

Randy Forbes says taxpayers have burden of proof when facing IRS

By: Louis Jacobson – May 22, 2013

"The IRS doesn't have to prove something against you ... you've got the burden of proof."

-Randy Forbes on Friday, May 17th, 2013 in an interview with Fox News

The Internal Revenue Service has been on the defensive since the news broke that the agency has been giving extra scrutiny to conservative groups seeking tax-exempt status. Among the lawmakers expressing concern about the IRS was Rep. Randy Forbes, R-Va.

In a May 17, 2013, interview, Fox News anchor Gretchen Carlson asked Forbes, "What's your No. 1 concern about the IRS being in charge of Obamacare?" (Carlson was wrong about the agency's role. It is not "in charge," as we addressed with our recent fact-check of Michele Bachmann.)

Forbes responded, "Well, Gretchen, first of all, it is the power that the IRS has that's different than any other agency, any other department. ... The IRS doesn't have to prove something against you. They can walk in and you've got the burden of proof."

The idea that the "burden of proof" rests on the accuser is a bedrock principle of justice around the world. While neither of the terms "burden of proof" or "presumption of innocence" appears in the U.S Constitution, an accuser's burden of proving that someone has committed a criminal act goes back to ancient times. In 1895, when the Supreme Court issued a resounding defense of the concept in the case *Coffin vs. United States*, it cited sources as varied as the Bible, Sparta, Athens and Rome. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law," the court wrote.

So we wondered whether it's really the case that the IRS "doesn't have to prove something against you. ... You've got the burden of proof."

The ways in which Forbes is correct

Saving receipts and canceled checks in case the IRS calls is all too familiar to many taxpayers. And generally speaking -- beyond some exceptions that we'll outline below -- the burden of supplying information is indeed on the taxpayer when he or she is told by the IRS that they underpaid their taxes or when they face an IRS audit.

This is a "traditional rule, going back a long way," said David Weisbach, a University of Chicago law professor who worked earlier in his career as an attorney-advisor in the Department of Treasury's Office of the Tax Legislative Counsel.

The IRS lays out the specifics on a Web page titled "Burden of Proof."

"The responsibility to prove entries, deductions, and statements made on your tax returns is known as the burden of proof," it says. "You must be able to prove ... certain elements of expenses to deduct them. Generally, taxpayers meet their burden of proof by having the information and receipts ... for the expenses. You should keep adequate records to prove your expenses or have sufficient evidence that will support your own statement. You generally must have documentary evidence, such as receipts, canceled checks, or bills, to support your expenses."

In other words, the IRS is presumed to be correct unless the taxpayer "produces 'credible evidence'" to counter the agency's finding, said Timothy Jacobs, a partner specializing in tax law at the firm Hunton & Williams.

It's worth noting that as frustrating as this burden may be, the alternative is even worse, said Neil H. Buchanan, a law professor at George Washington University. "If the IRS had the burden to produce evidence, it would have to be given access to individuals' private files, in order to find that evidence," he said. "Is that what we really want the IRS to be doing?"

So, for the most common interactions with the IRS, the burden of proof is indeed on the taxpayer.

The exceptions to the rule

There are a few exceptions to this rule. The most notable, since the penalties are so severe, are for tax-related criminal cases and civil fraud cases. In these types of cases, the burden of proof is essentially the same as it is for any other criminal case: The government, not the taxpayer, has to prove their case.

"If the government wants to convict you of murder, it has to show that you intentionally killed someone," said Kermit Roosevelt, a law professor at the University of Pennsylvania. And if the IRS takes you to court, he said, "it has to show that you owe a certain amount of taxes and didn't pay it."

Technically, Forbes was referring to the "burden of production," which is the burden of providing supporting evidence, rather than the "burden of proof," which typically refers to the burden of proving a case in court, Buchanan said.

Still, the IRS uses the term "burden of proof" on the Web page that spells out what people have to provide to justify their deductions.

So how common are the exceptions? Tax experts said criminal and civil-fraud cases are rare today when compared to ordinary tax-liability cases. "Essentially all tax cases are normal, non-fraudulent adjustments," Weisbach said.

This ratio of cases suggests that Forbes' claim is largely accurate. "Nothing the congressman said on the burden of proof would strike me as outside of the norm or the general rule if I or any other tax litigator heard it in everyday conversation," Jacobs said.

Our ruling

Forbes said "the IRS doesn't have to prove something against you. They can walk in and you've got the burden of proof."

He's correct for most tax disputes. As long as no criminal or fraud charges are being tried, and as long as the case is taken up administratively rather than in court, the burden of justifying a taxpayer's calculations falls upon the taxpayer. But in the relatively small number of criminal or civil fraud cases, the burden is on the government, just as it is in other types of prosecutions. On balance, we rate Forbes' claim Mostly True.