No. 17-10676

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN FINNEGAN, ET AL.,

PETITIONERS-APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT-APPELLEE.

On Appeal From
the United States Tax Court
(Tax Court Docket No. 8637-13)
Honorable Thomas B. Wells, United States Tax Court Judge

OPENING BRIEF FOR PETITIONERS-APPELLANTS

Agostino & Associates, P.C.
Counsel for Petitioners-Appellants
14 Washington Place
Hackensack, New Jersey 07601
Tel: (201) 488-5400
Fax: (201) 488-5855

Of Counsel:
Frank Agostino
Lawrence A. Sannicandro

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with 11TH CIR. R. 28-1(b) and 11TH CIR. R. 26.1-2, it is hereby certified that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this appeal:

1. Agostino, Esq., Frank, Agostino & Associates, P.C., 14 Washington Place, Hackensack, N.J. 07601;

2. Cullinan, Esq., Thomas A., The American College of Tax Counsel, c/o Sutherland Asbill & Brennan LLP, 999 Peachtree Street, N.E., Atlanta, G.A. 30309;

3. De Matos, Esq., Michael J., Internal Revenue Service, Office of Chief Counsel, 33 Maiden Lane, 14th Floor, New York, N.Y. 10038;

4. Finnegan, Joan, c/o Frank Agostino, Esq., Agostino & Associates, P.C., 14 Washington Place, Hackensack, N.J. 07601;

5. Finnegan, John, c/o Frank Agostino, Esq., Agostino & Associates, P.C., 14 Washington Place, Hackensack, N.J. 07601;

6. Gole, Esq., Rose E., Internal Revenue Service, Office of Chief Counsel, 33 Maiden Lane, 14th Floor, New York, N.Y. 10038;

7. Junghans, Esq., Paula M., The American College of Tax Counsel, c/o Zuckerman Spaeder LLP, 1800 M Street, N.W., Suite 1000, Washington, D.C. 20036-5807;

8. Paul, Esq., William M., Acting Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224;

9. Rothenberg, Esq., Gilbert S., Chief, Appellate Section, Tax Division, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 4324, Washington, D.C. 20530-0001;

10. Sannicandro, Esq., Lawrence A., McCarter & English, LLP, Four Gateway Center, 100 Mulberry Street, Newark, N.J. 07102;

11. Scharf, Esq., Jared J., 1025 Westchester Avenue, White Plains, N.Y. 10606;

12. Toscher, Esq., Steven, The American College of Tax Counsel, c/o Hochman, Salkin, Rettig, Toscher & Perez, P.C., 9150 Wilshire Blvd., Suite 300, Beverly Hills, C.A. 90212;

13. Vlasenko, Esq., Valerie, Agostino & Associates, P.C., 14 Washington, Place, Hackensack, N.J. 07601;

14. Wells, Honorable Thomas B., United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217;

15. Weiner, Esq., Andrew M., Appellate Section, Tax Division, United States Department of Justice, Post Office Box 502, Washington, D.C., 20044; and

16. Zilberman, Esq., Gennady, Internal Revenue Service, Office of Chief Counsel, 33 Maiden Lane, 14th Floor, New York, N.Y. 10038.

In accordance with 11TH CIR. R. 28-1(b) and 11TH CIR. R. 26.1-1, as well as FED. R. APP. P. 26.1(a), it is hereby certified that a Corporate Disclosure Statement is not required because Appellants are individuals and neither is a nongovernmental corporate entity.

Date: January 5, 2018

/s/ Lawrence A. Sannicandro
Lawrence A. Sannicandro
Attorney for Petitioners-Appellants
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Tel: (973) 639-2081

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11TH CIR. R. 28-1(c), Appellants respectfully ask this Court to hear oral argument with respect to whether the phrase "with the intent to evade tax" in 26 U.S.C. § 6501(c)(1) refers to the intent of the taxpayer or the intent of any third-party who is somehow connected to the filing of the taxpayer's tax return. The Federal courts to have decided this issue are divided; on the one hand, the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims agree with Appellants' interpretation of the statute, and on the other hand, the United States Tax Court endorses Appellee's reading of the statute. Oral argument will likely help this Court's deliberation of this contentious issue of statutory interpretation.

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JURISDICTIONAL STATEMENT

On February 7, 2013, the Commissioner of Internal Revenue ("Commissioner") mailed to John and Joan Finnegan (collectively, "Finnegans") a notice of deficiency ("Notice") determining deficiencies and related penalties with respect to their 1994 through 2001 Federal income tax returns. (A8).[1] On April 19, 2013, the Finnegans timely filed a petition with the United States Tax Court ("Tax Court") seeking a redetermination of the deficiencies and the penalties. (A5). As a result of the Notice and the timely filed petition, the Tax Court had subject matter jurisdiction pursuant to sections 6213(a) and 7442.[2]

The Tax Court filed a Memorandum Findings of Fact and Opinion on June 16, 2016, upholding the Commissioner's determinations in full. (A241). The Tax Court entered a decision to that effect on November 17, 2016. (A313). The decision is a final judgment disposing of all of the parties' claims. On February 8, 2017, within 90 days after the decision was entered, the Finnegans timely filed their notice of appeal. (A314). *See* FED. R. APP. P. 13(a); I.R.C. § 7483. Pursuant to section 7482(a)(1), the United States Courts of Appeals have jurisdiction to review the decisions of the Tax Court. This Court is the proper venue because the

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[1] Citations to the Appendix for Petitioners-Appellants are in the form "(A__)", with appropriate page numbers inserted.

[2] Unless otherwise indicated, all section references are to the applicable version of the Internal Revenue Code of 1986, as amended ("Code" or "I.R.C.").

Finnegans resided in Florida when the petition was filed. (A247). *See* I.R.C. § 7482(b)(1).

STATEMENT OF THE ISSUES

1. Whether the Tax Court, by holding that section 6501(c)(1) suspends the period of limitations on assessment in the case of a false or a fraudulent tax return even though it was a third-party and not the taxpayer who intended to evade tax, erred in ruling that the Commissioner's assessments of deficiencies and penalties for 1994 through 2001 are not time-barred by the three-year statute of limitations in section 6501(a). (A6 at ¶¶ 4-6; A44 at ¶ 8 (raising the issue below) and A258, n.18 (addressing the issue below)).

2. Whether the Tax Court erred by interpreting FED. R. EVID. 804(b)(3)'s exception to the hearsay rule to include affidavits and trial testimony given in connection with the declarant's cooperation-guilty plea. (A127; A132 (raising the issue below) and A242-A246 (addressing the issue below)).

STATEMENT OF THE CASE

This case is an appeal from a decision of the Tax Court (Honorable Thomas B. Wells) sustaining the Commissioner's determination of deficiencies in, and penalties under section 6662(a) with respect to, the Finnegans' Federal income tax returns for tax years 1994 through 2001.

I. Factual Background

During 1994 through 2001, the Finnegans resided in Monsey, New York. (A247). Mr. Finnegan was employed as a plumber, and Mrs. Finnegan worked as an admissions officer for a community college in Rockland County, New York. (A247). During 1988, the Finnegans purchased a rental property in Daytona, Florida for roughly $60,000. (A247).

After the Finnegans' long-time accountant moved away, they hired Duane Howell ("Howell") to prepare their tax returns. (A248). Howell took on more of an advisory role, (A248), and he delegated some of the tax preparation work to his associates, including Timothy Mitts ("Mitts") and Glen Robins ("Robins"). Howell, in his advisory role, counseled the Finnegans to conduct their rental activity through a partnership so they could contribute rent from the Daytona property to fund a retirement plan for self-employed individuals (these plans were previously known as "Keogh plans"). (A248). The Finnegans were honest people (A267, n.7 (noting the Finnegans testified credibly)), and it was important to them to have adequate income during retirement. (Trial Transcript at p. 179, lines 12-16). Consequently, the Finnegans, with the help of Howell, set-up a partnership by the name of "Jomarjen." (A248),. At that time, the Finnegans did not know the advice Howell gave them was incorrect: the rental income they received could not count as "self-employment income" to receive the tax-advantaged savings Howell touted. (A248).

Still, to the extent their lifestyle allowed it, the Finnegans contributed the rental income they received to a retirement account. (A249). Howell continued to include related deductions on the Finnegans' 1994 through 2001 tax returns, even though neither the Finnegans nor the Commissioner were quite sure at trial whether the amounts claimed as deductions equaled the amounts contributed some *20 years* earlier. (A249). The Finnegans, for their part, timely filed their 1994 through 2001 Federal income tax returns on April 15th of the year following the year for which a tax return was required (*e.g.*, the tax return for 1994 was filed on April 15, 1995; the tax return for 1995 was filed on April 15, 1996; and so on). (A53 at ¶ 41; A60).

If these were the only facts to be told, the Commissioner would not be relying on a strained reading of section 6501(c)(1) to try and assess 20-year-old tax liabilities. In addition to Jomarjen, the Finnegans' tax returns for 1997 through 2001 reported they were partners in a partnership named "Gannan Company" ("Gannan"). (A249). The Finnegans' tax returns for the 1994 through 2001 tax years reported losses from their "interests" in Jomarjen and Gannan in excess of \$300,000. (A251). Part of the Commissioner's problem is, as the Finnegans maintained at trial and throughout their involvement in the Internal Revenue

Service's ("IRS") criminal investigation of Howell, that the Finnegans did not actually know their 1994 through 2001 tax returns claimed losses they were not entitled to. (A249; Trial Transcript at p. 187, line 25 through p. 188, line 5). But the crux of the Commissioner's problem is his agents believed the Finnegans to such an extent that the agents decided to not pursue the 75% civil tax fraud penalty against the Finnegans. (Whole record). In other words, the Commissioner concedes that the Finnegans did not act with the specific intent to evade tax.

The Commissioner investigated Howell regarding his preparation of Federal income tax returns twice, once for tax returns he prepared during the 1980s and once for the 1992 through 2003 tax years. (A254-A255). During the second investigation, which was primarily conducted by Special Agent Steven Ashcroft ("Agent Ashcroft") and Special Agent Robert Miranda, IRS agents reviewed tax returns Howell prepared, including the Finnegans' tax returns for 1994 through 2001. (A256). The agents found that one of Howell's fraudulent schemes was to urge clients to set-up fictitious partnerships to create losses that flowed-through to the taxpayer's individual income tax returns.[3] (A255-A256). Another scheme involved promoting self-employment retirement plans. (A256). Howell falsified

[3] Partnerships do not pay an entity level tax. *See* I.R.C. § 701. Instead, partnerships annually report the results of their operations on an information return and each partner is required to report on her separate personal income tax return her allocable share of the partnership's income, gain, loss, deduction, and credit. *See* I.R.C. § 702.

income from partnerships and payments made by partnerships to claim self-employment retirement plan deductions to lower his clients' tax liabilities. (A256).

Howell was ultimately indicted in the U.S. District Court for the Southern District of New York in 2006 for conspiring to commit an offense or to defraud the United States in violation of 18 U.S.C. § 371 and for attempting to interfere with the administration of the internal revenue laws in violation of section 7212(a) and 18 U.S.C. § 2. (A255). None of the Finnegans' tax returns for any year in dispute were referenced in the indictment. (A256). Howell pleaded guilty to both counts of the indictment in 2007. (A225). Howell's guilty plea was apparently entered into in exchange for Howell's testimony against his former associate, Mitts, and affidavits against at least some of his clients, including the Finnegans. (A63-A115 (Howell's testimony against Mitts); A121 (one such boilerplate affidavit)).

On February 7, 2013, nearly 18 years after the Finnegans filed their 1994 tax return, the Commissioner issued them the Notice. (A8). In the Notice, the Commissioner determined the Finnegans owed additional taxes equal to $124,001 for the 1994 through 2001 tax years. (A8). The Commissioner also determined the Finnegans were liable for accuracy-related penalties equal to approximately $24,800 for the 1994 through 2001 tax years. (A8). As a subsidiary determination, the Commissioner determined the Finnegans were liable for related interest which, as of March 7, 2017, totaled approximately $316,342, *nearly 2.2 times the amount of the tax and penalties allegedly owed*. (A8).

II. Procedural History

On April 19, 2013, the Finnegans filed a petition with the Tax Court requesting a redetermination of the deficiencies and the penalties determined in the Notice. (A5). The Tax Court held a two-day trial during which the Government called four witnesses; namely, Mr. Finnegan, Mrs. Finnegan, Agent Ashcroft, and Robins. (A124, A202, A262). The Finnegans objected to the testimony of Agent Ashcroft and Robins on the ground of relevance because Robins did not prepare the Finnegans' tax returns for 1994 through 2001 and because Agent Ashcroft did not investigate those returns. (A242). The Tax Court took the objections under advisement, allowing both Agent Ashcroft and Robins to testify. (A124; A203). On the grounds of relevance and hearsay, the Finnegans also objected to the admissibility of: (1) Exhibit 57-R, which was Howell's testimony from the criminal trial of Mitts; and (2) Exhibit 63-R, which was an affidavit by Howell stating he "knowingly … prepared [for the Finnegans, Jomarjen, and Gannan] false income tax returns for [1994 through 2001]." (A121). Again, the Tax Court took the objections under advisement at trial. (A244-A245).

In a Memorandum Findings of Fact and Opinion filed on June 16, 2016, the Tax Court upheld the Commissioner's determinations in the Notice in full. (A268 (with respect to the deficiencies) and A269-A270 (with respect to the penalties)). On July 18, 2016, the Finnegans timely moved the Tax Court to withdraw and reconsider the opinion below on three grounds. (A271).[4] First, the Finnegans asserted the Tax Court erred in deciding to not revisit *Allen v. Comm'r*, 128 T.C. 37 (2007), despite an intervening opinion by the Court of Appeals for the Federal Circuit, *BASR P'ship v. United States*, 795 F.3d 1338, 1346-47 (Fed. Cir. 2015), *aff'g*, 113 Fed. Cl. 181 (2013), that rejected *Allen* as unpersuasive, incomplete, and inconsistent with other provisions of the Code. (A283). Next, the Finnegans argued the Tax Court should overrule its opinion in *Allen* and its holding that section 6501(c)(1) indefinitely extends the period of limitations on assessment in cases where a third-party prepared a false or fraudulent return, even though the taxpayer did not intend to evade tax. (A283). Third, the Finnegans asserted the Tax Court should enter a decision for them determining that the assessments of the deficiencies and the penalties determined in the Notice were time-barred by the three-year period of limitations on assessment in section 6501(a). (A283).

[4] Rule 161 of the Tax Court's Rules of Practice and Procedure requires a motion for reconsideration to be filed within 30 days after a written opinion is served. The opinion below was served on both parties on June 30, 2016, and 30 days thence is July 16, 2016, which was a Saturday. Pursuant to TAX CT. R. 25(a)(2), the motion for reconsideration was therefore due to be filed (without leave of Court) by Monday, July 18, 2016.

In an order dated October 3, 2016, the Tax Court denied the motion for reconsideration. (A310). Then, on November 17, 2016, the Tax Court entered a decision holding the Finnegans liable for the deficiencies and penalties as determined in the Notice. (A313). On February 8, 2017, in accordance with FED. R. APP. P. 13(a) and TAX CT. R. 190(a), the Finnegans timely filed their Notice of Appeal. (A314).

III. Rulings Presented for Review

There are three Tax Court rulings at issue in this appeal. The first erroneous ruling is that section 6501(c)(1) suspends the three-year period of limitations on assessment in section 6501(a) even when it was a third-party, and not the taxpayer, who intended to evade tax. (A258, n.6). The second unfounded ruling is that testimony of Agent Ashcroft and Robins concerning Howell's fraudulent intent is relevant to the Finnegans' intent. (A243). The third erroneous ruling is that an affidavit Howell made against the Finnegans and testimony he gave during Mitts' criminal trial, both in connection with his cooperation-guilty plea, were statements against his interest. (A244-A246).

SUMMARY OF THE ARGUMENT

The Finnegans ask this Court to decide an issue which presently divides the two Federal courts most likely to hear civil tax cases, the Tax Court and the United States Court of Federal Claims ("Claims Court"). That issue is whether section

6501(c)(1) suspends the three-year period of limitations on assessments in section 6501(a) even though, as the parties agree in this appeal, it is the tax return preparer and not the taxpayer who intended to evade tax. On one side of the controversy is the United States Court of Appeals for the Federal Circuit, the Claims Court, and their respective opinions in *BASR P'ship v. United States*, 795 F.3d 1338, 1346-47 (Fed. Cir. 2015), *aff'g*, 113 Fed. Cl. 181 (2013), which each hold that section 6501(c)(1) suspends the three-year period of limitations on assessment only when the taxpayer, not a third-party, acts with the intent to evade tax. On the other side of the dispute is the Tax Court and its holding in *Allen v. Comm'r*, 128 T.C. 37, 42 (2007), which interprets section 6501(c)(1) as indefinitely suspending the period of limitations on assessment in the case of a false or fraudulent return, even though it is a third-party and not the taxpayer who intends to evade tax.

The Finnegans advance two arguments in this appeal. First, the Tax Court erred in not prohibiting the Commissioner's assessments of deficiencies and penalties with respect to their 1994 through 2001 Federal income tax returns as required by section 6501(a). The Tax Court erred by not considering the plain language or history of section 6501(c)(1) and in failing to adopt a statutory construction that harmonizes the statute with sections 7454(a), 6663(a) and (c), or 6161(b)(3). This Court should adopt the statutory construction argument accepted in *BASR* that the phrase "intent to evade tax" as used in section 6501(c)(1) refers to the intent of the taxpayer and not the intent of some tenuous third-party. This Court should reverse the Tax Court because the only conclusion the Tax Court could have reached after properly applying section 6501(c)(1) is that the Commissioner's assessments of taxes and penalties at issue are time-barred by section 6501(a).

Second, as a result of the Tax Court's misapplication of section 6501(c)(1), the Tax Court abused its discretion by overruling two key evidentiary objections. The Tax Court admitted into evidence the irrelevant testimony of Agent Ashcroft and Robins, both of which were directed to Howell's intent, but not the Finnegans' intent. Since section 6501(c)(1) does not suspend the period of limitations on assessment in the absence of the taxpayer's fraudulent intent, the testimony of Agent Ashcroft and Robins should have been excluded under FED. R. EVID. 401 or 403.

The Tax Court also erred by admitting into evidence Exhibits 57-R and 63-R, which were Howell's testimony against Mitts and Howell's affidavit against the Finnegans, respectively. These exhibits are classic hearsay that are not admissible under the statement against interest exception of FED. R. EVID. 804(b)(3) because they are unreliable, self-serving statements Howell made principally to ensure he received the full benefits of his cooperation-guilty plea. If this Court does not reverse the Tax Court on the ground that the assessments of taxes and penalties are time-barred by the three-year period of limitations on assessment in section 6501(a), then this Court should reverse the Tax Court's evidentiary objections, vacate its decision, and remand this case for a new trial free of these evidentiary taints.

ARGUMENT

POINT I

THE TAX COURT ERRED IN INTERPRETING "WITH THE INTENT TO EVADE TAX" IN SECTION 6501(C)(1) TO REFER TO ANYONE OTHER THAN THE TAXPAYER'S INTENT

I. The Standard of Review Is *De Novo*

"The interpretation of a statutory section of the Internal Revenue Code by the tax court is a question of law reviewed *de novo*." *McLaulin v. Comm'r*, 276 F.3d 1269, 1273 (11th Cir. 2001) (citing *Fabry v. Comm'r*, 223 F.2d 1261, 1263 (11th Cir. 2000)). Whether the Tax Court erred in ruling the phrase "with the intent to evade tax" in section 6501(c)(1) includes the intent of persons other than the taxpayer presents a pure question of statutory interpretation. Accordingly, the standard of review for this issue is plenary.

II. Framework for Analysis

The Secretary of the Treasury or his delegate, the Commissioner, is authorized to review any tax return filed by a taxpayer. I.R.C. § 6201(a); *see also* I.R.C. § 7701(a)(11). If the Commissioner determines during his investigation that the taxpayer has not paid all taxes required under the Code, then the Commissioner is authorized to assess additional tax, interest, additional amounts, additions to the tax, and certain penalties. *See* I.R.C. § 6201(a). Congress limited the Commissioner's assessment authority in numerous respects, including establishing periods of limitation upon assessment as set forth in sections 6501 through 6533.[5]

Section 6501(a), which is set forth in the Statutory Addendum, provides the general rule that the Commissioner must assess tax within three years after the taxpayer files a tax return. Section 6501(c), which is also set forth in the Statutory Addendum, sets forth various exceptions to the general rule. Section 6501(c)(1) establishes one such exception, indefinitely suspending the three-year period of limitations on assessment "[i]n the case of a false or fraudulent return with the intent to evade tax."

Section 6501(c)(1) is silent as to which person or persons must have the requisite fraudulent intent to suspend the three-year period of limitations on assessment. But, in the one hundred or so years since the exception to the three-year statute of limitations was first enacted in 1918, courts have traditionally interpreted that statute to mean "[t]here must be additional evidence, independent of the general presumption of correctness, from which ***fraudulent intent on the part***

[5] Other limitations on the Commissioner's assessment authority include: the method of assessment, *see* I.R.C. § 6203; and the requirement that the Commissioner first issue to the taxpayer a notice of deficiency and an opportunity to challenge the proposed assessment before the Tax Court, *see* I.R.C. §§ 6204(b); 6213.

of the taxpayer can be properly inferred." *Payne v. Comm'r*, 224 F.3d 415, 421 (5th Cir. 2000) (citing *Drieborg v. Comm'r*, 225 F.2d 216, 218 (6th Cir. 1955)) (emphasis supplied); *see also Botwinik Bros. of Mass., Inc. v. Comm'r*, 39 T.C. 988, 996 (1963) (rejecting the Government's claim that a corporate bookkeeper's fraud suspends the period of limitations upon assessment because "the fraud to be established is the fraud of petitioner corporation, not that of [the corporate bookkeeper]"). And, from 1918 through 2001, the Commissioner's own Chief Counsel agreed that "the fraudulent intent of the return preparer is insufficient to make section 6501(c)(1) applicable." IRS Field Service Advice 200104006 (Sept. 15, 2000) (explaining the reasons the fraudulent intent of a third-party does not suspend the period of limitations on assessment pursuant to section 6501(c)(1)), *available at* https://www.irs.gov/pub/irs-wd/0104006.pdf ("FSA 200104006"). Since 2001, the Government has attempted to expand the breadth of section 6501(c)(1) in ways Congress did not intend.[6]

In *Allen*, for the first time in section 6501(c)(1)'s near-century long existence, the Tax Court rejected the conventional construction of the statute to

[6] In 2001, the Commissioner reversed his position, concluding that "the fraudulent intent of the taxpayer's agent provides a sufficient basis for applying section 6501(c)(1)." IRS Field Service Advice 200126019 (Mar. 30, 2001), *available at* https://www.irs.gov/pub/irs-wd/0126019.pdf. The IRS analysis, however, is flawed because it applied agency principles to the relationship between a taxpayer and the tax return preparer to reach the desired conclusion. This point is addressed in further detail in Section III.D. of this brief.

hold that the three-year period of limitations on assessment provided in section 6501(a) "is indefinitely extended under section 6501(c)(1) if a return is fraudulent, regardless of whether the fraud was committed by the taxpayer or the taxpayer's preparer." After conducting a limited analysis of the text of section 6501(c)(1) and briefly discussing the legislative history in a footnote, *see Allen*, 128 T.C. at 39, n.3, the Tax Court concluded that the "plain meaning of the statute indicates that it is the fraudulent nature of the return that extends the limitations period," not the intent of a particular actor, *see id.* at 42. The Tax Court's conclusion was resoundingly rejected by the other trial court most likely to hear Federal civil tax controversies, the Claims Court.

The Claims Court and the Federal Circuit both rejected the Tax Court's ruling in *Allen* and held that section 6501(c)(1) applies solely to situations where the taxpayer has the requisite intent to evade tax. *BASR*, 795 F.3d at 1138. The tax assessment in *BASR* was the product of an abusive tax shelter that was "designed to generate large noneconomic tax losses for wealthy taxpayers." *Id.* at 1341. As in this case, the Government did not allege that any partner had the intent to evade tax. *Id.* Instead, the Government argued that the admitted fraud of the attorney who structured the tax shelter suspended the period of limitations on assessment. *Id.* at 1342. The partnership, through its designated partner, argued the three-year period of limitations on assessment is suspended only when the taxpayer, not a third-party, acts with the requisite intent to evade tax. *Id.* at 1341.

After a thorough inspection of the parties' arguments, statutory construction, case law, and legislative intent behind section 6501(c)(1), the Federal Circuit ruled that the Commissioner is limited to the three-year statute of limitations unless the taxpayer possesses the intent to evade tax. *Id.* at 1350. As part of its analysis, the Federal Circuit carefully reviewed the holding in *Allen* and found the Tax Court's broad reading of section 6501(c)(1) to be unpersuasive, incomplete, inconsistent with other interpretations of the Code, and uncomforting. *Id.* at 1346-47.

III. "Intent to Evade Tax" in Section 6501(c)(1) Refers to the Taxpayer's Intent

This Court should adopt the traditional interpretation of section 6501(c)(1) and align itself with the Federal Circuit. The plain language and legislative history of section 6501(c)(1), as well as the statute's broader placement within the Code, all support the customary interpretation that "with the intent to evade tax" refers to the taxpayer's intent. Had the Tax Court applied the correct construction of section 6501(c)(1), the only result the Tax Court could have reached is that the Commissioner's assessments of the taxes and penalties for 1994 through 2001 are time-barred by the three-year period of limitations in section 6501(a). For this reason, as explained in Section IV of this brief, the Tax Court must be reversed.

A. <u>The Statute's Plain Language Supports That "Intent to Evade Tax" Refers to the Taxpayer's Intent</u>

Statutory interpretation begins with the words of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (internal quotation marks omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Applying these principles to section 6501(c)(1) compels the conclusion that "with the intent to evade tax" refers to the taxpayer's intent.

Section 6501(c)(1) provides: "[i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time." Textual analysis supports the traditional interpretation that limits the phrase "with the intent to evade tax" to the taxpayer's intent. The terms "tax" and "the tax" use a definite article and a singular subject. Therefore, those terms can only mean the tax that section 6151(a) generally requires taxpayers to pay without assessment or notice and demand from the Commissioner. Moreover, a person's Federal income tax is only imposed on the person required to file a tax return. *See generally* I.R.C. § 1(a); *see also* I.R.C. § 6203. It is inconsistent with the plain language of the statute to attribute to a person (the tax return preparer) an intent to evade a tax which that person (the tax return preparer) is not obligated to pay. The plainest reading of section 6501(c)(1) is that the "intent to evade tax" relates to "the tax" required to be reported on the taxpayer's tax return and, but for the evasion, would be reported and paid by the person signing and filing the return.[7]

The general statute of limitations rule in section 6501(a) is also instructive. Section 6501(a) provides: "Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed. … For purposes of this chapter, *the term 'return' means the return required to be filed by the taxpayer* (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit)." (Emphasis supplied). Section 6203, in turn, provides: "the assessment shall be made by recording the liability of the taxpayer…." By definition, sections 6203 and 6501 provide for an assessment of tax relative to the taxpayer's tax return. A plain reading of section 6501 is that Congress, by

[7] Congress enacted a comprehensive set of civil and criminal tax penalties to penalize the conduct of non-taxpayers who intended to evade a taxpayer's tax. For example, third parties can be subject to civil penalties for preparing an income tax return that causes an understatement of tax due to an unreasonable position, *see* I.R.C. § 6694(a), or failing to be diligent with respect to particular types of tax credits that are prone to abuse, *see* I.R.C. § 6695(g). In addition, third parties can face criminal liability for conspiring to defraud the United States, *see* 18 U.S.C. § 286, and aiding or assisting in the preparation or presentation of a false return, *see* I.R.C. § 7206(2).

referring to the assessment of the taxpayer's tax in section 6501(a), was also referring to the taxpayer's intent in section 6501(c)(1).

B. The Statute's Legal History Supports That "Intent to Evade Tax" Refers to the Taxpayer's Intent

The legal history of two key fraud provisions of the Code, section 6501(c)(1) and 6663(a), also demonstrate that "with the intent to evade tax" refers to the taxpayer's intent. Congress enacted the language presently codified in sections 6662(a) and 6663(a), which respectively authorize the Commissioner to impose penalties on underpayments of tax that are due to negligence or fraud, as section 250(b) of the Revenue Act of 1918, Pub. L. No. 54-254, 40 Stat. 1057, 1083 ("1918 Act").[8] At the same time, Congress introduced the language presently codified in section 6501(c)(1), which suspends the period of limitations on assessment "in the case of a false or fraudulent return with the intent to evade tax," as section 250(d) of the 1918 Act. Sections 250(b) and (d) of the 1918 Act are set forth in the Statutory Addendum.

Congress did not expressly provide in section 250(b) or (d) of the 1918 Act that the term "intent to evade tax" refers to the taxpayer's intent, but reading those

[8] Section 6662(a) presently authorizes the Commissioner to impose a 20% accuracy-related penalty for underpayments of tax that are due to, among other types of misconduct set forth in section 6662(b), negligence. Section 6663(a) now authorizes the Commissioner to impose a 75% penalty for underpayments of tax that are due to fraud.

sections together makes that point clear. For example, section 250(b) of the 1918 Act prohibited the Commissioner from imposing a negligence penalty if "the return is made in good faith and the understatement of the amount in the return is not due to any fault *of the taxpayer*." (Emphasis supplied). Then, one sentence later, section 250(b) of the 1918 Act confirmed that the focus was on the taxpayer's conduct by authorizing a negligence penalty "[i]f the understatement is due to negligence *on the part of the taxpayer*, but without intent to defraud." (Emphasis supplied). In its final sentence, section 250(b) of the 1918 Act specifies the consequence if "the taxpayer" acts "with the intent to evade tax," authorizing the imposition of the fraud penalty "[i]f the understatement is false or fraudulent with the intent to evade tax." When taken together, these provisions make clear that the term "intent" for purposes of section 250(b) of the 1918 Act refers to the taxpayer's intent.

Section 250(d) of the 1918 Act specified the period of limitations on assessment, drawing a line of demarcation between "false and fraudulent returns" and all other tax returns. When drafting section 250(d) of the 1918 Act, Congress borrowed near-identical language from section 250(b) of the 1918 Act ("false or fraudulent return" versus "false or fraudulent returns" and "with the intent to evade tax" versus "with intent to evade tax"). This Court should infer that the term "intent" as used in section 250(b) of the 1918 Act has the exact same meaning when used a few sentences later in section 250(d) of the 1918 Act. *See Morrison-Knudsen Constr. Co. v. Dir., Office of Worker's Comp. Programs*, 461 U.S. 624, 633 (1983) (recognizing the principle "that a word is presumed to have the same meaning in all subsections of the same statute"); *cf. Badaracco v. Comm'r*, 464 U.S. 386, 397 (1984) (declining to define the term "return" differently for purposes of sections 6501(a) and the rest of section 6501).

The legislative history of section 250(d) of the 1918 Act, now codified in section 6501(c)(1), even confirms the phrase "with intent to evade tax" refers to the taxpayer's intent. The Senate Finance Committee summarized section 250(d) of the 1918 Act as a provision by which "[a]uthority is given to the Commissioner to take summary proceedings for collection of the tax in cases where there is evidence that *the taxpayer designed to evade the tax*." Adam S. Wallwork, *On the Use and Abuse of Legislative History in the "Preparer Fraud" Doctrine*, 70 TAX LAW. 403, 414-15 (Fall 2016) (quoting H.R. 12863, 65th Cong., 2d Sess., Document No. 1267, at 21 (Sept. 3, 1918)) (emphasis supplied). This legislative history further confirms the foregoing statutory analysis.

Reorganization and recodification of the 1918 Act over the last century has led to a separation of the fraud exception to the three-year period of limitations and the fraud penalty. However, there is absolutely no evidence of a change in congressional intent to redefine the phrase "with the intent to evade tax" to refer to anyone's intent but the taxpayer's intent. Thus, this Court should interpret section 6501(c)(1) in the context in which it was first enacted.[9]

C. <u>The Fraud-Related Provisions of the Code Support That "Intent to Evade Tax" Refers to the Taxpayer's Intent</u>

The rules of statutory construction also require section 6501(c)(1)'s phrase "with the intent to evade tax" to be determined in the context of the Code as a whole and not in isolation. First, "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Second, statutes *in pari materia*, or relating to the same subject matter, should be construed so that their provisions are harmonized. *United States v. Caldera-Herrera*, 930 F.2d 409, 411 (5th Cir. 1991). The other fraud-related provisions of the Code, including sections 7454(a), 6663(a), 6663(c), and 6161(b)(3), all confirm it is the taxpayer (not some third-party) who must have the requisite fraudulent intent to indefinitely extend the period of limitations on assessment under section 6501(c)(1). *See BASR*, 795 F.3d at 1344-46.

[9] For an excellent in-depth discussion on the legislative history of section 6501, *see* Bryan T. Camp, *Tax Return Preparer Fraud and the Assessment Limitation Period*, Tax Notes, Aug. 31, 2007, https://ssrn.com/abstract=1008487, *and* Bryan T. Camp, *Presumptions and Tax Return Preparer Fraud*, Tax Notes, July 14, 2008, http://ssrn.com/abstract=1186582.

1. Section 6501(c)(1) Must Be Read Harmoniously with Section 7454(a)

Section 7454(a), which is set forth in the Statutory Addendum, supports the notion that it is the taxpayer's intent by which the existence of fraud is determined for purposes of section 6501(c)(1). The Commissioner bears the burden of proving fraud in any civil tax case by clear and convincing evidence. I.R.C. § 7454(a); *see also* TAX CT. R. 142(b). Section 7454(a) provides: "[i]n any proceeding involving the issue whether ***the petitioner*** has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary." Section 7454(a) indicates that, when pursuing fraudulent conduct, Congress considered the fraudulent intent of only the taxpayer, not of a third-party who advised or assisted the taxpayer. Section 7454(a) specifically identifies the "petitioner's" or the taxpayer's fraud and, by its plain terms, does not include fraud committed by a third-party that corrupted the taxpayer's return.

Section 6501(c)(1) should be read consistently with section 7454(a). To read section 6501(c)(1) as reaching beyond the taxpayer's intent has the effect of shifting to the taxpayer the burden of disproving fraud any time the Government alleges the fraud of a third-party suspends the period of limitations upon assessment. This result completely undermines the statutory purpose of section 7454(a), which was to shift to the Government the burden of proving fraud because "[p]roceedings before the [Tax Court] involving that issue in some respects resemble penal suits." S. Rep. 960, 70th Cong., 1st Sess., at 38 (May 1, 1928). The legislative history to section 7454(a), like its plain language, demonstrates Congress did not intend for the taxpayer to bear the burden of proof in any proceeding concerning civil tax fraud because, as Congress clearly required, "the burden of proof in respect of such issue shall be upon the Secretary." I.R.C. § 7454(a).

2. <u>Section 6501(c)(1) and Section 6663(a) Both Require the Taxpayer to Act With the Intent to Evade Tax</u>

Section 6663(a), which is set forth in the Statutory Addendum, also confirms it is the taxpayer's intent by which the existence of fraud is determined for purposes of section 6501(c)(1). Section 6663(a), which authorizes the Commissioner to impose a civil tax fraud penalty, provides: "[i]f any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud." Section 6663(a), like section 6501(c)(1), does not specify whether the fraud that triggers the statutory remedy (imposition of the penalty or suspension of the period of limitations on assessment) must be attributable to the taxpayer.

Nevertheless, courts agree the term "fraud" for purposes of section 6663(a) is an "intentional wrongdoing <u>*on the part of a taxpayer*</u> with the specific purpose to evade a tax believed to be owed." *Sadler v. Comm'r*, 113 T.C. 99, 102 (1999) (emphasis supplied); *see Crummey v. Comm'r*, 684 Fed. Appx. 416, 420 (5th Cir. 2017); *Worsham v. Comm'r*, 531 Fed. Appx. 310, 311 (4th Cir. 2013); *Day v. Comm'r*, 975 F.2d 534, 538 (8th Cir. 1992); *Granado v. Comm'r*, 792 F.2d 91, 93 (7th Cir. 1986) (quoting *Akland v. Comm'r*, 767 F.2d 618, 621 (9th Cir. 1985)); *Korecky v. Comm'r*, 781 F.2d 1566, 1568 (11th Cir. 1986); *Conforte v. Comm'r*, 692 F.2d 587, 592 (9th Cir. 1982). And, the Tax Court has held "the determination of fraud for purposes of the period of limitations on assessment under section 6501(c)(1) is the same as the determination of fraud for purposes of the penalty under section 6663." *Neely v. Comm'r*, 116 T.C. 79, 85 (2001). By applying the foregoing principles to the proper interpretation of section 6501(c)(1), it becomes apparent that the term "fraud" for purposes of section 6501(c)(1) means an intentional wrongdoing *on the part of the taxpayer* with the specific intent to evade a tax known to be due.

Section 6501(c)(1) should be read consistently with section 6663(a). As detailed above, both sections originated in section 250 of the 1918 Act. Congress borrowed the phrase "with intent to evade tax" from the fraud penalty provision for purposes of drafting the fraud assessment provision. Thus, in the statute as originally enacted, the same conduct that triggered the fraud penalty under section 250(b) (the conduct of the taxpayer) also triggered the unlimited assessment period under section 250(d). The Tax Court's holding to the contrary ignores the origins of section 6501(c)(1).

3. Interpreting Section 6501(c)(1) to Mean Anyone's Intent Renders Section 6663(c) Meaningless

Section 6663(c), which is also set forth in the Statutory Addendum, confirms it is the taxpayer's intent by which the existence of fraud for purposes of section 6501(c)(1) is determined. Section 6663(c) creates a special rule for imposing the fraud penalty with respect to a joint tax return. The statute provides: "[i]n the case of a joint return, [section 6663] shall not apply with respect to a spouse unless some part of the underpayment is due to the fraud of such spouse." I.R.C. § 6663(c). The phrase "with the intent to evade tax" in section 6501(c)(1) cannot refer to a third-party's intent because in cases where the Government alleges the fraud of a third-party suspends the period of limitations upon assessment section 6663(c) would be rendered meaningless.

4. Interpreting Section 6501(c)(1) to Mean Anyone's Intent Would Undermine the Relief Provisions of Section 6161(b)(3)

Section 6161(b)(3), which is set forth in the Statutory Addendum, likewise confirms it is the taxpayer's intent by which the existence of fraud is determined for purposes of section 6501(c)(1). Section 6161(a) authorizes the Commissioner to grant extensions of the time to pay certain tax deficiencies. The relevant statute provides: "[n]o extension shall be granted … if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax." I.R.C. § 6161(b)(3). Like the other statutory provisions discussed above, section 6161(b)(3) does not expressly state whether a third-party's negligent or fraudulent conduct prevents a taxpayer from receiving an extension. Applying the Tax Court's holding with respect to section 6501(c)(1) to section 6161(b)(3), as would surely be required given that the same phrase ("with the intent to evade tax") is at issue, means the taxpayer's eligibility for relief under section 6161(b) could be conditioned on the act of some third-party. Thus, the Tax Court's reading of section 6501(c)(1) must be rejected as inconsistent with section 6161(b)(3).

D. The Tax Court's Reading of Section 6501(c)(1) Violates *Boyle's* Nondelegable Duty Principle

The Tax Court's interpretation of section 6501(c)(1) must also be rejected as inconsistent with the principle that filing a tax return is the taxpayer's personal, nondelegable duty. In *United States v. Boyle*, 469 U.S. 241, 242 (1985), the Supreme Court decided whether an estate was liable for the late-filing penalty provided in section 6651(a)(1), where the executor sought to delegate to the estate's attorney responsibility to timely file the required estate tax return. The Supreme Court held the executor's reliance on the estate's attorney to file the estate tax return did not constitute reasonable cause for the late-filing of the return. 469 U.S. at 249. The Supreme Court explained:

> Congress has placed the burden of prompt filing on the executor, not on some agent or employee of the executor. The duty is fixed and clear; Congress intended to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of situations…. That the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute.

Id.

This nondelegable duty principle confirms the fraud of a tax return preparer is irrelevant to whether a tax return is filed with the intent to evade tax because only the taxpayer, or a person with legal authority to bind the taxpayer (*i.e.*, the taxpayer's agent), can discharge the taxpayer's duty to file a tax return. A tax return preparer does not become a taxpayer's agent solely by virtue of preparing the taxpayer's tax return. The United States Court of Appeals for the District of Columbia Circuit explains:

> Put simply, tax-return preparers are not agents. They do not possess legal authority to act on the taxpayer's behalf. They cannot legally bind the taxpayer by acting on the taxpayer's behalf. ... Indeed, a tax-return preparer who tried to act on the taxpayer's behalf would run into trouble with the IRS: Under the IRS regulation found at 26 C.F.R. § 601.504(a), "representation" of a taxpayer before the IRS requires formally obtaining the taxpayer's power of attorney, something tax-return preparers do not typically obtain when preparing returns. Moreover, because a tax-return preparer is not a representative, the tax-payer ordinarily must still sign and submit the return in his or her own name even when the taxpayer uses the services of a tax-return preparer.

Loving v. IRS, 742 F.3d 1013, 1017 (D.C. Cir. 2014). The Finnegan's reading of section 6501(c)(1) is the only construction of the statute that properly takes into account that the tax return preparers are not agents of and cannot bind the taxpayer.

E. Summary

The statutory predecessor to section 6501(c)(1), the statute's plain language, and canons of statutory construction confirm it is the taxpayer (not some third-party) who must have the requisite fraudulent intent to suspend the three-year period of limitations on assessment in section 6501(a). If the statute's silence causes any doubt for this Court, that doubt should be resolved in the Finnegans' favor. More than one hundred years ago, not long before the 1918 Act was enacted, the Supreme Court said:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge the operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.

Gould v. Gould, 245 U.S. 151, 153 (1917). Section 6501(c)(1) should be narrowly construed in the context in which it was first enacted and in the context in which it stands today: as an exception to the general rule. To hold otherwise invites the Commissioner to have the exception swallow the rule.

IV. The Commissioner's Assessments for 1994 Through 2001 Are Time-Barred by the General Rule in Section 6501(a)

The sole remaining issue to resolve Point I is whether the Commissioner's assessments of the taxes and penalties asserted in the Notice are time-barred by the three-year period of limitations in section 6501(a). This issue is easily resolved in the Finnegans' favor because the record below establishes that, for each of the years 1994 through 2001, the Finnegans timely filed their Federal income tax returns on April 15th of the year following the year for which the tax return was required (*e.g.*, the tax return for 2001 was filed on April 15, 2002). (A53 at ¶ 41; A60)). This means the Commissioner's assessments for taxes allegedly due from the Finnegans for 1994 through 2001 must have been made no later than three after the filing date of the return to which the assessment relates, and in no event after April 15, 2002.[10] *See* I.R.C. § 6501(a).

It is indisputable here that the notice of deficiency was mailed to the Finnegans on February 7, 2013, which was after the expiration of the three-year period of limitations on assessment. Thus, the Commissioner's assessments of the

[10] Sections 6213(a) and 6503(a)(1) collectively provide that the running of the period of limitations on assessment in section 6501(a) is suspended from the date on which a notice of deficiency is issued through the 90-day period during which the taxpayer can file a petition with the Tax Court for a redetermination for the deficiency, and for 60 days thereafter. Of course, that rule is of no consequence where, as here, the period of limitations expired before the issuance of the notice of deficiency.

taxes and penalties for the Finnegans' 1994 through 2001 tax years are time-barred. And, because the Tax Court clearly erred in failing to hold the assessments are time-barred, reversal is appropriate. *Accord United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (ruling that clear error occurs where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

POINT II

THE TAX COURT'S EVIDENTIARY RULINGS WERE AN ABUSE OF DISCRETION

I. Standard of Review

This Court reviews a trial court's evidentiary rulings for abuse of discretion. *See United States v. Hasner*, 340 F.3d 1261, 1274 (11th Cir. 2003). This Court should reverse an evidentiary ruling if the trial court made a clear error of judgment or applied an incorrect legal standard. *See Conroy v. Abraham Chevrolet-Tampa, Inc.* 375 F.3d 1228, 1232 (11th Cir. 2004). If this Court does not reverse the Tax Court on the ground that the assessments of taxes and penalties are time-barred by the three-year period of limitations on assessment in section 6501(a), then this Court should still reverse the Tax Court's evidentiary objections, vacate its decision, and remand this case with instruction to hold a new trial.

II. The Testimony of Agent Ashcroft and Robins Was Irrelevant and Highly Prejudicial

The Finnegans objected to the testimony of Agent Ashcroft and Robins on relevance grounds because Robins did not prepare, and Agent Ashcroft did not investigate, the Finnegans' tax returns for 1994 through 2001. (A242). The Tax Court, in applying the wrong legal standard to section 6501(c)(1), concluded that each of Agent Ashcroft's and Robins' testimony was admissible under FED. R. EVID. 406 as evidence of Howell's *modus operandi*. The Tax Court abused its discretion by recognizing as relevant, and admitting, this highly prejudicial testimony.

Rule 401 of the Federal Rules of Evidence sets forth the general test for relevant evidence, providing that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." As Point I of this brief explains, the phrase "with the intent to evade tax" in section 6501(c)(1) refers to the taxpayer's intent and not the intent of some third part. Once the reasoning in *Allen* is rejected, evidence of Howell's habit is completely irrelevant. The testimony of Agent Ashcroft or Robins does not make it any more or less probable that the Finnegans acted with the intent to evade tax, and that testimony is of no consequence in deciding the issue in this case: whether the Finnegans acted with the intent to evade tax. To the contrary, allowing this type of highly prejudicial testimony into evidence any time the Government alleges that the fraud of a third-party suspends the period of limitations upon assessment allows for an inference that the taxpayer acted with the specific intent to evade tax because the taxpayer's tax return reported items similar to the items on others' tax returns.

Moreover, the presumption that *Allen* invites is often irrebuttable because most taxpayers will be unable to compel their allegedly fraudulent preparer to testify if the preparer is awaiting trial or sentencing or has entered into a cooperation agreement with the Government. On the basis of the foregoing, the Tax Court should have excluded the testimony of Agent Ashcroft and Robins on the ground that their respective testimony was irrelevant. Even if the Tax Court believed the evidence was marginally relevant, the testimony was still inadmissible under FED. R. EVID. 403 because the probative value of the testimony is substantially outweighed by issue confusion and unfair prejudice.

III. Howell's Testimony in Mitts' Criminal Trial and Howell's Affidavit Against the Finnegans Are Inadmissible Hearsay Not Excepted by FED. R. EVID. 804(b)(3)

The Finnegans also objected to the admissibility of Exhibit 57-R, which was Howell's testimony from the criminal trial of Mitts, and Exhibit 63-R, which was Howell's alleged affidavit stating he "knowingly … prepared [for the Finnegans, Jomarjen, and Gannan] false income tax returns for [1994 through 2001]." (A121). The Tax Court ruled that both exhibits were admissible hearsay pursuant to the statement against interest exception of FED. R. EVID. 804(b)(3). (A244-245). This ruling was an abuse of discretion.

Rule 804(b)(3) of the Federal Rules of Evidence provides that a statement against interest is not excluded by the hearsay rule if the declarant is unavailable to testify and the statement is one which:

> **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
>
> **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

The Tax Court found that Howell's testimony and affidavit were "contrary to the declarant's proprietary or pecuniary interest" because Howell's statements exposed him to criminal and civil liability. (A246). The Tax Court also found that the mere fact that Howell testified pursuant to a cooperation-guilty plea does not render his statements unreliable or inadmissible. (A246). These conclusions were based on an error of law.

The Tax Court's determination that Howell's testimony at Mitts' criminal trial and his affidavit against the Finnegans were contrary to his proprietary and pecuniary interest overlooked the timing of Howell's statements. A federal grand jury indicted Mitts in connection with allegations of tax fraud on April 18, 2007, after Howell was indicted. *See United States v. Mitts*, No. 3:07CR-40-H, (W.D. Ky. Apr. 18, 2007) (superseding Indictment). Howell testified in Mitts' criminal trial on June 10, 2008, *after* Howell had already been indicted and signed a plea agreement. (A62-A117). The timing of Howell's statements leads to the logical inference that his statements were made as part of his cooperation-guilty plea.

The advisory committee notes to FED. R. EVID. 804(b)(3) specifically recognize that "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest." Consequently, when a co-conspirator has been convicted and given immunity so his statement could not subject him to further criminal liability, and where pressure is put on the co-conspirator by a prosecutor and grand jury to testify, giving of testimony is in his best interest rather than against it. *See United States v. Gonzales*, 559 F.2d 1271 (5th Cir 1977). Thus, Howell's statements were not statements against his interest because they were made in connection with a plea agreement that likely resulted in a more favorable resolution of his criminal matters. Moreover, Howell's statements are not against his pecuniary interest because they result in a tax liability for the Finnegans, not Howell. The Tax Court's admission of these statements as against Howell's interests represents a clear error.

The Tax Court also concluded that Howell's statements are trustworthy because they were corroborated by the Finnegans' respective testimony regarding his role in preparing their tax returns, Robin's testimony regarding office routines, and Agent Ashcroft's testimony about Howell's *modus operandi*. (A246). However, any trustworthiness to be ascribed to Howell's self-serving hearsay is easily outweighed by the fact that both the testimony at a prior trial and the affidavit were made in connection with a cooperation-guilty plea.

Out of court statements are untrustworthy and inadmissible as declarations against interest where a witness testified in hope of receiving preferential treatment from authorities. *See United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978). Howell's trial testimony was given at a time when he reasonably believed "that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes." *Williamson v. United States*, 512 U.S. 594 (1994). Thus, Howell's testimony at Mitts' criminal trial and his affidavit are inadmissible hearsay because the self-serving nature of both statements creates doubt as to their trustworthiness. The Finnegans' inability to cross-examine Howell deprived them of a fair trial. It follows that this Court reverse the Tax Court's evidentiary objections and vacate its decision.

CONCLUSION

For the foregoing reasons, the Tax Court's decision should be reversed or, alternatively, reversed, vacated, and remanded with instructions.

Date: January 5, 2018

Respectfully submitted,

/s/ Frank Agostino
Frank Agostino
Attorney for Petitioners-Appellants
Agostino & Associates, P.C.
14 Washington Place
Hackensack, New Jersey 07601
Tel: (201) 488-5400, x. 107

/s/ Lawrence A. Sannicandro
Lawrence A. Sannicandro
Attorney for Petitioners-Appellants
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Tel: (973) 639-2081

STATUTORY ADDENDUM

26 U.S.C. § 6501 – Limitations on assessment and collection

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) …, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

* * * * * * *

(c) Exceptions

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time….

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26 U.S.C. § 6663 – Imposition of Fraud Penalty

(a) Imposition of penalty

If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

(b) Determination of portion attributable to fraud

If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer establishes (by a preponderance of the evidence) is not attributable to fraud.

(c) Special rule for joint returns

In the case of a joint return, this section shall not apply with respect to a spouse unless some part of the underpayment is due to the fraud of such spouse.

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26 U.S.C. § 7454 – Burden of proof in fraud, foundation manager, and transferee cases

(a) Fraud

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary.

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26 U.S.C. § 6161 – Extension of time for paying tax

(b) Amount determined as deficiency

(3) No extension for certain deficiencies

No extension shall be granted under this subsection for any deficiency if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

Revenue Act of 1918, Pub. L. No. 54-254, 40 Stat. 1057

(b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. In such case if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intend to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

If the understatement is false or fraudulent with the intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the amount of the deficiency.

* * * * * * *

(d) Except in the case of false or fraudulent returns with intent to evade tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(g) AND 11TH CIR. R. 28-1(m)

It is hereby certified that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 11TH CIR. R. 32-4, this brief contains 8,004 words; and

2. This 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 this brief has been prepared in a proportionally spaced typeface using the Microsoft Word word processing program in 14 point font size and Times New Roman style.

Date: January 5, 2018

/s/ Lawrence A. Sannicandro
Lawrence A. Sannicandro
Attorney for Petitioners-Appellants
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Tel: (973) 639-2081

CERTIFICATE OF SERVICE

It is hereby certified that on January 5, 2018, I electronically filed the foregoing Opening Brief for Petitioners-Appellants with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. Counsel for the Appellee is a registered CM/ECF user and will be served by the CM/ECF system.

It is further hereby certified that I will mail to the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit seven paper copies of the foregoing Opening Brief for Petitioners-Appellants.

Date: January 5, 2018

/s/ Lawrence A. Sannicandro

Lawrence A. Sannicandro
Attorney for Petitioners-Appellants
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Tel: (973) 639-2081