of Proof*

In dealing with the taxpayer's burden of proof in tax disputes, a word must be said about the substance/content of proof. What exactly must the taxpayer show? This is perhaps a matter of common sense more than anything else. The Income Tax Act in section 80(3) requires the taxpayer to show that the 'assessment is excessive'. It is obvious that the only situation where a taxpayer is likely to object to an assessment is when it is excessive — the taxpayer who objects to paying an 'inadequate' assessment has not been born yet. Thus, section 80(3) is saying nothing more than that the legal burden is on the appellant taxpayer. *Why* the assessment is excessive really constitutes the content/substance of the taxpayer's proof. The assessment may be excessive for any number of reasons. For example, if the Comptroller wrongly included in his assessment receipts which were capital in nature, then the content of the taxpayer's proof consists of showing the non-revenue character of the receipt. If the Comptroller wrongly disallowed certain deductions, then the content of proof consists of showing that the items in dispute are allowable deductions within the scope of section 14 of the Act.

III. What is in Issue in Disputes over Choice of Accounting Methods: an Analysis from First Principles

Basically disputes over the correct choice of accounting methods can arise in one of 2 situations:

(a) *A Straightforward Dispute between the Taxpayer's Method and the Comptroller's Method.*

The simpler of the 2 situations arises when the taxpayer commences his business using one method to keep his accounts and the Comptroller assesses him on another. Thus, it is a straightforward dispute as to which is the more accurate method. As pointed out above, it is the taxpayer who will come before the Board of Review

to challenge the Comptroller's assessment and it is for him to prove that the assessment is excessive.[31] What determines his content of proof? Does he show that the assessment is excessive by showing that the accounting method used by the Comptroller is wrong for tax purposes? Or does the taxpayer show that the assessment is excessive by showing that his own accounting method is accurate in reflecting his tax liability, and therefore it follows that the Comptroller had no reason to reject it and substitute the Comptroller's own choice of accounting method?

The answer must surely turn on what is the scope of taxpayer's statutory obligation in keeping records for tax purposes. As noted above,[32] no form is prescribed by statute and it stands to reason that the taxpayer is free to choose his own accounting method to suit the nature of his business, as long as he observes the overriding requirement in section 67(1)(a), *i.e.*, that the records accurately reflect his financial position for tax purposes. That being the case, the Comptroller should have no cause to object, unless he has previously exercised his power under section 67(2) and prescribed a particular form for the records which required a particular method of accounting. Thus, the substance of the taxpayer's proof extends only to showing that his method is accurate in reflecting his tax liability. To require him to prove that the Comptroller's method is wrong would mean that in situations where there are more than one correct method of accounting, the Comptroller's method should prevail over the taxpayer's method, bearing in mind that the latter's choice serves not only the tax purpose but the taxpayer's other business purposes as well. This is clearly not contemplated by the statute, and the presence of the explicit power of the Comptroller in section 67(2) reinforces this analysis. If the Comptroller insists on any particular method, he will have to go through the statutory procedure of issuing a notice in writing to the taxpayer.

(b) *Disputes over Competing Accounting Methods which Involve the Element of Change*

The second situation in which a dispute can arise over competing accounting methods is much the same as in the situation of the straightforward dispute in (a), with one added dimension. This additional dimension is the element of 'change'. One of the two competing methods has been in use by the taxpayer for a period of time.[33] A dispute arises when one of the two parties, either the taxpayer or the Comptroller, attempts to change to a new method of accounting for whatever reason and the change is resisted by the other party who seeks to retain the existing method. In this second situation, would the burden of proof and the substance of proof differ from that in the first situation? Would the added dimension of change create a heavier burden?

(i) *Who Seeks the Change*

Although it has been noted that the legal burden in challenging an assessment is always on the taxpayer, what he has to do to discharge

31 See discussion in Part III, *supra.*
32 See p. 49, *supra.*
33 See, *e.g.* cases discussed in Part V, in particular *Ostime* v. *Duple Motor Bodies* (*supra,* n. 9).

this legal burden in a dispute over a change in accounting methods will turn on one significant fact — who is the party seeking the change: the taxpayer or the Comptroller. This is an inescapable conclusion upon examination of the taxpayer's statutory obligation in keeping accounts and upon recognition of the incontrovertible fact that the Comptroller's interest in the taxpayer's account is not identical with that of the taxpayer. The Comptroller's prime concern, and his *only legitimate interest,* is that the taxpayer's record, prepared by whatever accounting method, accurately reflect his financial position *for tax purposes.* By contrast, apart from complying with his statutory obligation in keeping accurate accounts, the taxpayer can and invariably does have other legitimate considerations in his choice of accounting method. He needs records which will also provide him with information for the purpose of making technical, administrative and economic decisions. Thus, it is entirely valid for a taxpayer to use an accounting method which is not only accurate for tax purposes, but will also produce records to serve the taxpayer's corporate or commercial purposes.

Their interests in the tax accounts being different, when the Comptroller attempts to implement a change in the accounting method, it can only be because he thinks that the taxpayer's existing method is no longer accurate in reflecting his tax liability; whereas when the taxpayer proposes a change it need not necessarily be because the old method has become obsolete for tax purposes. The old method may be still accurate for tax purposes but the change may be motivated by the fact that the existing method no longer serves his other legitimate corporate or commercial considerations.

(ii) *The Comptroller Seeking the Change and the Taxpayer Resisting*

Where it is the Comptroller who is trying to implement a change in accounting method the legal burden is still on the taxpayer, as always, to prove the assessment excessive. He does this by first discharging his evidential burden — *i.e.*, adducing evidence to the satisfaction of the judge that his accounting method produces accurate records and perfectly complies with his statutory obligation. At this stage, the evidential burden shifts to the Comptroller and the Comptroller must adduce countervailing evidence to show that the taxpayer's method is in fact wrong in that it distorts his tax liability and is therefore no longer acceptable.[34] If the Comptroller fails to discharge this evidential burden, then the taxpayer must win as, taking the evidence on both sides, there is no justification for compelling the change from the taxpayer's choice. It is not enough for the Comptroller to show that his method is as accurate as the taxpayer's method because, unless the Comptroller invokes section 67(2), the choice of accounting method belongs to the taxpayer. And between competing methods which are equally accurate, the fact that one method has been used for a period of time will weigh in its favour.[35] This is for the simple reason that changes in accounting method can be disruptive[36] as the bases of accounting, *e.g.*, valuation of stock-in-trade or work-in-progress, will have to be readjusted. The Comptroller cannot impose

[34] *Cf.* The cases of *Broadstone Mills,* and *Wetton, Page & Co.* discussed in Part V.
[35] *Cf.* The *Duple Motor Bodies* case *(supra,* n. 9) and *BSC Footwear Ltd.* v. *Ridgeway* [1971] 2 A.E.R. 534 H.L. both discussed in Part V.
[36] See the *Woodall-Duckham* case *(supra,* nn. 11, 12).

upon the taxpayer such a burden when the taxpayer's own method complies with the statutory requirement.

(iii) *The Taxpayer Seeking the Change and the Comptroller Opposing*

Where it is the taxpayer who changes his existing accounting method to a new method, a dispute arises when the Comptroller insists on assessing his tax liability using the taxpayer's previous method of accounting. Again, as the taxpayer is challenging the assessment the legal burden rests on him. First of all, he adduces evidence to show that the new method of accounting is accurate in reflecting his tax liability and thus complies with statutory requirements. Secondly, he adduces evidence to show that there are good reasons, flowing from corporate or commercial considerations (as for example, a change in the nature of his business that makes the previous method no longer appropriate) for the change. Once the taxpayer has done this, the evidential burden shifts to the Comptroller. If the Comptroller can adduce counter-evidence that the taxpayer's proposed new method distorts his tax liability, then most certainly the Comptroller will win.[37] (This is assuming that the old method relied upon by the Comptroller is still accurate in reflecting tax liability). If the Comptroller is unable to adduce evidence that the proposed new method is inaccurate, but only that the old method is equally accurate, then the taxpayer must succeed because, as noted above, as between competing methods it is the taxpayer's prerogative to choose.

What of the fact that the old method has been in use for some time? As in the case where the Comptroller is seeking the change, long usage weighs in favour of the old method. However, the taxpayer can overcome this piece of evidence when he adduces evidence that there are good commercial or corporate reasons for the change. No matter how long an existing method has been in use, it can hardly be advanced as a serious proposition that a taxpayer is locked into this method unless he can show that it has become obsolete or inaccurate *for tax purposes*. Whatever regard is paid to the value of consistency and whatever abhorrence there is for the disruptive consequences of accounting changes, these considerations must be outweighed when the taxpayer can give sound and valid reasons for desiring the change.[38]

IV. THE ROLE OF EVIDENCE OF COMMERCIAL ACCOUNTING PRACTICE IN TAX DISPUTES

As a matter of evidence, in order to discharge the evidential burden, both the taxpayer and the Comptroller must at some point show that an accounting method/practice in issue is either in accordance with commercial accounting practice or principles, or that it is wrong or incorrect. To do this, each side will have to rely on expert evidence given by accountants. Expert evidence is required because accounting practice is not a matter of common knowledge. In a dispute, the

37 The *Anaconda American Brass (supra,* n. 10) case is illustrative

38 See the *Woodall Duckham* case *(supra,* n. 11) where the validity of the taxpayer's change was never disputed. The only dispute over the tax treatment of the 'surplus' thrown up as a result of the change.

Board of Review as a tribunal of fact and law[39] is obliged to weigh the expert evidence given by accountants as to what constitutes good or sound commercial accounting practice. A question arises as to how much weight may be attached to such expert evidence by a tribunal of law. This question has been dealt with by a line of English authorities.

In *Odeon Associated Theatres Ltd.* v. *Jones (Inspector of Taxes)*[40] the taxpayer sought to deduct expenses incurred in carrying out certain repairs to a chain of acquired cinemas on the ground that such expenses were of a revenue nature. Expert evidence was given by some distinguished accountants that according to the principles of sound commercial accounting, these repairing expenses would be dealt with as a revenue expenditure in the taxpayer's account. On the strength of this evidence the Court held that the expenditure in question was of a revenue character and therefore properly deductible. In the Court of Appeal, Salmon L.J. pronounced:

> "In my judgement, the true proposition of law is well established, namely that in determining what is capital expenditure and what is revenue expenditure in order to arrive at the profit for tax purposes in any particular year, the courts will follow the established principles of sound commercial accounting unless they conflict with the law as laid down in any statute."[41]

In situations where there is no evidence of such a practice, or where there is conflicting evidence, or evidence of two parallel but conflicting principles in commercial accountancy, "... courts must do the best they can without evidence, or choose between the conflicting evidence or decide which is the most appropriate principle of commercial accounting."[42]

However, where there is evidence which is accepted by the court as establishing a sound commercial accounting practice, conflicting with no Act, that according to Salmon L.J., normally is the end of the matter. "The Court adopts the practice, applies it and decides the case accordingly."[43]

On the same bench, Buckley L.J. while accepting the relevance of evidence of accounting practice, had quite a different view as to the weight to be accorded it.[44] Having correctly characterised the question 'whether a particular outlay is of a capital or revenue nature' as a question of law, he held:

> "In answering that question of law, it is right that the court should pay regard to the ordinary principles of commercial accounting so far as applicable. Accountants are, after all, the persons best qualified by training and practical experience to suggest answers to many difficult problems that can arise in this field. Nevertheless, the question remains ultimately a question of law."[45]

[39] The Board's power and functions as a tribunal of fact and law is similar to that of the Special Commissioners (Commissioners for the Special Purposes of the Income Tax Act) in the English tax regime. For a discussion of the role of the tribunal of fact and law, see *Edwards* v. *Bairstow & Harrison* [1955] 36 T.C. 207.

[40] [1972] 1 A.E.R. 681 C.A.

[41] *Ibid*., at 689.

[42] *Ibid*., at 690.

[48] *Ibid*., at p. 691.

[44] The third judge on the bench, Orr L.J. expressed no opinion on this matter.

[45] *Supra,* n. 38 at 693-694.

But following Salmon L.J.'s pronouncement, Goulding J. in the subsequent case of *Heather (Inspector of Taxes)* v. *P-E Consulting Group Ltd*.[46] proceeded on the basis that the evidence of accountants should be treated as conclusive and that all the commissioners[47] and the court had to do would be to evaluate their evidence. When the Crown appealed, counsel for the taxpayer company submitted to the court of appeal that the *Odeon* case had upgraded the evidence of accountants so that the commissioners and the courts were bound by their evidence to a greater degree than they had been in the past.

Lest accountants should become afflicted by delusions of grandeur about the strength of their evidence in determining questions of law, Lord Denning M.R. was quick to reject such a proposition. He declared:

> "The courts have always been assisted greatly by the evidence of accountants. Their practice should be given due weight; but the courts have never regarded themselves as being bound by it. It would be wrong to do so. The question of what is capital and what is revenue is a question of law for the courts. They are not to be deflected from their true course by the evidence of accountants, however eminent."[48]

Buckley L.J. reiterated his stand in the *Odeon* case:

> "Skilled accountants may well be much better qualified than most judges to formulate and explain (sound accountancy) principles; but nevertheless in every case of this kind it is the judge and not the witness who must decide whether a witness's evidence in fact exemplifies sound accountancy principles."[49]

The position adopted by the Court of Appeal in the *PE Consulting Group,* case is of course unassailable. By definition, questions of law can only be decided by the tribunal of law after taking into account the evidence before it. This is the inexorable result of characterising the question in issue as a *question of law*. The position would be different if what is in issue is a question of fact. For example, if what is to be established before the court is what method of accounting is used by taxpayers in the cotton spinning industry, what is in issue is a question of fact. Thus, if accountants' expert evidence is that the base-stock method is invariably used, such evidence is conclusive of the fact. The distinction in the relative weight to be given to accountant's evidence on questions of law and questions of fact is no better drawn than by Pennycuick V.C. in the *Odean* case:

> "… The concern of the court in this connection is to ascertain the true profit of the taxpayer. That and nothing else, apart from express statutory adjustments, is the subject of taxation in respect of a trade. In so ascertaining the true profit of a trade the court applies the correct principles of the prevailing system of commercial accountance. I use the word 'correct' deliberately. In order to ascertain what are the correct principles it has recourse to the evidence of accountants. That evidence is conclusive on the practice of accountants in the sense of the principles on which accountants act in practice. That is a question of pure fact, but the court itself has to make a final decision as to whether that practice corresponds to the *correct* principles of commercial accountancy."[50]

[46] [1972] 2 A.E.R. 107. The Court of Appeal decision is reported in [1973] 1 A.E.R. 8.
[47] This is referring to the Commissioners for the Special Purposes of the Income Tax Act. See n. 37 *supra.*
[48] [1973] 1 A.E.R. 8 at 13.
[49] *Ibid*., at 14.
[50] [1971] 2 A.E.R. 407 at 414. "Correct" here is used in relation to that which is desirable for tax purposes.

Similarly, on the question of whether the LIFO[51] method of keeping inventory and valuing stock is permissible for income tax purposes, the Privy Council in a case on appeal from the Supreme Court of Canada held that:

> "… the evidence of expert witnesses, that the LIFO method is generally acceptable, and in this case the most appropriate, method of accountancy is not conclusive of the question that the court has to decide. That may be found as a fact by the Exchequer Court and affirmed by the Supreme Court. The question remains whether it conforms to the prescription of the Income Tax Act.. ,"[52]

The legal obligation to pay taxes is a legal obligation which is entirely the creature of statutes. Tax disputes invariably revolve on the question of a person's tax liability, which necessarily is a question of law for the Courts. Where the resolution of a question of law depend in part on the existence of facts and to the extent that the accountant's evidence can establish the existence of certain facts in issue, his evidence will be conclusive. But not otherwise.

The case of *Willingale (Inspector of Taxes)* v. *International Commercial Bank Ltd*.[53] provides further important lessons on the weight of evidence of commercial accounting practice in the resolution of tax disputes.

One important lesson is the restatement of the proposition that even where a court is prepared to accept the accountant's evidence and *rule* that a particular accounting method or practice is in accordance with principles of sound commercial accounting, it may still reject the results of such an accounting method (for the purposes of ascertaining tax liability) if they conflict with any established principles of tax law. This limit on the applicability of principles of commercial accounting in determining tax liability was recognised even in the earlier case of *Odeon.* But there Salmon L.J. contemplated the conflict in relation only to provisions in tax statutes.[54] In *International Commercial Bank* case, the Court went further and noted that conflict could also arise in relation to principles of tax law established by cases. In this second situation too, tax law should prevail.[55]

The taxpayer in the *International Commercial Bank* case was a bank carrying on business which included the discounting of or the purchase of discounted bills issued by borrowers all over the world. The bills were held by the bank over more than one accounting period. Some of the bills were held till maturity, others sold before maturity. The question in issue was whether any appreciation in value of the bills, before sale or maturity, should be recognised for tax purposes—clearly a question of law. A fundamental principle in tax law is that profits cannot be anticipated, *i.e*., profits cannot be taxed until it is realised.[56] Thus, the issue turned on whether at any point before

[51] *Infra,* n. 66.
[52] See the *Anaconda American Brass (supra,* n. 10) at 102.
[53] *Supra,* n. 8.
[54] *Supra,* n. 38 at 689. "… the Courts will follow established principle of sound commercial accounting unless they conflict with the law *as laid down in any statute."* Emphasis added.
[55] "The application of the principles of commercial accounting is however, subject to one well-established though non-statutory principle..." *per* Lord Reid in the *BSC Footwear* case *(supra,* n. 33) at 536.
[56] *Ibid.*

sale or maturity, profits can be said to have been realised by the taxpayer as the bills mature over time. The taxpayer in its annual commercial accounts reflected the annual growth in value of the bills in the form of 'accrued discounts'. In so making up its accounts, the bank "by common consent acted in accordance with the principles of commercial accountancy."[57] In the face of all the evidence, both the Court of Appeal and House of Lords (by 3:2 majority) held that no profits on the bills were realised by the bank until sale or maturity, and therefore the annual growth in value of the bills were not taxable.

The Revenue authorities' attempt to rely on the taxpayer's own accounts, which the Court had unhesitatingly pronounced as being in accordance with sound principles of commercial accounting, failed for the simple reason that, the so called 'accrued discount' were anticipated profits, and therefore it would be contrary to an established principle of tax law to assess it to tax. Although much criticism can be and has been directed at the courts' treatment of the issue of realisation,[58] its position on the role of accounting practice in a tax dispute is totally defensible.

The second lesson to be learnt from the *International Commercial Bank* case is that even when it is the taxpayer's own choice of accounting method upon which the Revenue authorities has based their assessment, the taxpayer is not precluded from showing that the assessment is excessive. And the taxpayer can do so by showing that the financial position reflected by the accounts is inaccurate for *tax purposes,* although they were very effective for commercial/business purposes; as in the instant case, the accounts were prepared in the manner adopted by the bank to give a "true and fair view" of its profits over the years.

V. THE ENGLISH APPROACH IN TAX DISPUTES ON CHOICE OF ACCOUNTING METHOD

An analysis of English cases involving disputes over choice of accounting method reveals an approach which is closely parallel to, and fortifies, the propositions advanced above (Part III). The cases show that the English courts proceed on the reasonable premise that the choice of accounting method is primarily the taxpayer's and that the only legitimate interest that the Revenue has in the taxpayer's accounting methods is in the accuracy of the resulting records for the purposes of ascertaining tax liability. With this basic premise, the rationalisation of the cases produces a remarkably consistent approach.

(a) *Two Competing Methods, One More Accurate than the Other*

As between two competing methods, the Revenue authorities' method will always prevail if it can be shown that the taxpayer's method, while in accordance with principles of commercial accounting, failed to produce an accurate picture of taxpayer's financial position for tax purposes. The case of *Patrick (Inspector of Taxes)* v. *Broad-*

57 *Per* Sir John Pennycuick in the Court of Appeal [1977] 2 A.E.R. 618 at 631.
58 See Louis Blom-Cooper, *Willingale* v. *International Commercial Bank Ltd.* (1978) B.T.R. 229. See also J.F.A.J., "A Matter of Interest" (1977) B.T.R. 236; "Wrong Again" (1978) B.T.R. 69.

stone Mills, Ltd.[59] provides a good illustration to begin with. The taxpayer company carried on the cotton spinning business. It purchased stocks of raw cotton and processed the cotton into saleable yarn. The average time taken for the process was approximately six to eight weeks.

In preparing its accounts, the taxpayer adopted a system of accounting known as the 'base stock' system. Under that system the 'fixed process stock', *i.e.* the cotton which is on the machines, does not appear in the trading account at all, and the 'spare process stock' is taken at an arbitrary figure. The Revenue authorities assessed the taxpayer to tax based on a system that included a valuation of all the stock (either at market or post price) at the commencement and at the end of the accounting period. In disputing the Revenue's assessment, the taxpayer's contention was that the system it used was well recognised and in accordance with the principles of sound commercial accountancy, and that it ought to be adopted to ascertain the company's tax liability.

At first instance, there was a finding of fact that "the method adopted by the company in dealing with its base stock in its accounts was one of the methods recognised in the trade of cotton spinning and was in accordance with sound commercial practice."[60] There was also a finding of fact that there had been great fluctuation in the price of raw cotton over the years. The Revenue's contention was that the taxpayer's method "did not show that full amount of the profits of the relevant year, but showed a distorted view of those profits and understated them."[61] On the basis of the first finding of fact, and without dealing with the Revenue's contention, the commissioners allowed the taxpayer's appeal against the assessment.

On appeal by the Revenue, the court gave full consideration to the contention that the taxpayer's method produced records that distort the company's tax liability. The evidence of the Revenue's expert witness was that the base stock method was "unobjectionable and made little difference to results over a number of years provided there were no violent fluctuations in the cost of raw material; but in a time of violent fluctuations, and in particular in a time of consistently rising prices, in his view, the use of the base stock method could and did give rise to very misleading results."[62] The effect of using the base stock method was to understate the company's profits by reason of a "hidden reserve" of the true cost of cotton.

Both the High Court and the Court of Appeal had no difficulty in finding for the Revenue *once it ruled that the base-stock method distorted the company's tax liability.* Singleton L.J. summed up neatly the position the Court would take when faced with 2 or more competing methods for ascertaining the taxpayer's profits.

> ". .. the one which shows most accurately the position between the revenue on the one hand, and the taxpayer, on the other, is the one which ought to be adopted. In other words it is not sufficient to say that a particular system of accounting is a well-recognised system of

[59] *Supra,* n. 10.
[60] *Ibid.*, at 164, the judgement of Singleton L.J.
[61] *Ibid.*
[62] *Ibid.*, at 169, the judgement of Singleton L.J.

> accounting and satisfactory during normal times if the contention on the other side is that the system does not give a true result for the particular year, the accounting year."[63]

It is important to note that here the company had in fact been using the base-stock method for a good 27 years, since it commenced business in 1920. This means that the Revenue authorities have been accepting the taxpayer's accounting method for at least that period of time. However, the fact of long usage which carries with it the appeal of consistency, a desirable object in accounting practice, nonetheless has to yield to the primary concern of accuracy in the reflection of tax liability.

The case of *Wetton, Page & Co.* v. *Attwooll*[64] reaffirms the approach taken in the *Broadstone Mills* case and it is particularly apposite, if only because the taxpayers in question were a firm of accountants! The taxpayer firm was formed in 1932 and from 1932 to 1953 inclusive, the taxpayers' accounts were made up to December 31 in each year on a cash basis. Their tax liability during these years had been assessed on these accounts. They appealed against assessments for the years 1954 to 1958 inclusive on the ground that their profits had been computed on an earnings basis whereas the appropriate basis was a cash basis. Both before the special commissioners and before Ungoed-Thomas J. in the High Court, the taxpayers' appeal was readily dismissed. The commissioners made the finding that the earnings basis is "the usual basis upon which the profits or gains of accountants are computed for income tax purposes, and it produces *more accurate* results than the cash basis."[65] This finding of greater accuracy was sufficient to conclude the matter for Ungoed-Thomas J. on the issue of which method had the better claim. Again, this was despite the fact that the taxpayers had been using the cash basis of accounting for a good 21 years.

The 'mirror image' of the situation found in both the cases of *Broadstone Mills Ltd.* and *Wetton, Page & Co.* is to be seen in a Canadian case on appeal to the Privy Council: *Minister of National Revenue* v. *Anaconda American Brass Ltd.*[66] It is the 'mirror image' of the other 2 cases as here the *taxpayer* is the party attempting a new method. The taxpayer company was in the business of manufacturing metal sheets, rods and tubes for sale. It constantly purchased metals to replace those that were being processed. At all times, it maintained an inventory or stock of metals of about one-third to one-quarter of its annual requirements, so that it turned over its inventory three or four times a year. The company did not keep records from which the actual metals used during the year could be identified or the amounts paid for those metals determined. But it kept records of the quantities of metals (a) in its inventory at the beginning of the year, (b) purchased during the year, and (c) in its inventory at the end of the year. It also kept records of the prices paid for the metals from time to time. In the years before 1947, the prices of raw materials were relatively stable such that an estimation

[63] *Ibid*., at 174.
[64] *Supra,* n. 14.
[65] *Ibid*., at 167. Emphasis added.
[66] *Supra,* n. 10.

(either by the average cost method or the FIFO [67] method) of cost of the materials used and of those remaining in stock produced substantially accurate results for ascertaining tax liability. In 1947, for the first time, the company submitted a return in which the last-in-first-out (LIFO) system of valuing inventory was adopted.[68] This system had been in use for some time by the taxpayer *for its own corporate purposes* but neither it nor any taxpayer in Canada had previously adopted it for taxation purposes. The Revenue authorities were of the view that however appropriate the LIFO method might be for the corporate purposes of the company, it did not truly reflect its profit for income tax purposes. Accordingly, the Revenue assessed the company to tax using the first-in-first-out (FIFO) method.[69]

The taxpayer's appeal against assessment, allowed by the Exchequer Court and affirmed by the Supreme Court of Canada, was set aside by the Privy Council on the ground that the application of the LIFO method in the present case involve the "deliberate disregard of facts which can be ascertained and must have their proper weight ascribed to them."[70] Facts such as: the metals which were bought in the last month of 1947 could hardly have been processed in 1947, and so large a stock of metal purchased in an earlier year was not likely to be still in stock in 1947. The use of the LIFO method in fact created a hidden reserve and substantial purchases may never go into the profit account at all.[71]

The two English decisions, as well as the Privy Council decision from Canada, demonstrate an approach which is not only reasonable but perfectly consistent with analysis from first principles. While recognising the taxpayer's right to choose his own accounting method, such a right must yield to the Revenue's choice when it is shown that the latter method produces the more accurate result for tax purposes. The requirement for consistency carries little, if any, weight when change is dictated by the object of accuracy.

(b) *Two Competing Methods, One No More Accurate than the Other*

Where the English Courts have been faced with a dispute involving two competing methods, neither of which is clearly superior to the other in serving the object of accuracy, the results have been predictably different. This is inevitable as the approach in these cases must and do remain faithful to the major premise that underlies the resolution of disputes involving one mthod more accurate than the other. The battle lines are again clearly drawn: the choice of accounting method is primarily the taxpayers, and the Revenue's only

67 See n. 67 *infra.*

68 The last-in-first-out (LIFO) system is an accounting method for identifying stock for the purpose of assigning the stock a value. The LIFO system treats stock in trade at the end of the accounting period as the stock which has been held for the longest period.

69 The first-in-first-out (FIFO) method treats stock in trade at the end of the accounting period as the stock most recently purchased.

70 *Supra,* n. 10 at 102.

71 As Viscount Simonds pointed out, "… the Income Tax Act is not in the year 1947 concerned with the years 1948 or 1949: by that time the company may have gone out of existence and its assets been distributed." *Supra,* n. 10 at 102.

legitimate interest is in the accuracy of the resulting records for tax purposes.

An obvious starting point is the famous House of Lords decision of *Ostime (H.M. Inspector of Taxes)* v. *Duple Motor Bodies Ltd.*[72] The question at issue between the taxpayer and the Revenue was as to the correct method of ascertaining the cost of work in progress in order to determine, for tax purposes, the full amount of the profits or gains of the company's trade. The taxpayer company was incorporated in 1946 to take over the business of a predecessor company. The business was that of building to order bodies for motor coaches. As the business was almost entirely building to order, very few finished bodies were included in work-in-progress at the end of the accounting period. In preparing its accounts, the taxpayer (and its predecessor since 1924) had been using, and had been assessed on, the direct-cost method of valuing work-in-progress. This means that work in progress was brought into account on the basis of cost of material and labour directly attributable to that work. This differ from the on-cost method which brings into account not only direct expenditure but also indirect expenditure in the form of an equitable estimated proportions of overhead. The Revenue authorities assessed the company to tax, for the period of 1951-1954 inclusive, using the on-cost method and the company appealed. The Special Commissioners upheld the assessment but stated a case for the opinion of the Court. Vaisey J. reversed the decision below and was upheld both in the Court of Appeal and the House of Lords.

The 'dilemma' facing the Court was that neither of the two competing methods was more accurate than the other so that there was no obvious answer as to which method had the better claim in applicability. The finding by the tribunal of fact was that both methods were recognised by the accountancy profession as correct accountancy:

> "On the evidence adduce before us we find, and this naturally has caused us difficulty, that the accountancy profession as a whole is satisfied that either method will produce a true figure of profit for Income Tax purposes."[73]

In the House of Lords, Lord Reid's judgement contained a note of exasperation when he declared:

> "Normally a Court attaches great weight to the view of the accountancy profession, though the Court must always have the last word. But here the findings … show that that assistance is not available on the issue which your Lordships have been invited to consider. The Commissioners state that they were asked to decide between these methods as a broad matter of principle and your Lordships were also invited to take that course. *But I find that very difficult: if the accountancy profession cannot do that, I do not see how I can.* The most I can do is to bring common sense to bear on the elements of the problem involved in this case in the assumption, which I am entitled to make, that common sense is the same for lawyers as for accountants."[74]

In the face of these 2 methods, neither more compelling than the other, what should tilt the balance? One may have recourse to our major premise that the choice of accounting method belongs to the taxpayer.

[72] *Supra,* n. 9.
[73] *Ibid*., at 170, the judgement of Viscount Simonds.
[74] *Ibid*., at 173-174. Emphasis added.

And as the Revenue's method is no more accurate than the taxpayer's, the Revenue's interest in accuracy for tax purposes is equally served by the taxpayer's method. On principle, this is sufficient to dispose of the matter and the judgements of Viscount Simonds and Lord Guest clearly shows this. Viscount Simonds:

> "My Lords, I think that in this dilemma the prevailing consideration must be that the taxpayer should not be put to any risk of being charged with a higher amount of profit than can be determined with reasonable certainty. He may concede that stock in trade and work in progress must for tax purposes be regarded as a receipt. Upon that professional accountants appear to be universally agreed, though it might not be obvious to the layman. But this concession should not be pressed beyond the point at which the profession is widely, if not universally, agreed; and I should, therefore, if I had to choose (which I have not) between 2 vaguely defined methods, choose the direct cost method as the loss likely to violate the taxing statute...."[75]

Lord Guest:

> "... the Crown are not so much interested in altering the method of costing work in progress as in making an alteration in the deductible expenses of the Company's accounts. It is at once obvious that by adding a sum in name of overhead expenses to the cost of work in progress the Crown are *pro tanto* reducing the expenditure which would otherwise appear on the debit side of accounting. The principle contended for is no justification in my view, for adopting the on-cost method in relation to work in progress. No other justification in principle was put forward for the on-cost method...."[76]

Both their Lordships were further reinforced in their decision by the fact that the on-cost method favoured by the Revenue authorities may also produce absurd results:

> "If the overhead expenses are allocated to work in progress it will follow that if trade is slack during any given year a greater proportion of the overheads will be allocated to the work in progress, and as the cost of the work in progress is to appear as an item of profit, this will swell the profits of the business."[77]
>
> "An idle and unprofitable year thus increases for tax purposes the value of the work that has been, or is in course of being done."[78]

Even Lord Reid recognised that on principle, the taxpayer must prevail.

> "The line may be drawn differently for practical reasons in different cases. But *it would be impossible to say as a matter of principle* that factory overheads must be brought in and others left out, and quite impossible to say as a practical criterion if we do not even know how to define factory overheads."[79]

However, apart from first principles, the taxpayer had a further factor in his favour and it is Lord Reid who seized upon it as a dramatic way of cutting the Gordion Knot. The taxpayer and its predecessor company had been using the direct cost method since 1924, some 27 years. Lord Reid thus capitalised on the appeal of consistency.

> "One thing clearly emerges as approved by the accountancy profession — whatever method is followed it must be applied consistently. I accept that. *So the real question is what method best fits the circumstances of a particular business.* And if a method has been applied consistently

75 *Ibid*., at 170-171.
76 *Ibid*., at 177.
77 *Ibid*., at 178, the judgement of Lord Guest.
78 *Ibid*., at 171, *per* Viscount Simonds.
79 *Ibid*., at 174. Emphasis added.

> in the past, then it seems to follow that it should not be changed unless there is good reason for the change sufficient to outweigh any difficulties in the transitional year. In cases where the on cost method has been consistently followed in the past there may or may not be good reason for changing now. There might perhaps, be good reason for a change in a particular case in the other direction. But I can find nothing in the case to justity such a change in the present case."[80]

It is clear from Lord Reid's judgement that the object of consistency in accounting method here is not advanced as a separate principle of tax law. It is a fact which the court may rely upon to determine which method "best fits the circumstances of the particular business" when faced with 2 equally accurate methods. This being the true role of the so-called 'consistency factor' (the writer hesitates to call it a 'principle'), it must naturally give way if there are good reasons for change. If the existing familiar method has become obsolete or has been superceded by some more accurate method then there is obviously good reason to change. In fact, it would not merely be a 'good reason' — it would be a legal obligation to change. Thus, good reasons for change is not confined to the old method being shown to be wrong.[81]

The above analysis, on the role of the factor of consistency and the nature of the evidence required to negative this factor, is clearly borne out by the House of Lords decision in *BSC Footwear Ltd.* v. *Ridgeway.*[82] The taxpayer in its tussle with the Revenue over the applicable method of valuing its stock-in-trade, lost at every round right up to the House of Lords. Although the taxpayer lost by a narrow margin (3:2) in the last round, the dissenting judgements as much as the majority judgements, reveal an approach that is perfectly consistent with the underlying premise defining the relative interest of the taxpayer and the Revenue in the choice of accounting methods.

The dynamics of the case is identical to that of the *Duple Motor Bodies* case. The taxpayer's practice of valuing its stock-in-trade by a method which uses the concept of a "replacement value" had been in use for at least 30 years. This method had been accepted by the Revenue, but in 1959, the Revenue authorities assessed the taxpayer to tax using market value of its stock-in-trade. These majority judgements reveal a very clear appreciation of the relative positions of the parties in such a dispute. Lord Morris of Borth-y-Gest:

> "For many years the company have kept their accounts upon a particular basis. The Crown with appreciation of it have accepted it. The onus must be upon the Crown to show that the basis is unacceptable and should be changed. *As between competing methods and practices of commercial accounting a mere preference for once should not give it priority if the others are not open to objection.* What must in the present case be considered is whether the basis which the company adopted was or was not a basis which would show "the full amount of the profits of yanis of a particular year: see section 127 of the Income Tax Act 1952."[83]

Lord Pearson:

> "The question is whether the appellant's system of stock valuation is acceptable for tax purposes. As it had been accepted by the Inland Revenue for many years up to 1959, it is now for the Inland Revenue to justify their rejection of it for 1959 and subsequent years. In order

80 *Ibid*., at 175. Emphasis added.
81 See the *Woodall-Duckham* case, *supra,* n. 11.
82 *Supra,* n. 33.
83 *Ibid*., at 537. Emphasis added.

> to do this, I think the Inland Revenue must show that system is likely to produce stock valuations which are seriously and substantialy incorrect and thereby to cause distortion of the assessment of the profits and gains for the year. If that is the effect of the system, the appellants cannot succeed with either of their two alternative contentions...[84]

Their Lordships in referring to the Revenue's onus were, of course, referring to the evidential burden on the Revenue to displace the taxpayer's evidence that its method had been in use, and accepted by the Revenue, for over 30 years — *prima facie* evidence that its method was correct for tax purposes. The legal burden remained with the taxpayer to show that the assessment was excessive. The fact that the Revenue has to show that the taxpayer's method is inaccurate in order to succeed, very clearly shows that substance of the taxpayer's legal burden of proof is only to show that its method is accurate and complies with statute.

The taxpayer's use of the concept of "replacement value" was based on the value of its stock in a wholesale market although its business was to sell shoes in the retail market. The Revenue's method used the value of the stock in the retail market. All three judges in the majority, were of the opinion that taking the value at the wholesale market price, in the circumstances of the taxpayer's business, produced *inaccurate* results. They, therefore, had no difficulty in holding that the Revenue's method should prevail. Lord Morris:

> "The company's methods make a considerable inroad upon the broadly accepted principle that neither expected future profits nor expected future losses are to be anticipated."[85]

Lord Pearson:

> "In my opinion, therefore, the system does produce some distortion of the assessment of taxable profits for any particular year."[86]

Lord Guest:

> "In my opinion, the Crown's method more fairly and reasonably represents the profit of the appellant's business and they have shown that the appellant's method is less preferable than their own."[87]

The result is thus in accordance with the cases of *Broadstone Mills,* and *Wetton, Page & Co*., and as between 2 competing methods, the one which is more accurate in reflecting tax liability will prevail. And this result cannot be deflected by any argument for the need to have consistency: 30 years of consistent practice did not help the taxpayer in *BSC Footwear.* So it is easy to understand why, where the Revenue must fail in *Duple Motor Bodies* when confronted with the consistency factor, the Revenue must succeed in *BSC Footwear* against the very same factor. The Revenue had more than good reason to enforce a change in accounting method.

The dissenting judgement can equally be reconciled with the mainstream. Lord Reid was of the opinion that in the taxpayer's business there was "no market in the ordinary sense"[88] for obsolescent line of

84 *Ibid*., at 550.
85 *Ibid*., at 543.
86 *Ibid*., at 551.
87 *Ibid*., at 544-545.
88 *Ibid*., at 537.

shoes (which constituted a large part of taxpayer's closing stocks). He thus found the Revenue's method a 'rough and ready' method *no more accurate* than the taxpayer's. To him, the choice was between two equally accurate (or more precisely, two equally flawed) methods. In the light of the *Duple Motor Bodies'* case, his solution was inevitable.

> "To sum up, in my view the Crown's method, though rough and ready generally produces a reasonable result though in this case it brings out too high a figure. The appellant's method is liable to abuse but in this case it brings out a result which is reasonable and it cannot be said to conflict with any rule of law. I think the Crown are quite entitled to prevent anyone from changing to this method, but it is another matter to require the appellants to abandon it. In my judgement the disadvantages of making a change outweigh the advantages."[89]

Viscount Dilhorne explains his dissent thus:

> "In this case the revenue have to show that the appellant's method is wrong. They accept that the onus is on them to do so. In view of the many years they have accepted the system, the onus is a heavy one. They have also to show that their method is, if not the right one, *at least a better one;* and their assertion that it is, appears to me really to depend on the correctness of their assertion that only known expenses directly referable to the sale are deductible from the retail price... To my mind, it has not been established that the appellant's method is wrong and I am far from satisfied that the revenue's method is right or better."[90]

His Lordship's interpretation of the 'consistency factor' uttered *obiter* was, however, far more radical.[91]

> "Even if the revenue's method is better or more right than that of the appellants — and for the reason I have given, I do not think it is — I still would be in favour of allowing the appeal.... Here, in my view, there are not good reasons for the change, but even if I accepted the revenue's contentions as good reasons for a change, I would not think they outweigh the difficulties that may ensue, which are either that the taxpayer will pay tax twice on some parts of his profits or that a substantial sum will entirely avoid tax."[92]

The sum of *Duple Motor Bodies'* case and *BSC Footwear,* in particular the dissenting judgements, reaffirms the major basic premise — as between two equally accurate methods, the taxpayer's choice must prevail. And the onus is on the Revenue to prove that the taxpayer's method is either wrong or less accurate than the Revenue's methods.

89 *Ibid*., at 539.

90 *Ibid*., at 547. Emphasis added.

91 Viscount Dilhorne's radical view, even if uttered *obiter,* must be recognised for what it is — incorrect. The *Woodall-Duckham* case *(supra,* n. 11) shows this to be so. There the taxpayer company changed from an on-cost method of computing profits to the "accrued profit" method. The first method differed from the second in that the former took into account profits only on completion of contracts and actual receipt of the moneys payable to the company pursuant to the contracts. Because of a change on the nature of the taxpayer's business, it changed methods of accounting for sound commercial reasons. Despite substantive difficulties resulting from the change (which became the subject matter of the taxpayer's dispute with the Revenue), at no point in the proceedings did the Revenue dispute, nor the Courts censure, the taxpayer's change.

92 *Supra,* n. 33 at 549.

VI. THOMSON HILL LTD. v. THE COMPTROLLER OF INCOME TAX[93] — A CRITIQUE

The basic premise, formulated from first principles and defining the relative positions of the parties to a dispute over accounting methods, can be seen to produce reasonable and consistent results in application.[94] The English cases, as well as the Canadian P.C. decision, using an approach which reflects the same basic premise, have provided proof of this.[95] It is therefore with a certain measure of consternation and regret that one must greet the recent decision of the Singapore Court of Appeal in *Thomson Hill Ltd.* v. *The Comptroller of Income Tax.* The decision of the Court of Appeal is unfortunate as it affirms the position, adopted both by the High Court[96] and by the Board of Review,[97] which can neither be justified on first principles, nor by application of English precedents, notwithstanding the reliance placed on them by the Comptroller. It has to be pointed out that precedents on English tax law are not binding, as such, on the Singapore courts. The English tax regime is based on statutory provisions very different and far more complex than the Singapore tax statute. However, as the Singapore tax system shares certain basic concepts with the English system, English precedents may be relied upon as highly persuasive authorities. Indeed, the chief use to which English precedents may be put is as a model for 'reasoning by analogy'. That being the role of English precedents in the Singapore context, it becomes almost tautologous to say that to correctly apply the reasoning used in these precedents presupposes an understanding of the reasoning behind the judgement. The *Thomson Hill* case manifestly 'applied' English precedents but it would appear that the 'principles' attributed to these English precedents are misconceived and not borne out by careful analysis. In fact, the misconceived reliance placed on the English precedents suggests an absence of appreciation for the major basic premise that underlie the resolution of tax disputes over accounting methods in the English Courts,

The facts of the *Thomson Hill* case raises squarely all the issues that are to be found in a dispute over the taxpayer's choice of accounting method:

(1) As an initial proposition, is the choice of accounting method the taxpayer's or the Comptroller's?

(2) If the taxpayer's method produces accurate records for ascertaining tax liability and complies with his statutory obligations, has the Comptroller any legitimate cause for objecting?

(3) Where a taxpayer changes from an old method to a new method, what is the substance/content of his proof that will discharge his legal burden: is it sufficient to show that his new method is accurate and complies with his statutory

93 Civil Appeal No. 10 of 1981, judgement rendered on 4 March 1981, in the Court of Appeal of Singapore.
94 See discussion in Part IV above.
95 See discussion in Part V above.
96 Reported in *T.H. Ltd.* v. *The Comptroller of Income Tax* [1981] 2 M.L.J. 105.
97 *Ibid.*

obligation, or must he show that the old method (favoured by the Comptroller) is wrong or inaccurate?

The taxpayer company carries on the business of a housing developer. The company purchases properties which it either develops or retains in its "land bank". Since it commenced business in 1970 and up to 1973, the taxpayer used the "completed contract" method of accounting in preparing the accounts of its development projects. Under this method all the development expenses, which included property tax, are 'capitalised' and carried forward until completion of the project. Thus, the property tax, though incurred and paid annually, did not appear in the profit and loss account. During these years, the Comptroller did not object to the taxpayer's method and accepted the treatment of property tax which had been capitalised in the balance sheet as part of the cost of the taxpayer's properties.

In 1974, the taxpayer brought the property tax paid into the profit and loss account and as this item is a deductible expense, the inclusion affected the taxpayer's tax liability. The Comptroller disallowed this change in treatment of the property tax payment and assessed the income tax payable accordingly, *i.e.*, based on taxpayer's old method of treatment. The taxpayer appealed to the Board of Review.

The Board of Review Decision

The Board of Review's decision is noteworthy for its conspicuous gaps in findings of fact and curious leaps in reasoning. The Board heard the evidence of accountants for either party to the dispute. The taxpayer's expert witness gave evidence that the taxpayer's treatment of property tax for the year 1974 was consistent with ordinary principles of commercial accountancy. The Comptroller's expert witness then gave evidence that the practice of capitalising property tax is in accordance with normal accounting practice. The Board of Review did not at any time reject the evidence given by the taxpayer's expert witness. There was no express finding that the taxpayer's method was either right, wrong or less accurate. It also accepted the evidence of the Comptroller's witness. Thus, the Board was faced with two competing methods of treating property tax, both of which were accepted as in accordance with principles of commercial accounting. There was no finding of fact that one method was more accurate than the other. In such a situation, the only way to determine which of the two equally accurate methods should prevail is to determine which party has the prerogative to choose accounting methods.

As have been argued above,[98] the taxpayer's statutory obligation to keep records is governed by section 67(1). No particular form is prescribed by statute and it is only reasonable that it is for the taxpayer to choose. So long as the taxpayer's choice of method does not distort his tax liability, there is no reason why the Comptroller's choice should prevail. If the Comptroller wishes the taxpayer's records to take any particular form, then he must exercise his power under section 67(2) and give the taxpayer a formal notice in writing. Here, the Comptroller has not invoked section 67(2). The taxpayer's method has not been shown to violate his statutory obligation. Therefore, on

[98] See Part I Introduction especially pp. 48-49, *supra.*

principle,[99] between two competing methods the Board should hold that the taxpayer's choice prevails.

However, the Board did not at any time consider the relative interests of the parties as governed by the Income Tax Act. Instead, after accepting evidence that neither method was more accurate than the other, it went on to hold that the onus was on the taxpayer to show good reason for the change.[1] This ruling is undoubtedly correct as the analysis of the *Duple Motor Bodies'* case has shown that between two equally acceptable methods, the 'consistency factor' will weigh in favour of the old method, against the new method. However, as pointed out above,[2] the 'consistency factor' is not a separate principle in law — It is merely another fact to help decide which is the more appropriate method. As such, it can be negatived by adducing reasons for making the change. This the taxpayer did The Board recorded evidence[3] that the change was motivated by legitimate commercial considerations.[4] A slump in the property market in 1974 had halted work in various projects. If the property tax continued to be added to the development costs, the value of the stock-in-trade would be overstated. The taxpayer was also acting on advice that there was no legal obligation to capitalise property tax, and that property tax was in fact a revenue expense. These reasons were not rejected by the Board of Review. It is very curious that after correctly holding that the taxpayer must show good reason for the change, the Board made no attempt to evaluate the evidence of the taxpayer and made no finding whether the reasons advanced by the taxpayer were sufficient reasons to justify a change.[5]

What is even more curious, the Board concluded its "grounds of decision" with this surprising statement:

> "The onus being on the appellants to satisfy the Board *that their former treatment of property tax was wrong and must be changed,* we are of the opinion that they have not discharged that onus and that the Comptroller was justified in disallowing the deduction claimed."[6]

By a quantum leap, the "onus to show good reason for the change" is transmitted into the "onus to show that their former treatment of property tax was wrong." It bears repeating[7] that the burden to show good cause for change is quite different from the burden of showing the old method to be wrong. A review of the *Duple Motor Bodies* case and *BSC Footwear* will provide instructive lessons. "Good reason for change" includes far more than the fact that the old method is wrong. If the old method is wrong, it is not quite precise to say that the taxpayer has "good reason" for change. He *has* to change because otherwise he would fail to comply with his statutory obligation of keeping accurate records. It is more precise to say he has a "legal

99 See Part III *supra.*

1 *Supra,* n. 94 at 107.

2 *Supra,* Part V especially at pp. 66-67.

3 *Supra,* n. 94 at 106-107.

4 There was nothing on the record that indicated that the Board did not believe the evidence given by the taxpayer on the reasons for making a change. On the evidence, these reasons were valid considerations.

5 Nothing in the record indicates that the Board had made a finding that the reasons given by the taxpayer were *not* good reasons.

6 *Supra,* n. 94 at 107. Emphasis added.

7 See discussion at pp. 54-55, *supra.*

obligation" to change. This makes it clear that even in situations where the old method is not wrong, he may still have "good reason" to change. A reference to the case of *Pearce* v. *Woodall Duckham Ltd.*[8] will give a graphic example when there are good reasons for changing accounting method without showing the old method to be wrong.

The proposition that the taxpayer's onus is to show that the other method (favoured by the Comptroller) is wrong cannot be supported for the simple reason that the choice of accounting method is the taxpayer's.[9] Unless the Comptroller can show that is produces inaccurate records or violates the taxpayer's statutory obligation, the taxpayer's choice cannot be rejected. All the taxpayer needs to show is that his method is in accordance with principles of commercial accounting, complies with his statutory obligations and produces records which are as accurate as those prepared by using the Comptroller's method. In a situation, where the taxpayer changes from one method to another, his additional onus is to show that there are good reasons for change — this is evidence to negative the weight of the "consistency" factor.[10]

The Board of Review's decision in dismissing the taxpayer's appeal is against the weight of evidence and can neither be justified by reason nor precedent.

The High Court Decision

A review of this decision discloses that it is as unsupportable as the decision below but for different reasons. The decision was based on a total misconception of the taxpayer's position in this kind of dispute, as well as an inadequate appreciation of the duty of the Court in hearing an appeal from the Board of Review.

The taxpayer appealed against the Board's decision. One of the grounds of appeal was that the Board had erred in law and on the facts in holding that the onus was upon the company to satisfy the Board that the company's treatment of property tax was wrong. Chua J. rejected this ground of appeal by referring to section 80(3) of the Act and the *Anaconda* case. With all due respect, the reasons given by his Lordship for rejecting the taxpayer's first ground are bad. It would appear that his Lordship did not fully appreciate the differences in the legal burden, the evidential burden as well as the substance/ content of proof in a tax dispute.

It is not disputed that section 80(3) casts upon the taxpayer the legal burden to prove that the assessment is excessive.[11] This burden never shifts from the taxpayer. However, where the taxpayer has adduced sufficient evidence to show that his method of accounting is accurate and complies with his statutory obligation, the evidential burden shifts to the Comptroller. The Comptroller must adduce countervailing evidence to show that his method is more accurate or

8 *Supra,* n. 11.
9 See Part I and Part III, *supra.*
10 See pp. 66-67, *supra.*
11 See discussion in Part II, *supra.*

that the taxpayer's method is wrong.[12] What is the substance of the taxpayer's proof before he can discharge his legal burden? As indicated above,[13] this is a matter governed by the substantive law which gives the taxpayer the prerogative to choose accounting methods. Therefore, the content of the taxpayer's proof is to show that his method is also correct and complies with the Act. To deprive the taxpayer of his choice of accounting method, the Comptroller must show that his method is more accurate than the taxpayer's or that the taxpayer's method is wrong. Therefore, his Lordship's holding that "it is not sufficient for the taxpayer merely to prove that the taxpayer's practice is also correct"[14] is patently wrong in law. His Lordship further referred to *BSC Footwear* as authority for the proposition that the onus is on the party seeking the change in the accounting method to justify the change *on the ground that the old method was wrong*. He said "It was conceded by counsel for the Crown that in such a situation the Crown could only succeed if it could be proved that the method that had been consistently applied was wrong."[15]

A reference to the analysis of *BSC Footwear* above,[16] will easily show why this is a misapplication of the case. First of all it bears repeating that even where it is the Revenue seeking the change, the legal burden is still on the taxpayer to prove the assessment excessive.[17] Thus the "onus on the party seeking the change" refers to the legal burden on this issue alone which carries with it an evidential burden. The Revenue must adduce sufficient evidence to justify the change. Second, the *content* of proof required for the Revenue to succeed is to show the other (the taxpayer's) method *is wrong* and not merely that the Revenue's method is also correct. Thus, the content of proof *differs* from the situation where the *taxpayer* is the party seeking the change. As have been submitted above this is because the substantive law gives the prerogative to choose to the taxpayer. So that whilst the taxpayer, even when he is the party seeking the change, need only prove that the new method is also correct, the Revenue in seeking a change must prove that the old method is wrong.

The taxpayer's next important ground of appeal was that the Board erred in law in *failing to find that the company had shown good reasons for the change* and that the Board's *finding and decision were against the weight of evidence.*[18] The main ground of objection was that the Board was wrong in that it failed to give reasons for the rejection of the evidence of its expert witness in preference for the evidence of the Comptroller's witness. As noted above,[19] the record of the grounds of decision made no finding on this issue but the decision implicitly rejected the evidence by the taxpayer's expert witness.

12 This is the content of the Revenue's proof when it is the Revenue seeking the change. See discussion in Part II and Part V especially cases of *Duple Motor Bodies* and BSC *Footwear.*

13 See Part II and Part III.

14 *Supra,* n. 94 at 110.

15 *Ibid.*

16 *Supra,* Part V.

17 Part II above.

18 *Supra,* n. 94 at 110.

19 *Supra,* at p. 71.

It is very curious how the Court deals with this objection. In fact, his Lordship does not deal with this objection at all as he proceeds to hold that "the Board was entitled in law" to reject the evidence of the taxpayer's witness.[20] With all due respect, the taxpayer's objection did not at any time question the Board's *right* to reject accounting evidence. The objection is that *no reasons* have been given. Even in relation to a question of law, especially questions of law the resolution of which depends on the existence of certain facts, it behoves the tribunal to give reasons for rejecting evidence adduced to establish those facts. How else will the tribunal justify its decision? It is therefore totally bewildering why his Lordship, in answer to the taxpayer's objection, rehearsed the authority for a proposition (that the evidence of accountants in itself, can never be conclusive of a matter of law) which was not at all in dispute!

In the face of the taxpayer's appeal on this ground, it would have been instructive for the Court to recall the approach formulated by Lord Radcliffe in *Edwards* v. *Bairstow & Harrison.*[21] There His Lordship accurately stated the position to be taken by the Court in an appeal from the Special Commissioners, the English counterpart of the Board of Review:

> "I think that the true position of the Court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction as being erroneous in point of law, it is for them to state a case and in the body of it *state the facts they have found as well as their determination.* I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is *value in the distinction between primary facts and inferences drawn from them.* When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is obviously erroneous in point of law. But *without any misconception appearing ex facie, it may be the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.* In those circumstances too the Court must intervene. It has no option but to assume that there has been a misconception of the law and this has been responsible for the determination. So there, too, there has been error in point of law."[22]

This, in answering the question whether the Board of Review had erred in law, the court should have directed its attention to whether there was any express findings of fact to support the Board's determination. In the absence of any express findings of fact which directly supports the Board's determination, the Court should have asked itself whether any inferences could have been drawn from other primary facts to provide the necessary support. If no such inferences may be drawn, then there is an error in point of law. As Lord Radcliffe further pointed out:

> "I do not think it much matter whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with or contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test."[23]

20 *Supra,* n. 94 at 110-111.
21 *Supra,* n. 37. See also the recent decision of the Singapore Court of Appeal in *C.B.H.* v. *Comptroller of Income Tax* [1982] 1 M.L.J. 112.
22 *Supra,* n. 37 at 229. Emphasis added.
23 *Ibid.*

Applying Lord Radcliffe's approach to the Board of Review decision in *Thomson Hill,* it becomes apparent that the decision is erroneous in law in at least three respects. First, it contains *ex facie* a proposition which is bad law and which bears upon the Board's determination. This is the proposition that the onus on the taxpayer, in a dispute over choice of accounting methods, is to show that the Comptroller's choice is *wrong*. Secondly, another misconception of law appearing *ex facie* is the Board's equating of two different propositions: the Board treated the requirement to show "good reasons for change" as identical with showing "the Comptroller's method is wrong". And this misconception in law is instrumental in the Board's determination. Thirdly, quite apart from the misconceptions appearing *ex facie,* in failing to find that the taxpayer company had shown good reasons for the accounting change, the Board's determination is not only unsupported by any evidence but is in fact inconsistent with the evidence before it.

Thus, the decision of the High Court in dismissing the taxpayer's appeal is totally misconceived.

The Court of Appeal Decision

The taxpayer appealed to the Court of Appeal. The decision of the Court of Appeal is a great disappointment as much for what it did not hold as for what it did. It is a totally mystifying decision. The only clear object of the decision is it affirms the decision below. The content of the judgement was essentially a rehearsal of all the evidence and arguments presented in the Courts below plus a review of some general propositions of tax law established by English cases.

In dealing with the substance of the appeal, the Court interpreted the issue at hand thus:

> "The dispute in this case is whether the property tax paid by the company in respect of its properties is part of their cost. If it is not then the treatment of property tax paid in the 1974 accounts would be in accordance with the ordinary principles of ordinary accounting."[24]

Thus, the correct method of accounting is made to turn on what is the true legal nature of property tax in the taxpayer's business. If it is of a capital nature, it should be capitalised as part of the cost of the properties (and the Comptroller's method is correct); if it is of a revenue nature it is deductible against profits and the taxpayer's treatment would be correct. At this stage, one would have expected the Court to proceed to rule on the true legal character of the item of property tax, but it did not. To be sure, it rehearsed the submissions of both the taxpayer and the Comptroller on this issue. But no ruling was made as to which party's submission is correct in law. Instead, the Court proceeded next to note the Comptroller's reliance on section 80(3) of the Income Tax Act in casting the onus on the taxpayer, as well as on the so-called "consistency principle" enunciated by Lord Reid in *Duple Motor Bodies.* The Court then concluded its judgement:

> "The Board found no reason for the change in the treatment of the property tax for the accounting year 1974 and that on the accountancy evidence the company had failed to discharge the onus on them to

[24] *Supra,* n. 91.

> show that treatment of the property tax in the accounts for the earlier years was wrong in law and in fact. Those findings were accepted by the High Court and we have not been persuaded on the undisputed fact and on the accountancy evidence before the Board that the decision of the Board in dismissing the appeal of the company against the assessment was wrong."[25]

The Court accordingly dismissed the taxpayer's appeal.

In doing so, it has perpetuated an error in law which was the result of the Board of Review's decision. It failed to recognise that the Board had indeed erred as the Board did not make any finding on whether the reasons advanced by the taxpayer were sufficient to justify a change in accounting method. The Court of Appeal, like the Court below, incorrectly equated the "absence of a finding of good reason" to be the "finding of no good reason" for change. Therefore, the Board's holding that the taxpayer's change was unjustified was a *holding unsupported by any finding of fact and totally against the weight of evidence.* What is even more egregious, the Court of Appeal affirmed a proposition which is patently incorrect in law: that the onus on the taxpayer, in a dispute between competing methods, was to show that the Comptroller's choice is wrong.

VII. CONCLUSION

The decision in the *Thomson Hill* case is an unfortunate one. It is the result of a lack of appreciation for the notional framework that must govern the resolution of such a tax dispute. If the Singapore Courts are to resolve tax disputes over choice of accounting methods in a manner that is both supportable by reasoning from first principles and by judicious application of precedents, the following steps are indispensable:

Step 1: The Court must first determine generally what is the extent of the taxpayer's obligation under the Income Tax Act in keeping records and accounts.

Step 2: The Court must next determine in the absence of any accounting method prescribed by statute and where the Comptroller does not exercise his specific power of prescription under section 67(2) of the Act, who has the right to choose accounting methods: the taxpayer or the Comptroller.

Step 3: The Court must then receive evidence as to whether the competing methods are both in accordance with commercial accounting practice. If one method is found not to be in accordance with commercial accounting practice, then the matter ends here. The method which is recognised will prevail.

If both methods are equally recognised or accepted in commercial accounting practice, then the Court must proceed to the next step.

Step 4: Having received evidence and having found that both are in accordance with commercial accounting practice,

[25] *Ibid.*

the Court must determine whether one method produces more accurate records *for tax purposes* than the other, or that neither method is more accurate than the other.

Step 5: If the Court finds one method to be *more accurate* than the other in reflecting the taxpayer's tax liability, then the solution suggests itself. The more accurate method must prevail. This is irrespective of whether it is the taxpayer's choice or the Revenue's, and *notwithstanding that the competing method has been in use for a long time.*

Step 6: If, however, the Court finds that neither method can claim to be more accurate than the other, to determine which method should prevail, the Court must consider the following factors:

(a) The Revenue seeking the change:

Content of proof — if the Revenue is the party seeking the change, the onus is on the Revenue to show that the existing method used by the taxpayer is *wrong,* or *inaccurate,* or *less accurate for tax purposes.*

'Consistency' factor — if the Revenue can show that the taxpayer's existing method is wrong, inaccurate or less accurate, the fact that the taxpayer's method has been used for a long time is inconsequential.

In other words, where the two competing methods are *equally* accurate and the Party seeking the change is the Revenue, the Revenue cannot succeed.

(b) The taxpayer seeking the change:

Content of proof — if the taxpayer is the party seeking the change, the onus on the taxpayer is to show that the new method is at least as accurate as the old method, that it complies with his statutory obligation and violates no established principle of tax law.

'Consistency' factor — to overcome the weight of this factor which is in favour of the old method, the taxpayer must adduce evidence of good reasons to justify the change. These reasons may be corporate, business/commercial reasons, *e.g.* the taxpayer can show that the nature of his business has changed such that the old accounting method is rendered obsolete or no longer as appropriate as the new method.

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