No. 14-5037

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BASR PARTNERSHIP and WILLIAM F. PETTINATI, SR.
Tax Matters Partner,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

On Appeal from the
United States Court of Federal Claims
(Judge Susan G. Braden)

CORRECTED BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Paula M. Junghans
Zuckerman Spaeder, LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
Phone: (202) 778-1850
Facsimile: (202) 822-8106
Principal Attorney of Record

Caroline D. Ciraolo
Rosenberg Martin Greenberg, LLP
25 S. Charles Street
21st Floor
Baltimore, MD 21201
Phone: (410) 547-7852
Facsimile: (410) 727-1115
Of Counsel

Attorneys for Amicus American College of Tax Counsel
July 29, 2014

CERTIFICATE OF INTEREST

Counsel for *amicus curiae* certifies the following:

1. The full name of every party or amicus represented by counsel is:

   American College of Tax Counsel

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by counsel is:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by counsel are:

   There are no parent corporations of the American College for Tax Counsel or publicly held companies owning 10 percent of the College.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by counsel in the trial court or agency are expected to appear in this court are:

   None.

July 29, 2014

/s/ Paula M. Junghans
Paula M. Junghans
Attorney for Amicus
American College of Tax Counsel

TABLE OF CONTENTS

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. An Advisor's Self-Serving Statement of Fraudulent Intent Should Not Be Attributed to a Taxpayer Who Has No Practical Ability to Challenge the Statement 4

A. The Peculiar Case of Erwin Mayer 4

B. Other Return Preparer Cases 8

II. The Fraudulent Conduct of an Unrelated Third Party Who Acts Without a Taxpayer's Knowledge Should Not Subject the Taxpayer to an Unlimited Period of Assessment 12

III. The Government's Position Harms Vulnerable Victims 17

IV. The Need to Identify and Investigate Fraudulent Returns Does Not Justify an Unlimited Assessment Period Where the Taxpayer Did Not Engage in Fraudulent Conduct 19

CONCLUSION 23

CERTIFICATE OF SERVICE 24

CERTIFICATE OF COMPLIANCE 25

TABLE OF AUTHORITIES

CASES

3K Investment Partners v. Commissioner,
133 T.C. 6 (2009) 20

Allen v. Commissioner,
128 T.C. 37 (2007) 8, 9, 10, 13

American Boat Co. LLC v. United States,
583 F. 3d 471 (7th Cir. 2009) 20

American Boat Company, LLC v. United States,
583 F. 3d 4471 (7th Cir. 2009) 6

Berger v. United States,
87 F. 3d 60 (2d Cir. 1996) 14

City Wide Transit, Inc. v. Commissioner,
709 F. 3d 102 (2d. Cir. 2013) 10, 11, 16, 17

Domulewicz v. Commissioner,
T.C. Memo 2010-77 20

Eriksen v. Commissioner,
T.C. Memo 2012-194 9

Kligfeld Holdings v. Commissioner,
128 T.C. 16 (2007) 20

SAS Investment Partners v. Commissioner,
T.C. Memo 2012-159 .... 6, 20

Stobie Creek Investments, LLC v. United States,
82 Fed. Cl. 636 (2008) 20

Wagner v. Commissioner,
T.C. Memo 1996-355 .... 13, 14

Wright v. Commissioner,
84 T.C. 636 (1985) 9

COURT PROCEEDINGS

Redstone v. Commissioner,
Docket No. 8097-13, U.S. Tax Court 16

United States v. Amodeo,
Docket No. 6:08-cr-00176 (M.D. FL., 2008) 17

United States v. Carter,
Docket No. 2:11-xr-00871 (D.N.J., 2011) 17

United States v. Credit Suisse, AG,
Docket No. 1:14:CR:188 (E.D. Va. 2014) 15

United States v. Daugerdas, et al.,
Docket No. 1:09-cr-00581 (S.D. N.Y., 2009) 4, 6

United States v. DiFrancesco,
Docket No. 2:13-cr-00089 (D. NV., 2013) 17

United States v. Figueroa,
Docket No. 2:11-cr-00723 (D. N.J., 2011) 17

United States v. Harrison,
Docket No. 1:10-cr-00411 (M.D. N.C., 2010) 17

United States v. Hebert,
Docket No. 1:14-cr-00085 (D. R.I., 2014) 17

United States v. Holzwanger,
Docket No. 3:10-cr-00714 (D. N.J. 2010) 17

United States v. Pircher,
Docket No. 5:12-cr-0886 (W.D. TX., 2013) 17

United States v. Troiano,
Docket No. 2:07-cr-00151 (D. NV., 2007) 17

United States v. Visconti,
Docket No. 2:14-cr-00311 (C.D. CA. 2014) 17

United States v. Weiss,
Docket No. 1:12-cr-00249 (M.D. N.C., 2012) 17

United States v. Zakarian,
Docket No. 1:17-cr-00218 (N.D. OH., 2013)..17

STATUTES

Internal Revenue Code (26 U.S.C.)
§ 6229 14

§ 6501(a)..22

§ 6501(c)..13

§ 6501(c)(1) .... passim

§ 7201 8

§ 7206 8

§ 7206(1)...9

§ 7206(2)...9

OTHER AUTHORITIES

Chief Counsel Advisory
201238026 (September 21, 2012) 13

Internal Revenue Manual
25.1.1.1(2) (01-23-2014)..22

25.1.1.1(8) (01-23-2014)..21

4.16.1.1 (06-14-2011)..21

Coder, Jeremiah, *The IRS's Misguided Fraud Whodonit,*
137 Tax Notes 7 (2012)..19

http://www.irs.gov/uac/Definition---Abusive-Return-Preparer 18

http://www.irs.gov/uac/Return-Preparation-and-Electronic-Filing
---Abusive-Return-Preparer...18

http://www.irs.gov/uac/Statistical-Data-Abusive-Return-Preparers 18

RULES

Rule 29(a)..1

Rule 29(c)(5)..1

American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of BASR, BASR Partnership and William F. Pettinati, Sr. ("BASR").[1] Pursuant to Rule 29(a), this *amicus* brief is filed with the consent of both parties in the case below.

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;

- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and

- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows chosen in recognition of their outstanding reputations and contributions in the field of tax law, and is governed by a Board of Regents consisting of one Regent from each

[1] Pursuant to Rule 29(c)(5), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and none of its members, or its counsel, or person other than *amicus curiae,* made a monetary contribution to fund the preparation or submission of this brief.

federal judicial circuit, two Regents at large, the Officers of the College, and the most recently retired Chair of the College.

This *amicus* brief is submitted by Paula M. Junghans of the law firm of Zuckerman Spaeder, LLP, in Washington, DC, and Caroline D. Ciraolo, of the law firm of Rosenberg Martin Greenberg, LLP, in Baltimore, Maryland and does not necessarily reflect the views of all members of the College.

The present case involves an attempt by the United States to expand the reach of 26 U.S.C. ("IRC") § 6501(c)(1) to eliminate the statute of limitations on assessment with respect to a taxpayer's return where the government can establish the fraudulent intent of a third party, regardless of the relationship between the taxpayer and the third party and notwithstanding the number of years since the return was filed. As noted herein and in the brief filed by Appellees, this case involves an issue of substantial importance to tax administration. The position advocated by the United States in this case represents an unsupported and unwarranted expansion of a provision of the Internal Revenue Code that has been in place for decades, but only recently been imbued with the interpretation that the government argues for here.

The government's position arises from its apparent view that the need to assess and collect underpayments of tax related to "tax shelters," outweighs established precedent regarding fraudulent intent and a taxpayer's right to finality.

Yet the government's good intentions fail to address the substantial harm that will be caused, and the inequities that will result if its position is adopted.

SUMMARY OF ARGUMENT

Taxpayers who act in good faith and file what they believe to be accurate tax returns are entitled to some measure of finality with respect to the ability of the government to audit their returns and assess additional tax. The government should not be permitted to bypass the statute of limitations on assessment based on the fraudulent conduct of third parties where the taxpayer had no knowledge of the fraud. This is particularly true where the third party may be motivated to admit to fraudulent intent as to specific returns to gain an advantage in a proceeding unrelated to the taxpayer whose return is at issue.

Allowing the evisceration of the statute of limitations on assessment where the taxpayer is not involved in the fraudulent conduct and has no influence over the third party alleged to have the fraudulent intent puts taxpayers in a position of being unable to disprove the allegation of fraudulent conduct, regardless of its veracity, and unduly burdens unsuspecting taxpayers victimized by unscrupulous tax return preparers and other tax advisors. In the end, the government's position in this case, while motivated by a good faith desire to assess and collect tax, undermines fair tax administration and sound public policy.

ARGUMENT

I. An Advisor's Self-Serving Statement of Fraudulent Intent Should Not Be Attributed to a Taxpayer Who Has No Practical Ability to Challenge the Statement.

A. The Peculiar Case of Erwin Mayer

In this case, the government advocates that Erwin Mayer's admission of fraudulent intent satisfies the element of fraud in IRC § 6501(c)(1) and therefore serves to eliminate the statute of limitations on assessment with respect to BASR's tax returns. Understanding precisely how evidence of Mayer's "intent" was developed illuminates the practical problems and dangers in adopting the government's position.

Mayer, along with his partners Paul Daugerdas and Donna Guerin, as well as others, were indicted on June 9, 2009.[2] The indictment included one broad-ranging "Klein" conspiracy charge as to all defendants; it also alleged, among other things, that certain of the defendants, including Mayer, filed false and fraudulent personal income tax returns by engaging in the same tax shelter transactions that he

[2] *United States v. Daugerdas, et al.*, Docket No. 1:09-cr-00581 (S.D. N.Y., 2009) Dkt #1 (references herein to docket entries are identified as "Dkt # ___").

promoted to clients. Mayer entered pleas of not guilty to all of the charges, and maintained those pleas through the return of three superseding indictments.[3]

More than a year later, on November 5, 2010, Mayer entered pleas of guilty to Count One of the indictment (the conspiracy), and Count Twenty-Nine, which charged him with evading his own personal taxes. Central to his plea agreement was his promise to cooperate with the government in all things requested of him related to his tax shelter activities. And cooperate he did – Mayer spent thousands of hours reviewing documents and preparing summary exhibits for the continuing criminal prosecutions of his co-defendants, and he testified at great length in two criminal trials. He has yet to be sentenced.

Mayer's cooperation agreement launched the Declaration which is at the heart of this case. In it, he stated that it was his intent "to fraudulently evade the federal income tax" liabilities of Mr. and Mrs. Pettinati by implementing the short sale tax shelter and providing tax opinions.

But Mayer's "intent" was not always so. For more than ten years prior to his change of plea, he maintained that the strategy was lawful:[4] when he employed the

[3] First Superseding Indictment, June 23, 2009 (Dkt 14); Second Superseding Indictment, November 19, 2009 (Dkt 56); Third Superseding Indictment, March 4, 2010 (Dkt 81).

[4] Courts have reached different conclusions about whether a taxpayer could reasonably rely on Mayer's advice, but all have recognized that he was a reputable and competent attorney who represented to his clients that the Son of BOSS

transaction for himself;[5] when his own tax return was audited;[6] when he testified in civil litigation with some of his clients;[7] when he made presentations to the United States Attorney in an effort to avoid indictment;[8] and when he moved to dismiss the charges against him.[9] Even after entering his guilty plea, Mayer explained his state of mind as follows:[10]

> Q: When you were working for 15 years either advising clients or defending clients on those transactions, it is your testimony that you were trying to persuade yourself that what you were doing was lawful?
>
> A: Yes, sir. I tried to believe for a long time that the clients could have the right motivations for engaging in these strategies.

---

transaction was legal. *Compare, American Boat Company, LLC v. United States*, 583 F. 3d 4471 (7th Cir. 2009) (reliance reasonable) with *SAS Investment Partners v. Commissioner*, T.C. Memo 2012-159 (no reasonable reliance).

[5] Trial Transcript, *United States v. Daugerdas, et al.*, *supra,* at 7, 12 (trial transcript available upon request).

[6] *Id.* at 14-15.

[7] *Id.* at 17.

[8] *Id.* at 19-24.

[9] *Id.* at 30.

[10] *Id.* at 37.

Ultimately, of course, Mayer persuaded himself to the contrary. His epiphany in late 2010 that he in fact had criminal intent all along[11] came only in the face of the seizure of most of his assets[12] and an impending trial. It is understandable that Mayer would decide to make the best deal he could and conclude that his own interests were best served by cooperating with the government and saying what the government needed to be said for purposes of this civil case. After all, he has no skin in the game in the Pettinatis' dispute with the Internal Revenue Service. But that is exactly the problem.

Had this case gone to trial, the taxpayers would have had no meaningful way to challenge Mayer's self-proclaimed fraudulent intent. Mayer teamed up with the government in a proceeding in which the taxpayers had no standing and certainly no ability to compete with what the government could offer Mayer in exchange for his cooperation. The trial court in this civil tax dispute would not be required to accept Mayer's recent admission in light of the substantial impeachment arising from the circumstances under which his statements were made. But, it is more likely that a factfinder would take his admission at face value, leaving the

[11] Notably, Mayer had not realized he had fraudulent intent at the time the FPAA was issued to BASR on January 20, 2010, thus rendering the FPAA untimely until the government later acquired evidence of his purported "intent."

[12] *See* Ex Parte Post-Indictment Restraining Order, August 4, 2009, Dkt 35; Dkt 48.

Pettinatis powerless to defeat the argument that Mayer's fraudulent intent could be imputed to "the return" despite their own lack of fraudulent intent.

B. Other Return Preparer Cases

The few cases in which courts have held that third-party (i.e., non-taxpayer) fraudulent intent was sufficient to extend the statute of limitations involve third parties who were return preparers convicted of filing false returns. The cases do not present a coherent approach to determining when a third-party's intent may be attributed to a taxpayer.

In *Allen v. Commissioner,* 128 T.C. 37 (2007), the false returns considered at the preparer's criminal trial did not include the returns of the taxpayer for whom the fraud was being used to extend the civil statute of limitations. The taxpayer, Allen, stipulated that the returns were fraudulent because the preparer had fraudulent intent. The Tax Court did not look beyond that stipulation, appearing to believe that *any* conviction of the return preparer was sufficient to prove fraudulent intent on his part.[13]

[13] The taxpayer in *Allen* stipulated that "petitioner himself did not have the intent to evade tax, but [the preparer] claimed the false deductions for the years at issue on petitioner's returns with the intent to evade tax." 128 T.C. at 38. Since the return preparer was not convicted of an offense for which fraudulent intent is an element and since the return preparer did not testify, the basis for this stipulation is not apparent. It is likely that the parties in *Allen* did not focus on the distinction between a conviction under IRC § 7206 and one under IRC § 7201.

That, of course, is not the law. Allen's return preparer was convicted of violating IRC § 7206(2), which the Tax Court described as "willfully aiding and assisting in the preparation of false *and fraudulent* income tax returns." *Allen,* at 38 (emphasis added). But that is not what IRC § 7206(2) provides. Rather, a person violates that statute if he "willfully aids or assists in, or procures, counsels or advises the preparation or presentation under, or in connection with any matter arising under the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent *or* is false as to any material matter…," regardless of whether the taxpayer was aware of the error. IRC § 7206(2) (emphasis added). The Tax Court has long held that a conviction for filing a false return under IRC § 7206(1) is not conclusive evidence that the taxpayer acted with fraudulent intent. *See Wright v. Commissioner*, 84 T.C. 636 (1985). The same principle applies to convictions under IRC § 7206(2), which was evidenced by the Tax Court's decision in *Eriksen v. Commissioner*, T.C. Memo 2012-194.

In *Eriksen,* two return preparers each pleaded guilty to one count of preparing numerous false income tax returns in violation of § 7206(2), but Eriksen's[14] returns were not part of the criminal prosecutions. As part of their plea agreements, the preparers agreed to submit to the Internal Revenue Service a list of "false and fraudulent" tax returns they had prepared, but neither admitted that

[14] For convenience, we refer to the taxpayer in *Eriksen* as one individual, but there were actually three similarly-situated persons.

every tax return he prepared was fraudulent. The Commissioner argued that, under *Allen,* the fact of the return preparers' convictions and their "general practice" of claiming unsubstantiated deductions necessarily meant that Eriksen's returns were *fraudulent* as a matter of law. The return preparers did not testify in the Tax Court and the taxpayer did not enter into any stipulation about the return preparer's intent. Accordingly, the Tax Court undertook a detailed analysis of the *taxpayer's* state of mind to determine whether or not fraud was present, and concluded it was not. Had the government been able to persuade either of the return preparers to testify that he had fraudulent intent with respect to Eriksen's return, that factfinding, under the government's position here, would have been both unnecessary and irrelevant.

City Wide Transit, Inc. v. Commissioner, 709 F. 3d 102 (2d. Cir. 2013), *rev'g* T.C. Memo 2011-279, involved a preparer who filed the returns in issue without the authorization – or even the knowledge – of the taxpayer, and then stole the refunds generated by his filings. In the Tax Court, the taxpayer stipulated facts about the return preparer's conduct, but did not stipulate the return preparer's intent. Rather, it argued from the stipulated facts that the preparer's intent was to embezzle funds from the taxpayer, not to evade or defeat the tax. The Tax Court agreed.

On appeal, City Wide *conceded* "that [the accountant] filed false *or fraudulent* tax returns and amendments on its behalf and that [the] returns triggered the tolling provision if … [the accountant] filed them with the intent to evade City Wide's taxes." 709 F.3d at 107. Realizing – as perhaps the taxpayer did not – the import of this concession, each member of the Second Circuit panel asked taxpayer's counsel if he intended to make it. *Id.* at fn. 3. Since taxpayer's counsel agreed that he did, the issue of whether the returns were "fraudulent" was not before the Court. The only remaining issue was whether the accountant had the "intent to evade" as required by IRC § 6501(c)(1). The Second Circuit found that by filing tax returns that cheated the Internal Revenue Service out of money that was due, the accountant necessarily acted with the requisite intent, and his underlying motive to embezzle funds from the taxpayer was irrelevant.

Notably, the Second Circuit observed that the case might be different if the accountant "falsely recorded…expenses on City Wide's ledger that in turn caused City Wide to file a tax return that fraudulently understated its income. If that had been the case, [the preparer's] fraud on the company would have *caused* the company to file a false return, and we would not assume that the company intended to evade a tax by filing that false tax return." *Id.* at 108. The position advanced by the government in the instant case argues for exactly that result. Here, the

government contends that although the taxpayers did not have fraudulent intent, their advisor did, he caused the filing of false tax returns, and that is enough.

II. The Fraudulent Conduct of an Unrelated Third Party Who Acts Without a Taxpayer's Knowledge Should Not Subject the Taxpayer to an Unlimited Period of Assessment

The government argues that the fraudulent intent of a third party, who is unrelated to the taxpayer and acts without the taxpayer's knowledge or consent, should eliminate the statute of limitations on assessment for the taxpayer's returns, thereby subjecting the taxpayer to audit at any time – even decades – after a return is filed. The government fails to offer any standard governing the relationship that must exist between the alleged fraudulent actor and the tax return in issue, and fails to address the practical problems resulting from open-ended statutes where the taxpayer is not on notice of the fraudulent conduct.

In this case, Mayer was obviously intimately involved in structuring the transaction and advising how it should be reported on the partnership return, and the taxpayers at least had some interaction with him. But the taxpayers did not sign the partnership returns, did not participate in the return's preparation, and had no contemporaneous knowledge of Mayer's now-asserted guilty state of mind. When faced with similar facts, the Internal Revenue Service issued a Chief Counsel Advisory in 2012 ("the 2012 CCA") clearly stating that a fraudulent Form 1120S, "U.S. Income Tax Return for an S Corporation," could not serve to extend

the assessment period for one of the shareholders, where the shareholder did not participate in the fraud. *See* CCA 201238026 (September 21, 2012).

The 2012 CCA involved an S corporation shareholder (Shareholder A) whose personal return reported understated pass-through income because a fellow shareholder (Shareholder B) submitted false invoices for personal expenses that the corporation paid and deducted. Shareholder A did not sign the Form 1120S, participate in the return's preparation, or have knowledge of Shareholder B's fraudulent conduct. The Internal Revenue Service stated its doubt that *Allen* could be extended to allow for an unlimited statute of limitations based on the facts presented because "such an extension would require the Tax Court to focus on the fraud of a third party who did not prepare or file the return." *Id*.

Notwithstanding the 2012 CCA, the government continues to push for a blanket rule that non-taxpayer conduct satisfies the fraud element of IRC § 6501(c), ignoring the practical problems associated with this position. A few examples illustrate the point:

In *Wagner v. Commissioner*, T.C. Memo 1996-355, several promoters structured the creation of limited partnerships that acquired movie rights in the early 1970s. The promoters overstated the purchase prices of the movie rights, obtained kickbacks of the inflated amounts, skimmed those amounts from the partnership, and created phony books and records to conceal their activities. They

provided the investors in the limited partnerships information returns that intentionally overstated the partners' distributive shares of deductions and credits. None of the partners had any knowledge of the promoters' machinations. This activity pre-dated the enactment of TEFRA in 1986 and the enactment of IRC § 6229 in 1997, thus rendering IRC § 6229 irrelevant. But, under the government's view of IRC § 6501(c)(1), the lack of relationship is irrelevant as long as the government can show that the promoters knew their conduct would ultimately cause the partners to understate their tax liabilities. Therefore, if the government is right, it is *today* not too late to assess decades-old liabilities for taxpayers like those in *Wagner.*

Similarly, in *Berger v. United States*, 87 F. 3d 60 (2d Cir. 1996),[15] a lawyer (Berger) backdated certain pension plan documents that falsely stated that the plans had been amended in order to comply with an IRS deadline for qualified plans. The employer sponsors of the plans deducted contributions to the plans in 1984 and 1985, believing that they were qualified plans. Contributions to non-qualified plans would not have been deductible and therefore would have increased the employer sponsors' corporate tax liabilities. If Berger acted with fraudulent intent, then, under the government's position here, the corporations can *today* be assessed

[15] *Berger* involved a "promoter penalty" assessment against Berger himself. The record is silent as to whether the corporations were ever assessed the tax liabilities traceable to his misconduct.

additional taxes for 1984 and 1985, because no limitation governs the degree of relationship Berger needed to have had with the taxpayers, or the time within which the Internal Revenue Service needed to act.

Or, think how the government's position would operate in cases arising out of the current spate of offshore account investigations. Imagine that in the 1980's an individual skimmed money out of his business and hid it in an account in Switzerland. In 1995, he died and the account passed to his son, a United States taxpayer, who did not learn of the account until 2002. Of course, because the son "owned" the account as of 1995, any income earned on the account was taxable to the son, whether or not he was aware of it.

If the government prevails, the father's fraudulent intent may be imputed to the son's 1995-2001 tax returns, even though the son did not know of the existence of the account during those years. So too could the fraudulent intent of the Swiss bankers or financial advisors who assisted in creating the account and concealing it from the Internal Revenue Service. Perhaps even the institutional fraudulent intent of the bank itself is enough. *See, e.g., United States v. Credit Suisse, AG*[16] ("Due in part to the assistance of Credit Suisse and its personnel…numerous U.S. clients of Credit Suisse filed false and fraudulent U.S. individual income tax returns…")[17]

[16] Docket No. 1:14:CR:188 (E.D. Va.) (May 19, 2014).

[17] *Id.,* Statement of Facts in Support of Guilty Plea, Dkt 14.

The government also fails to offer any predictable time frame in which it must act. Indeed, what this case shows is that the more time goes on, the more likely it may be that the government will use resources available to it, but denied to the taxpayer, to obtain evidence to avoid the ordinary statutes of limitations. Need it be thought fanciful to think that a deficiency would be asserted thirty or forty years after a tax period, one need only look at the case of Sumner Redstone, in which the Internal Revenue Service waited until 2013 to assert a gift tax deficiency that allegedly arose in 1972.[18]

If the government's theory prevails, taxpayers will be subject to audit and assessment of additional tax, penalties and interest long after the culpable third party has disappeared or been charged, and long after any records that might be necessary in future proceedings have been destroyed. While this may be good for tax collections, it is extremely poor public policy – substantially punishing the non-culpable party.

A real life example of this scenario is the fraudulent payroll service provider that (like the preparer in *City Wide)* embezzles from its clients, fails to deposit the required employment tax, and files false Forms 941 to hide its fraudulent conduct. The employer-clients then file false corporate income tax returns, claiming

---

[18] *Redstone v. Commissioner*, Docket No. 8097-13, U.S. Tax Court. The Redstone matter did not arise from alleged fraud; rather, the statute remained open because Redstone never filed a gift tax return for 1972. But the result is the same – the IRS took forty years because it could.

deductions based on what they believe was deposited with their employment tax returns, and issue incorrect Forms W2, reflecting withholding that was never remitted. Finally, the employees file the false Forms W2 with their individual income tax returns, reflecting incorrect withholding credits and underreporting the tax due. Under the government's current position, these employers and their employees will be subject to audit and assessment for an indefinite period of time. Cases like *City Wide* are not rare; sadly, they are epidemic, with thousands of taxpayers affected by the fraud of corrupt preparers.[19]

III. The Government's Position Harms Vulnerable Victims

If the government's interpretation of IRC § 6501(c)(1) is adopted, the low income taxpayer community and innumerable victims of abusive return preparers will suffer the hardest blow. The Internal Revenue Service acknowledges that, "Return Preparer Fraud generally involves the orchestrated preparation and filing of false income tax returns (in either paper or electronic form) by unscrupulous

[19] *See*, *e.g., United States v. Troiano,* Docket No. 2:07-cr-00151 (D.NV. 2007); *United States v. Amodeo,* Docket No. 6:08-cr-00176 (M.D.FL. 2008); *United States v. Harrison*, Docket No. 1:10-cr-00411 (M.D.N.C. 2010); *United States v. Holzwanger*, Docket No. 3:10-cr-00714 (D.N.J. 2010); *United States v. Figueroa*, Docket No. 2:11-cr-00723 (D.N.J. 2011); *United States v. Carter*, Docket No. 2:11-xr-00871 (D.N.J. 2011); *United States v. Weiss,* Docket No. 1:12-cr-00249 (M.D.N.C. 2012); *United States v. Pircher*, Docket No. 5:12-cr-0886 (W.D.TX. 2013); *United States v. Zakarian*, Docket No. 1:17-cr-00218 (N.D.OH. 2013); *United States v. DiFrancesco;* Docket No. 2:13-cr-00089 (D.NV. 2013); *United States v. Visconti*, Docket No. 2:14-cr-00311 (C.D.CA. 2014); *United States v. Hebert*, Docket No. 1:14-cr-00085 (D.R.I. 2014).

preparers. … The preparers' clients may or may not have knowledge of the false expenses, deductions, exemptions and/or credits shown on their tax returns."[20] Moreover, "[t]he advent of electronic filing of income tax returns by electronic return transmitters has provided a new mechanism for unscrupulous preparers to commit fraud," allowing abusive preparers to file false returns without the client's knowledge or consent.[21] In FY 2013, the government obtained 207 convictions of abusive return preparers, a 16% increase from FY 2012, and 27% increase from FY 2011.[22] Taking the government's arguments in this case to their logical conclusion, each and every client of these abusive tax return preparers could face, more than a decade after the preparer has been charged, convicted, sentenced, and released, an assessment of tax, penalties and interest that could represent a substantial percentage of the client's net income. It is difficult to see how this is not a substantial penalty on the taxpayer:

> Punishing taxpayers for fraud committed by their preparers "may disproportionately impact clients of low-cost tax preparers, such as those who paid returns with imagined charitable deductions, including many in the immigrant communities," [John] Colvin said, adding that the system "seems to steamroll over many who are trying to do the right thing but who accidentally hooked up with the wrong preparer, rather than those who affirmatively cheat on their own."

---

[20] http://www.irs.gov/uac/Definition---Abusive-Return-Preparer.

[21] http://www.irs.gov/uac/Return-Preparation-and-Electronic-Filing---Abusive-Return-Preparer.

[22] http://www.irs.gov/uac/Statistical-Data-Abusive-Return-Preparers.

Coder, Jeremiah, *The IRS's Misguided Fraud Whodonit,* 137 Tax Notes 7 (2012).

IV. The Need to Identify and Investigate Fraudulent Returns Does Not Justify an Unlimited Assessment Period Where the Taxpayer Did Not Engage in Fraudulent Conduct

The government argues that its interpretation of IRC § 6501(c)(1) levels a playing field that is unfairly tipped against the Internal Revenue Service when it investigates fraudulent returns. In its brief, the government goes to great length to justify the late issuance of the FPAA to BASR. But, it is worth noting that BASR's allegedly fraudulent returns for the years 1999 and 2000 were filed in October 2000, and October 2001, respectively. By that time, the Internal Revenue Service had already issued Notice 99-59 (1999-52 I.R.B. 761) and Notice 2000-44 (2002-I.R.B. 304) describing "BOSS" and "Son of BOSS" transactions, respectively, and announcing its view that the transaction was not legitimate.

BASR and the Pettinatis reported all of the elements of the transaction on their tax returns; what they did not do was put a label that said, "This is a Son of BOSS transaction" on their returns. Even if they had done so, there is no reason to believe the Internal Revenue Service would have acted more quickly to examine the returns. The government's contention that the Internal Revenue Service was incapable of detecting the transaction until it obtained a list of Jenkens and Gilchrist's clients in May, 2004, rings hollow in light of the fact that the examination did not begin until almost two years after the taxpayers were

identified to the IRS (BASR Br., at 8), the FPAA was not issued until six years after the Pettinatis were identified by Jenkens and Gilchrist, and ten years after the transaction was first reported.

Nor does the government explain why it was able to detect and examine other "Son of BOSS" transactions implemented by Mayer and his colleagues at Jenkens and Gilchrist in a more timely fashion. *See, e.g., Kligfeld Holdings v. Commissioner*, 128 T.C. 16 (2007) (a 1999 transaction); *3K Investment Partners v. Commissioner,* 133 T.C. 6 (2009) (a 2000 transaction); *Domulewicz v. Commissioner*, 129 T.C. 11 (2007) and T.C. Memo 2010-77 (a 1999 transaction); *American Boat Co. LLC v. United States*, 583 F. 3d 471 (7th Cir. 2009) (a 1998 transaction);[23] *Stobie Creek Investments, LLC v. United States*, 82 Fed. Cl. 636 (2008) (a 2000 transaction); and *SAS Investment Partners v. Commissioner*, T.C. Memo 2012-159 (a 2001 transaction).[24]

---

[23] The Seventh Circuit pointed out that the taxpayer in *American Boat* had in 1996 engaged in a "likely…invalid Son of BOSS tax shelter" structured by Mayer in 1996, but that "the IRS did not discover [it] until the statute of limitations had expired." 583 F. 3d at 475. Now that the government has Mayer's statement that every Son of BOSS transaction he devised was fraudulent, if the government is correct that the statute of limitations is completely open-ended, there is nothing to prevent the Internal Revenue Service from asserting additional liabilities for that transaction.

[24] The taxpayer in SAS also implemented a Son of BOSS transaction through Mayer in 1999, but the Internal Revenue Service did not challenge it, presumably because it thought the statute of limitations had expired when it issued the FPAA for 2001 in 2009. If the government prevails here, and now that it has Mayer's

Of course, fraudulent conduct can make the detection of problems on a return more difficult, but this does not, and should not, justify an open-ended period of limitations where the taxpayer was not involved in the fraudulent conduct. This is particularly true where the taxpayer does not have the resources to challenge the IRS, or where the amounts in issue are less than the cost of litigation.

If anything, the Internal Revenue Service should have an incentive to aggressively and quickly pursue fraudulent behavior, not a blank check to wait until many years after the fraud was committed, particularly when the Internal Revenue Service has substantial tools to address these issues. For example, the Special Enforcement Program ("SEP") is "a specialized compliance program within the Small Business/Self- Employed Operating Division (SB/SE) [of the Internal Revenue Service] directed toward that segment of the population which derives substantial income from either legal or illegal activities and intentionally understate their tax liability." Internal Revenue Manual ("I.R.M." or "the Manual") 4.16.1.1 (06-14-2011). In addition, the Fraud Technical Advisor Program "is a service-wide program administered by seven groups. The groups are comprised of revenue agents and revenue officers who are located strategically throughout the country to assist with the development of fraud." I.R.M. 25.1.1.1(8) (01-23-2014).

---

statement, taxes and penalties resulting from that 2009 transaction are ripe for assessment, even though the taxpayer has already litigated what he no doubt understood to be his entire tax liability from his Son of BOSS strategies.

And the Manual provides a "Fraud Handbook," a "comprehensive guide for IRS employees service-wide in the recognition and development of potential fraud issues; referrals for criminal fraud; duties and responsibilities in joint investigations; civil fraud cases; and other related fraud issues." I.R.M. 25.1.1.1(2) (01-23-2014).

The Internal Revenue Service is a formidable agency with trained, dedicated employees utilizing extensive tools and techniques to identify false returns and fraudulent conduct. Notwithstanding this leverage, and regardless of the fact that the taxpayers at issue have not engaged in fraudulent conduct, the government seeks a blanket elimination of limitations based on unrelated, third party conduct. The government contends that this aggressive tactic "denies the windfall that a fraudulent return could produce" and "leaves [the taxpayer] no worse off than if he had simply paid his proper tax liability (plus interest)." Defendant-Appellant's Brief, p. 48. But as Professor Bryan T. Camp notes in his *amicus* brief, "what is now § 6501(a) was enacted as a statute of repose, promoting a strong congressional policy of closure." Camp *Amicus* Brief, p. 3-4. The government fails to address how much time it needs to detect the errors, or to offer a time at which a non-culpable taxpayer can consider a matter closed and dispose of related records. The position espoused by the government in this case will require all taxpayers to retain records indefinitely, based on the possibility, however remote, that a preparer,

financial advisor, or other third party committed some level of fraud that had an impact, regardless of how limited, on the taxpayer's returns.

CONCLUSION

The government is asking this court to eliminate the statute of limitations on assessment whenever it can establish that someone committed some level of fraud at some point in time, and that a taxpayer's return was somehow, in some way, impacted by the fraudulent conduct, regardless of whether the taxpayer knew the third party, had knowledge of the fraudulent conduct, or was aware that the return was inaccurate. The statute does not allow for this aggressive interpretation and public policy demands more equitable treatment and finality. For the reasons stated herein, the judgment should be affirmed.

/s/ Paula M. Junghans
Paula M. Junghans
Zuckerman Spaeder, LLP
1800 M Street, N.W., Suite 1000
Washington, D.C. 20036
Phone: 202-778-1850 - Fax: 202-822-8106
Principal Attorney of Record

/s/ Caroline D. Ciraolo
Caroline D. Ciraolo
Rosenberg Martin Greenberg, LLP
25 S. Charles Street, 21st Floor
Baltimore, MD 21201
Phone: 410-547-7852 - Fax: (410) 727-1115
Of Counsel
Attorneys for Amicus
American College of Tax Counsel
July 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on this 29th day of July, 2014. I further certify that service of the brief was made on counsel for the appellant by CM/ECF.

/s/ Paula M. Junghans_______________
Paula M. Junghans
Attorneys for Amicus
American College of Tax Counsel

CERTIFICATE OF COMPLIANCE

WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

X This brief contains 5,503 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), or

☐ The brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

X This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font, or

☐ The brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/ Paula M. Junghans_______________
Paula M. Junghans
Attorney for Amicus
American College of Tax Counsel

4585678.1