The Paradox of Preparer Fraud

By Adam S. Wallwork

Adam S. Wallwork provides a novel look at the Tax Court's doctrine of preparer fraud, which recently provoked a circuit split. Adam shows that that doctrine is inconsistent with the language of Code Sec. 6501(c)(1)'s fraudulent-return exception, as well as its history and policy. The article also presents empirical evidence that this new tax policy actually increases fraud in the name of preventing it.

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I. Introduction

Tax evaders have never enjoyed repose from statutes of limitation in federal tax cases.[1] During the 19th century, the Supreme Court twice removed limitations from federal tax collectors where the government proved that their delinquent assessments were due to fraud on the part of taxpayers or their agents.[2] Congress first codified this principle in Section 250(d) of the Revenue Act of 1918, which has survived through codification in Code Sec. 6501(c)(1).[3]

Section 6501 of the Internal Revenue Code of 1986 ("the Code") is only the most recent in a long history of tax statutes designed to restrict repose to honest mistakes by good-faith filers. Under Code Sec. 6501(a), the IRS must generally determine and notify the taxpayer of a deficiency within three years after the return has been filed by sending a statutory notice of deficiency, which is also called a 90-Day Letter, to the taxpayer's last known address.[4] Another provision of the tax code extends the IRS's period for collecting taxes by another three years if the taxpayer negligently omits an item of income from a federal tax return that exceeds 25 percent of reported gross income.[5]

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But until recently taxpayers who have filed their returns honestly and in good faith have been immune from federal tax assessments not commenced within six years of the return's filing date. If the taxpayer's return was "fraudulent with the intent to evade tax," however, no such time limit has applied for nearly a century under a rule whose meaning is now in flux.[6]

From its inception, Congress intended the tax code's unlimited assessment period for fraudulent returns to apply only "where there is evidence that the taxpayer designed to evade the tax."[7] Nevertheless, the IRS has recently changed its interpretation of 6501(c)(1) to meet the perceived threat of tax-return preparers who are generally not agents.[8] Expansion of the tax-preparation industry between 1993 and 2005, combined with increasingly complex U.S. income tax rules, led to a 66-percent drop in the number of self-preparers during that period.[9] During the most recent 10 years for which statistics are available, professional preparers completed 59 percent of all U.S. tax returns, compared with only 41 percent which were self-prepared.[10]

In the IRS's view, this trend represents a serious threat to tax administration because it might "allow a taxpayer to receive the benefit of a fraudulent return by hiding behind the preparer."[11] And the agency has since 2001 pursued a policy of going after innocent taxpayers for wrongs of persons over whom they may have no control.[12]

In *V. Allen*,[13] the IRS convinced the U.S. Tax Court in a matter of first impression that deficiencies under Code Sec. 6501(c)(1) could forever be assessed against a taxpayer "if the tax on a return is understated due to the fraudulent intent of the income tax return preparer."[14] This novel doctrine, which has since been adopted by the Second Circuit Court of Appeals, "keys the extension to the fraudulent nature of the return, not to the identity of the perpetrator of the fraud."[15]

Thus, for litigants in federal courts that hear over 95 percent of taxpayers' claims against the IRS, no proof of the taxpayer's innocence is grounds for relief from perpetual tax assessment on the basis of a preparer's fraud.[16] Nor is proof that the taxpayer's preparer was acting outside the scope of his actual or apparent authority. All that is required for limitless assessment of a taxpayer's return in these courts is "clear and convincing evidence" that for each return "(1) an underpayment of tax exists, and (2) the return preparer intended to evade taxes known to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of tax."[17]

The federal courts of appeal are now badly split over whether the taxpayer's fraudulent intent is required to toll the statute of limitations in tax cases.[18] Last July, in *BASR Partnership*,[19] the U.S. Court of Appeals for the Federal Circuit upheld the Claims Court in rejecting the doctrine of preparer fraud.[20] Although the Federal Circuit case involved a lawyer rather than Allen's "signing tax return preparer," a majority of the panel held that only fraud of the taxpayer or an authorized agent triggered unlimited assessment under 6501(c)(1).[21] With the Federal Circuit's split from the Second Circuit over the viability of Allen's preparer-fraud doctrine, Supreme Court intervention is needed to resolve the conflict.

For taxpayers who know the rule of law and can pay their deficiency, the Tax Court's doctrine of preparer fraud may become less of a burden in light of the doctrine's rejection in the Claims Court. Federal laws give taxpayers their pick between those courts with the ticket to Claims Court contingent on paying first and litigating later.[22] The circuit split may be a momentary blessing for those well-informed and financed enough to pay their way into Claims Court. But for those without such resources, the Tax Court's doctrine of preparer fraud remains a formidable obstacle.[23]

This article examines 6501(c)(1)'s text, history and policy in light of these recent decisions and concludes that Allen is not only inconsistent with all three but that the IRS should support its abolition.[24]

II. Legislative History

That fraud vitiates all transactions is no less true under the Code than it is at common law.[25] For as long as Congress has limited the amount of time the IRS has to collect taxes from delinquent taxpayers, good faith on the part of the taxpayer has been required for any such limitation to apply.[26] Federal tax procedures have since 1919 authorized tax collection at any time "in the case of a false or fraudulent return with intent to evade tax."[27]

Congress enacted the first such statute as part of Section 250 of the Revenue Act of 1918 in order to prevent those who would defraud internal-revenue laws from obtaining their preclusive effect.[28] And for all but the last few years, the fraudulent-return statute-of-limitations exception has been construed in light of principles of agency, which require the government to prove fraud on the part of a taxpayer or an agent before allowing perpetual assessment of taxes.[29] But more recently, a misunderstanding of the statute's original intent following its recodification in Code Sec. 6501(c)(1) has caused courts to lose their way.

The House Ways and Means Committee originally conceived the fraudulent-return exception as one of five provisions penalizing fraud in Section 250 of House Bill 12863 (Sept. 3, 1918).[30] That provision was not

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subdivided and defined "false or fraudulent returns" in contrapose to "negligence on the part of the taxpayer, without intent to defraud," and "fault of the taxpayer."[31]

The Senate Finance Committee later divided Section 250 into subparagraphs but continued to define "fraudulent returns with intent to evade the tax" in terms of the taxpayer's fraud.[32] Thus modified, Senate Finance reported Section 250(d) out of committee with the explanation that "[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."[33] On that basis, the 65th Congress established the unlimited assessment period for "fraudulent returns with intent to evade the tax," now found in Code Sec. 6501(c)(1).

The cases on preparer fraud have not discussed this legislative history, which sheds new light on the intent required to toll the statute under 6501(c)(1) and calls Allen's doctrine into question.[34]

III. Code Sec. 6501

The IRS generally has three years from the taxpayer's filing date, or deemed filing date, within which to reassess unpaid taxes.[35] That three-year limitations period may be extended to six years for honest, but substantial, omissions from the taxpayer's return.[36] But if the IRS fails to reassess the return within six years of filing, collection is barred unless the government proves fraud under Code Sec. 6501(c)(1) (income tax fraud), Code Sec. 6501(c)(2) (employment, payroll and excise tax fraud) or Code Sec. 6229(c)(1) (fraud on partnership returns).[37]

Code Sec. 6501(c)(1) authorizes unlimited assessment "[i]n the case of a false or fraudulent *return* with the intent to evade tax." The "return" referred to in this provision means "the 'return' required to be filed by the taxpayer."[38] Whether a third-party preparer's fraudulent return is attributable to the taxpayer would therefore seem to turn on the scope of the preparer's authority to act on the taxpayer's behalf.[39]

Congress has also removed the IRS's presumption of correctness in cases "involving the issue whether *the petitioner*," in other words the taxpayer, "*has been guilty of fraud with intent to evade tax*."[40] Although taxpayers ordinarily have the burden of disproving their deficiency in federal tax cases, Code Sec. 7454(a) shifts that burden onto the government in cases where the taxpayer's fraud is at issue.[41] In cases under Code Sec. 7454, the Tax Court requires the government to prove fraud by "clear and convincing evidence," which is a quantum of proof higher than a mere preponderance of evidence but less stringent than guilt beyond a reasonable doubt.[42]

Whether a *taxpayer* has filed a "fraudulent return with the intent to evade tax" under 6501(c)(1) undoubtedly involves a Code Sec. 7454 question of whether "the petitioner has been guilty of fraud with intent to evade tax," which shifts the burden of proof to the IRS. In cases of preparer fraud, however, the issue is not "whether the petitioner has been guilty of fraud with intent to evade tax" but whether his or her preparer has. And while the taxpayer can petition federal courts for redetermination of a deficiency, a preparer cannot.[43]

Code Sec. 7454(a) should not apply, and taxpayers should retain their burden of proof if 6501(c)(1) does not require proof of a taxpayer's fraud.[44] But the Tax Court incongruously places the burden on the IRS in cases of preparer fraud to prove by clear and convincing evidence both (1) that the taxpayer's return is deficient and (2) that some amount of the deficiency is due to fraud on the part of the tax return's preparer.[45] That the IRS has not objected to this burden speaks more to the ease of proving preparer fraud rather than its structural integrity.[46]

There would be no contradiction between applying the higher burden of proof under 7454(a) and eliding the taxpayer's fraudulent intent from 6501(c)(1) if "tax return preparers" were invariably agents of the taxpayer. A taxpayer who vests an accountant with a broad power of attorney to file a return may be held liable if the agent does so fraudulently.[47] But without such power, tax-return preparers are not agents for they lack authority to bind the taxpayer.[48] IRS regulations also make clear that many of those classified as "tax return preparers" for federal tax purposes are not agents under general legal principles.[49] Cases of preparer fraud do not therefore raise the issue of the taxpayer's imputed fraud, which precludes the application of 7454(a). Thus, the Tax Court's doctrine of preparer fraud contravenes the logic of the Code.[50]

IV. The Doctrine of Preparer Fraud

A. Tax Preparation

The tax-preparation industry did not exist when Congress first authorized unlimited tax collection from those who filed "fraudulent returns with the intent to evade tax" in 1919.[51] Commercial tax preparation is a creature of the post-war era.[52]

Although the Sixteenth Amendment put the federal income tax back on a constitutional footing, after Pollock, in 1913, federal budgets before and after the Second World War were of different orders of magnitude.[53] Federal budgets from 1944 to 1974 exceeded by 1294 percent those from 1913 to 1943, although the earlier decades included budgets for both World Wars.[54]

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Taxes fueled that growth. Only one American in 17 owed federal taxes before 1940.[55] At war's end that number was three in four.[56] But federal taxes after World War II were not only levied on a broader base but also were more complex. While the Revenue Act of 1918 was only 47 pages of U.S. Statutes at Large, Congress's recodification of the tax laws in 1954 for the first time exceeded 900 pages.[57] And today's Instructions to Form 1040 and Schedules now exceed the 1918 tax code by nearly 200 pages.[58]

Studies have shown that taxpayers' demand for "professional tax assistance is directly related to the complexity of the tax return and the marginal tax rate on income."[59] Between 1919 and 1954, the federal income tax base increased by more than 1,150 percent, and the length of the federal tax code expanded by 1,830 percent.[60] Professional and commercial tax preparation began to develop as an industry during the late 1950s and early 1960s along with this concomitant expansions of federal taxing power.[61] Each year, tax-return preparers help taxpayers navigate the Byzantine architecture of federal tax laws and make sense of administrative complexity.

B. Tax-Return Preparers

Congress authorized the IRS to regulate tax preparers as part of the Tax Reform Act of 1976.[62] Today, the IRS estimates that professionals prepare nearly 60 percent of all federal tax returns.[63] IRS statistics indicate that the number of self-preparers who filed returns without professional assistance fell by more than 66 percent between 1993 and 2005.[64] More recent statistics show that professionals prepared 59 percent of U.S. returns filed between 2004 and 2013, with self-preparers responsible for the other 41 percent.[65]

Reg. §301.7701-15 defines the concept of a "tax return preparer" for federal income tax purposes, although it remains to be seen whether Allen's doctrine of preparer fraud includes all such preparers.[66] Broadly speaking, and subject to numerous qualifications, "tax return preparers" are independent contractors who are paid for tax advice that is directly relevant to a position taken on the taxpayer's "return" or "claim for refund."[67]

Under IRS rules, most people who prepare information returns are not considered tax-return preparers for purposes of the Code.[68] Nor are federal tax litigators or those involved in low-income taxpayer assistance programs.[69] Most importantly, for our purposes, the regulatory definition of "tax return preparers" excludes numerous categories of common-law agents, including the taxpayer's employees, officers, directors and general partners.[70] That these classic subjects of vicarious liability are not "tax return preparers" demonstrates that tax-return preparers simply are not agents.[71] The concepts track each other not at all.

This makes sense in light of the divergent purposes of agency law and regulations governing tax-return preparers. While Reg. §301.7701-15 regulates practitioners, the Allen doctrine of preparer fraud regulates those who hire practitioners. Thus, the IRS regulations establish rules for "signing tax return preparers," which subject those primarily responsible for preparing a return to strict liability for failing to sign it.[72] But the regulatory concept of "nonsigning tax return preparers" also encompasses a much broader category of professional advisors, including lawyers, who may never even see the return they are deemed to have "prepared."[73]

It is unclear what role, if any, this regulatory distinction between "signing" and "nonsigning" preparers should have in the context of preparer fraud. But no court has ever subjected taxpayers to perpetual liability based on the actions of "nonsigning tax return preparers."[74] Indeed, the Federal Circuit distinguished Allen on grounds that Erwin Mayer, "the lawyer who structured the fraudulent tax vehicle" at issue in *BASR Partnership*, was "yet another step removed" from the accountant who signed the taxpayer's return, although Mayer was likely a nonsigning-tax-return preparer under IRS regulations.[75]

Not only are employees, director, officers, representatives and other agents of a taxpayer "persons who are not preparers" under Reg. §301.7701-15(f) but many persons who are not agents will be "tax return preparers" within the meaning of the regulations. "Put simply, tax-return preparers are not agents."[76]

As a general matter, the rules of agency hold persons responsible for their servants, vicariously, and for their independent contractors only as a result of negligence.[77] Federal tax law, which values certainty, has established even more precise rules for statutory tolling.[78] Thus, in 1985, the Ninth Circuit held that the terms of a taxpayer's Form 2848, *Power of Attorney and Declaration of Representative*, controlled what actions of his accountant were attributable to him for purposes of tolling the statute of limitation under Code Sec. 6501.[79] The court noted that, although the taxpayer could have designated the address of his representative as that to which any deficiency notice should be sent, he had not done so.[80] As such, the IRS's timely notice to the taxpayer's accountant was insufficient to toll the three-year period within which such notice had to be sent to the taxpayer.[81]

C. Paying for Preparer Fraud

Allen decided for the first time that "the limitations period for assessing income tax under section 6501(c)(1) is

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extended if the tax on a return is understated due to the fraudulent intent of the income tax return preparer."[82] But Allen's analysis is misleading because it assumes that "tax return preparers" are agents, although they are not.[83] Thus, Judge Kroupa, who wrote the *Allen* opinion, refers variously to Gregory Goosby, whom Vincent Allen hired to prepare his returns, as the taxpayer's "preparer" or his "agent," without distinguishing the concepts.[84] The *Allen* decision is made more confusing because the IRS had argued Goosby's agency as one grounds for the court's decision, which the Tax Court rejected in favor of a second, broader, theory that "it is the fraudulent nature of the return that extends the limitations period" under 6501(c)(1).[85] However, more recent cases of preparer fraud are more careful about their terms and do not speak of agency.[86]

Tax-return preparers are most often independent contractors under agency law for whom liability is based on fault rather than imputed.[87] Under standard rules of agency, a taxpayer would only be liable for actions undertaken by a return preparer within the scope of his or her power of attorney.[88] Thus, the Fifth Circuit ruled in 1941 that a taxpayer could not be held liable for his preparer's tax fraud unless he knew about, and ratified, the fraudulent filing of his return.[89] Today, however, the Tax Court holds taxpayers accountable for intentional torts committed by persons who are not their agents under a doctrine of preparer fraud that is more uncertain today than ever before.[90]

The doctrine of preparer fraud is Justice Robert Jackson's nightmare world where innocents are forever liable "to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest" and where there never comes a day of final rest.[91] Its punitive effects are felt randomly by those who are incapable of preventing the tax evasion for which they are punished.

1. The Chief Counsel's Switch in Time

When Congress first authorized "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," nearly all income tax returns were self-prepared.[92] During the later half of the 20th century, however, commercial tax preparation developed into a multibillion-dollar industry.[93] By early 2001, IRS data showed that more than half of U.S. tax returns were prepared by professionals rather than taxpayers, prompting the IRS Chief Counsel's Office to dramatically change its theory of preparer fraud within a six-month span.[94]

Two Field Service Advice Memoranda (FSAs) issued by the IRS Chief Counsel's Office in late January and June 2001 illustrate the agency's shift from traditional rules of agency to a novel doctrine of strict and perpetual liability for innocent taxpayers. In January of that year, the IRS issued a lengthy FSA to an innocent truck driver whose tax-return preparer had committed fraud and who wanted to know whether he was perpetually liable under 6501(c)(1).[95] The Chief Counsel explained in a well-reasoned response that general principles of agency foreclosed unlimited liability in cases where the taxpayer was unaware of the preparer's fraud.[96]

Then, six months later, the Chief Counsel's Office reversed course in a June 2001 decision issued a month before commencing litigation in the first case of imputed fraud under 6501(c)(1).[97] Now, the Chief Counsel reasoned that 6501(c)(1) applied because the fraud required under that provision was not taxpayer-specific. As if reading the 97-year-old statute with new eyes, the IRS ruled that fraud on the part of a tax-return preparer would toll the assessment period indefinitely regardless of the taxpayer's intent.

Although the Tax Court found the Chief Counsel's new position unconvincing in *Christians*, the Court ultimately sided with the IRS in *Allen*.[98] Both the *Allen* decision and FSA 200126019 are premised on a theory that taxpayers can evade taxes by hiding behind a tax-return preparer. From this premise, it follows that taxpayers should be deterred from hiring fraudulent return preparers at any cost. But this premise is conceptually unsound and empirically inaccurate, as discussed in further detail below.[99]

2. Allen

In *Allen*, the Tax Court decided for the first time that fraud of a taxpayer's income-tax-return preparer indefinitely tolls the IRS's collection period under 6501(c)(1).[100] *Allen* arose out of the IRS's criminal investigation of Vincent Allen's professional tax preparer, Gregory D. Goosby, who was ultimately convicted under Code Sec. 7206(2) for "willfully" falsifying deduction on tax returns filed on behalf of clients for tax years 1999–2001.[101] The IRS Criminal Investigation Division (IRS-CI) began auditing Goosby's tax preparation service in 2001 and interviewed his client, Allen, in 2003.[102]

Allen told IRS investigators that he had been employed as a UPS truck driver in 1999 and 2000 and had hired Goosby on the advice of co-workers to prepare his tax returns for both years.[103] He also said that Goosby had provided him with copies of the returns soon after they were filed.[104] But when Allen went over Goosby's work with IRS-CI in 2003, he identified numerous deductions claimed by Goosby for expenses Allen had not incurred during either year.[105]

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The facts of *Allen* suggest that the relationship between Allen and Goosby was that of principal and agent, and indeed the case was argued on that basis.[106] Allen authorized Goosby to prepare his returns and file them sight-unseen. Nor had Allen verified the truth of Goosby's filings when the preparer provided a copy to him years earlier. If Allen had bothered to review Goosby's work in April 2000, he might have identified the numerous bogus deductions that Goosby had taken on his 1999 return. Instead, IRS-CI was left to discover the error during a criminal probe at a time when the three-year assessment period under Code Sec. 6501(a) had nearly expired on the 1999 return. The case was therefore squarely within the purview of the long history of tax jurisprudence that ascribed fraud of the taxpayer's agent to the taxpayer for statute of limitation purposes.[107]

But the Tax Court's ruling in *Allen* went far beyond the principal of agency advocated by the IRS.[108] *Allen*'s radical innovation was to eliminate personal responsibility as a requirement of unlimited assessment "[i]n the case of a false or fraudulent return, with the intent to evade tax," and to reframe the exception as a rule of strict liability based on principles of efficiency. The court's textual analysis was limited to 6501(c)(1)'s use of the passive voice, while its analysis of legislative history was virtually nonexistent. The court claimed that, since 6501(c)(1) lacked a subject, the *taxpayer*'s *motive* was irrelevant to the analysis of whether there was a "fraudulent return, with intent to evade tax."[109] *Allen* thus transformed the analytical focus of 6501(c)(1) from the *intent* of the taxpayer to the *fraudulent* nature of the *return.*

3. City Wide Transit

Whatever principle of agency once underlay Allen's doctrine of preparer fraud was eliminated by the Second Circuit's 2013 decision in *City Wide Transit, Inc.*[110] Ray Fouche owned and managed *City Wide Transit, Inc.,* which transported handicapped schoolchildren in the New York City Public Schools.[111] Although the company had dutifully filed quarterly payroll tax returns showing the correct amount of taxes owed for 1997 and 1998, it could not afford to pay its bills.[112] By the end of 1998, Fouche's bus companies, including City Wide, owed the IRS a total of nearly $700,000 in back payroll taxes.[113]

Fouche hired Manzoor Beg in April 1999 to help her clean house. She gave Beg a power of attorney to deal with the IRS on behalf of her companies, although his Form 2848 was not part of the Tax Court's record.[114] But Beg turned out to be a fraud who stole more than $370,000 from City Wide in tax payments made out to the IRS.[115]

In late 2000, Beg told Fouche that he had resolved City Wide's payroll liabilities. He told her that in order to complete the deal the revenue agent with whom he had been dealing required all of City Wide's truthfully prepared, but then outstanding, payroll tax returns from January 1999 to June 2000.[116] Fouche gave Beg the City Wide returns he had requested along with a check for approximately $370,000 made out to the IRS for the amount of taxes shown on those returns.[117] These returns, which Fouche had signed, were never filed by Beg.[118]

Instead, Beg stole City Wide's $370,000 tax check by altering the name of the payee and depositing it in his Himalayan bank account.[119] He then prepared forged returns on City Wide's behalf, which not only replaced the signed returns Fouche had given him but also amended two others besides, which had already been filed and paid by City Wide during 1997 and 1998.[120] On these returns, which were at issue before the Tax Court and Second Circuit, Beg knowingly claimed false deductions on City Wide's returns for earned income credit (EIC) payments to employees, so that he could pay the smaller amount of tax due and keep the remaining $370,000.[121]

This scheme allowed Beg to keep his theft secret from Fouche for nearly a year before the U.S. government indicted him for embezzling City Wide's money, forging company checks and filing false tax returns on its behalf.[122] Thus, Beg's purpose in filing the fraudulent returns was not to benefit City Wide but to keep his defalcation hidden from the company's owner and manager.[123] The Tax Court focused on this fact to distinguish Allen, although the Second Circuit reversed.

There is no question that the government could have collected taxes from City Wide if it had done so within three years of the date the returns were filed by Beg. But by the time the IRS sought to collect them from City Wide, 6501(c) remained the only grounds on which the company's 1999–2000 payroll taxes could be collected.[124]

Under standard principles of agency, Beg's outrageous crimes against City Wide would be considered a personal frolic for which City Wide could not be held vicariously liable.[125] And that is what the Tax Court held in *City Wide Transit, Inc.*[126] The trial court found no clear and convincing proof that Beg's filing of fraudulent returns on behalf of City Wide had been done with the specific intent to evade tax.[127] According to the Tax Court, "Mr. Beg intended only to cover up his embezzlement scheme and not [to] defeat or evade petitioner's tax," which was only "an incidental consequence or secondary effect of his embezzlement scheme."[128] Therefore, the court refused to authorize unlimited assessment of the defrauded company.[129]

But the Second Circuit demurred on grounds that Allen established perpetual liability whenever "taxes [are] understated due to fraud of the preparer."[130] The Second

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Circuit first established Allen's doctrine of preparer fraud as the proper interpretation of 6501(c)(1). The appellate court explained that "the special disadvantage to the Commissioner in investigating fraudulent returns is present if the income tax return preparer committed the fraud that caused the taxes on the return to be understated."[131]

However, the Second Circuit rejected the Tax Court's fillip in City Wide for cases where the return preparer's tax fraud is merely secondary to a fraud on the taxpayer.[132] Drawing on rules of criminal law, the court of appeals reasoned that "if one of a conspiracy's objectives, even a minor one, be the evasion of federal taxes, the offense is made out, though the primary objective may be concealment of another crime."[133]

Thus, Beg's fraudulent intent was no less fraudulent for purposes of statutory tolling by virtue of his embezzlement scheme against the taxpayer. And City Wide remained liable not only for its own defrauding but also compound interest forever more.[134] Unless the Second Circuit changes course, the Tax Court will be obligated to apply City Wide in any case of preparer fraud arising in the states of New York, Connecticut and Vermont.[135]

4. BASR Partnership

City Wide turned out to be preparer fraud's high-water mark for the Court of Federal Claims rejected Allen less than eight months later.[136] Last summer, the Federal Circuit Court of Appeals upheld the Claims Court's decision in *BASR Partnership*, splitting the courts of appeal and establishing a different rule of law for refund claims as for deficiency claims.[137] As a result of *BASR Partnership*, taxpayers now have a choice of independent refund procedures that depend on their ability to "pay first and litigate later."[138]

BASR Partnership involved a "Son of Boss" tax shelter setup for the Pettinati family in order to eliminate capital gains on a sale of their closely-held printing company. Erwin Mayer of the law firm of Jenkens & Gilchrist conceived of the Pettinatis' transaction in six steps.[139] Radically simplified, the Pettinatis first executed short sales of U.S. Treasuries, through various entities, which gave them approximately $6.64 million in exchange for their promise to repay the lender in equivalent securities sometime later.[140] They then contributed that $6.64 million, plus their note to repay the same, along with their printing business to *BASR Partnership*. Finally, the Pettinatis elected to step up their basis in the partnership under Code Sec. 754.[141] Mayer told the Pettinatis and their professional preparer that such transfers increased the Pettinatis' outside basis in *BASR Partnership* by $6.64 million without offset for the partnership's assumption of a $6.64 million obligation to close the short sale by repurchasing the Treasuries.[142] Several days later, *BASR Partnership* closed the short sales and sold the Pettinatis' printing business for $6.91 million.

Mayer's firm had made "Son of Boss" transactions a cottage industry, which ultimately felled Jenkens & Gilchrist by landing its Chicago tax group in prison.[143] Mayer copped a plea and turned against his colleagues. He also agreed to confess that his transaction on behalf of the Pettinatis had been undertaken with fraudulent intent even though he had told BASR's partners and accountant that the transaction was legitimate.[144]

Mayer claimed that his transaction shrunk the Pettinatis' capital gain from their sale of the printing business from $6.91 million to just under $270,000.[145] Although *BASR Partnership's* signing-tax-return preparer, John Malone, was innocent of any wrongdoing, Malone consulted with Mayer in order to prepare the partnership's Schedule K-1.[146] That made Mayer a "nonsigning tax return preparer" within the meaning of Reg. §301.7701-15(b)(2), which allowed the IRS to raise for the time the question of whether someone other than a signing-tax-return preparer could make a return fraudulent under *Allen*.[147] But, instead, the Claims Court rejected the doctrine of preparer fraud altogether and a plurality of the Federal Circuit agreed.

Both courts distinguished *Allen* and *City Wide* on grounds that those cases had involved individuals directly involved with the preparation of the taxpayer's return, whereas Mayer's fraud in *BASR* was "secondary or remote to the fraudulent returns."[148] But that argument is less than convincing because Mayer was most likely a "nonsigning tax return preparer" for federal income tax purposes who would seem to be within *Allen's* purview.[149]

More importantly, both the Claims Court and Federal Circuit gave independent reasons for rejecting Allen's interpretation of 6501(c)(1). The Claims Court argued that Allen's preparer-fraud doctrine could not be squared with the structure of 6501(c)(1).[150] As discussed above, the fraudulent-return provision extends collection "[i]n the case of a false or fraudulent return," which is defined as "the return required to be filed by the taxpayer."[151] From this, the trial court concluded that "6501(c) is by implication limited to fraud by the taxpayer."[152]

Although *BASR Partnership* could have authorized Mayer to file its partnership tax return (Schedule K-1), it had delegated that task to Malone, whose intent was pure.[153] Consequently, the Claims Court held that Mayer's fraud did not make the partnership's return fraudulent within the meaning of 6501(c)(1).[154]

On appeal to a panel of the Federal Circuit, all three judges rendered separate opinions.[155] Judge Chen, joined by Judge O'Malley, reasoned from a "survey of other

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fraud-related provisions of the Code" that the fraudulent-return provision "contemplate[s] fraud by the taxpayer, as opposed to by a person who merely contributed, albeit in a fraudulent way, to the filing of an inaccurate tax return."[156] Although Judge Chen rightly notes that "[t]he fraud penalty and the fraud suspension of the statute of limitations appeared together in § 250 of the Revenue Act of 1918," he failed to uncover crucial legislative history wherein the provision's drafting committee simply stated that authority to suspend the statute depended on "evidence that the taxpayer designed to evade the tax."[157]

Without that link, Chief Judge Prost could rebuke the majority's analysis in *BASR* as just more evidence that Congress could write provisions like the fraud penalty that expressly require the taxpayer's fraudulent intent, although it had not done so here.[158] But Chief Judge Prost's analysis of 6501(c)(1) is unconvincing in light of the Senate Finance Committee's statements about the provision it had drafted.[159]

5. Forum Choice

BASR Partnership is a blockbuster case because it changes the stakes in cases of preparer fraud. Before the Federal Circuit's decision, taxpayers faced uncertainty wherever they litigated a tax case involving a preparer's fraud. But the Federal Circuit's rejection of the *Allen* doctrine makes the Claims Court a ready alternative to the Tax Court's jurisprudence.

The Code allows taxpayers a choice of forums, with advantages and disadvantages in each.[160] On the one hand, taxpayers may litigate an IRS determination of a deficiency in Tax Court without paying the assessed amount.[161] But taxpayers who can pay their deficiency up front may choose the Claims Court as their forum.[162] That makes last summer's *BASR* decision a likely game changer since taxpayers who can pay first will invariably choose to litigate cases of preparer fraud in Claims Court where they can bar collection of untimely assessments for the year or years at issue.[163]

As a matter of tax policy, however, this makes little sense because those who can "pay first and litigate later" are not always most affected by preparer fraud. In fact, 60 percent of the Tax Court's decided cases on preparer fraud have involved blue-collar workers who mistakenly hired tax criminals as accountants.[164] Fairness therefore counsels against the doctrine of preparer fraud.

But Allen is also indefensible on grounds of effective tax administrative because it makes hiring a professional tax preparer less desirable, although professionally-prepared returns are more than 20 times less likely to be fraudulent than self-prepared returns. This paradoxical result is explored in the empirical analysis of IRS data that follows.[165]

V. The Paradox of Preparer Fraud

A. Tax Policy Goals

In *Allen*, the Tax Court's analysis of the fraudulent-return exception's legislative history and structure is so parsimonious that *Allen* can only be explained on more general principles of tax policy. Judge Kroupa made those principles pretty clear. On the one hand, she said that it was not "unduly burdensome" to require taxpayers to check their tax-return preparer's work for fraud.[166] On the other, Judge Kroupa concluded that the IRS was equally disadvantaged by fraud of the tax-return preparer as it was by fraud of the taxpayer and should not only be allowed an extension of time for assessment in the latter case.[167] Neither assumption appears to be correct as a matter of fact or law.

The *Allen* decision cites the seminal Supreme Court case of *Badaracco* (1984) for the proposition that "[a]n extended limitations period is warranted in cases of a false or fraudulent return because of the special disadvantage to the Commissioner in investigating these types of returns."[168] That is true in so far as it goes. But the Tax Court then went on to say that the IRS "has just as much need for an extended limitations period to investigate and examine taxpayers who sign and allow to be filed returns that greatly overstate expenses or include fictitious expenses whether the fraud was committed by the taxpayer or the taxpayer's preparer."[169] A brief examination of the Supreme Court's *Badaracco* decision shows why that is not the case.

In *Badaracco*, the Supreme Court upheld a decision by the U.S. Court of Appeals for the Third Circuit that authorized the IRS to assess "fraudulent filers" for unpaid taxes more than three years after they had filed truthful amended returns.[170] The issue was whether a taxpayer who intentionally filed a false return with the intent to evade tax could subsequently repent and begin the running of the statute of limitations.[171] The Court ruled that once the taxpayer filed a fraudulent return, nothing could be done by the fraudulent filer to obtain repose.[172]

That result hardly seemed unfair to Justice Harry Blackmun or the seven other justices who joined his opinion since "*a taxpayer who has filed a fraudulent return with intent to evade tax* hardly is in a position to complain of the fairness of a rule that facilitates the Commissioner's collection of the tax due."[173] Justice Blackmun explained that it was also justified by sound tax policy since a fraudulent filer's amended return carries "no special or significant imprimatur [when] it comes from *a taxpayer who already*

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has made false statements under penalty of perjury."[174] The "special disadvantages" identified by the Supreme Court in *Badaracco* are like those of the Boy who Cried Wolf: Whom do we believe? The lying you, or the truthful one.

But now, under *Allen*'s unique interpretation of *Badaracco*, Code Sec. 6501(c)(1) "forever suspend[s a Sword of Damocles" over honest taxpayers who may once have hired a bad accountant.[175] To make matters worse, the Claims Court's rejection of preparer fraud provides a means of escape for wealthy taxpayers which is not available to all those who are innocent of tax fraud.[176] This result is not only unfair, it is also bad tax policy.

Almost 60 percent of U.S. taxpayers pay professionals to prepare their income tax returns.[177] According to the IRS, the number of paid tax-return preparers has grown steadily with the complexity of the U.S. tax code.[178] Less than six percent of Americans needed professional help to prepare their returns in 1932 when the income tax code was only 122 pages.[179] Today, the Code alone is 5,621 pages, and the Income Tax Regulations interpreting them run tens of thousands. Even the Instructions for Form 1040 and its Schedules are 1.7 times longer than the entire tax code was in 1932.[180] Between 1932 and 2009, tax-preparation services grew from an ancillary business of law and accounting firms into a multibillion-dollar industry with between 900,000 and 1.2 million professional tax-return preparers nationwide.[181] These professional preparers file approximately 86.6 million tax returns on behalf of clients each year.[182]

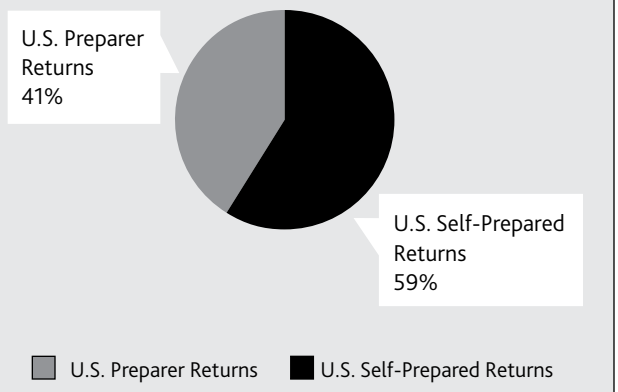
B. Hypothesis Testing

1. Preparer Fraud in Theory and Practice

Before the *Allen* doctrine of preparer fraud, taxpayers could effectively avoid perpetual assessments by adequately monitoring their agents. Taxpayers like Vincent Allen might be surprised by a late assessment but they could easily have prevented that risk by monitoring returns filed on their behalf. Today, taxpayers face uncertain and uninsurable risks from third-party tax preparation that can only be avoided by preparing their returns themselves. Empirical data on the prevalence of fraudulent returns filed by professionals and self-preparers call this policy into question, and regression analysis shows that *Allen's* doctrine of preparer fraud must fail on its own terms.

IRS data indicate that only about one in 11,765 taxpayers will hire a fraudulent-return preparer. Under these circumstances, it is neither feasible nor economical for taxpayers who use preparers to hedge against these infinitesimal odds. As a result, the likelihood of the taxpayer, as opposed to the government, spreading the cost of preparer fraud through self-insurance is not feasible.[183] On the other hand, taxpayers can only prevent this risk by avoiding third-party tax preparation. While taxpayers know their own minds, they cannot know for sure whether their preparers' intent is fraudulent. Thus, to the extent that self-preparation is a reasonable substitute for professional preparation, some taxpayers will avoid the uncertainty of Allen by preparing their returns themselves. In cases of preparer fraud, self-preparation is not only the best way of insuring against the long odds of perpetual assessment but also is likely the only way.

FIGURE 1. U.S. RETURNS FILED 2004-2013*



* I.R.S. Office of Research, Analysis & Statistics, Return Preparer Industry Analysis, June 20, 2013, https://www.irs.gov/pub/irs-soi/13resconreturnprepar.pdf (last visited: May 2, 2016).

The IRS has never said why it changed its litigating position in early 2001. But the agency must have determined around that time that third-party tax preparation represented an unacceptable risk of fraud. We can therefore measure the success of the preparer-fraud doctrine in terms of its likely impact on tax evasion.

This can be done empirically by evaluating the tax-preparation industry's contribution to fraudulent filings. If tax preparers file less fraudulent returns than self-preparers, the doctrine's encouragement of self-preparation cannot pay its way because the cost of reducing demand for third-party preparation will increase tax fraud system-wide.

IRS statistics, published annually since 2004, show that 59 percent of all returns prepared each year are prepared by tax professionals. The other 41 percent of tax returns are self-prepared (*see* Figure 1).

Although the population of self-preparers may be larger, we would expect that IRS prosecutions, indictments and sentences for tax fraud would be roughly in proportion to the number of return filed by either group because a person who files twice as many fraudulent returns has

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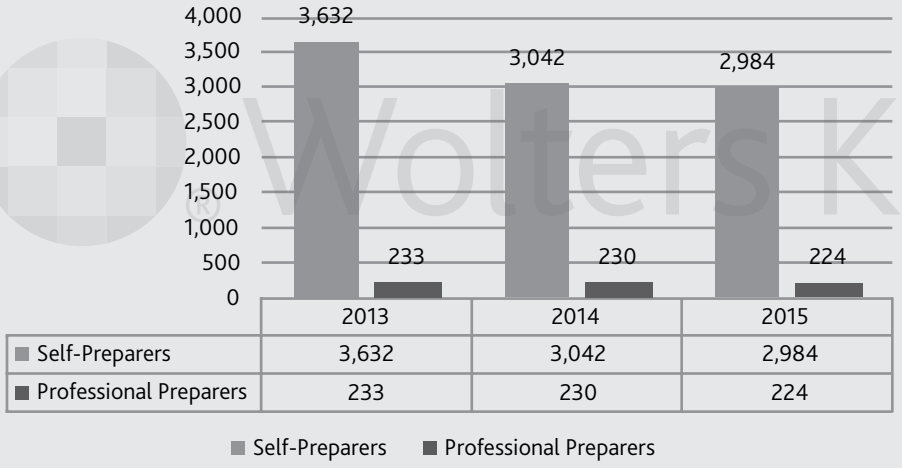
FIGURE 2. U.S. TAX FRAUD PROSECUTIONS*

* I.R.S. Office of Research, Analysis & Statistics, Return Preparer Industry Analysis, June 20, 2013, https://www.irs.gov/pub/irs-soi/13resconreturnprepar.pdf (last visited: May 2, 2016).

FIGURE 3. U.S. TAX FRAUD INDICTMENTS*



* I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data: Abusive Return Preparers, Oct. 13, 2015, https://www.irs.gov/uac/Statistical-Data-Abusive-Return-Preparers (last visited: May 2, 2016); I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data for Three Fiscal Years: Criminal Investigation (CI), Oct. 13, 2015, https://www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI), https://www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI) (last visited: May 2, 2016).

twice the chance of getting caught. Thus, all things being equal, professional preparers should account for close to 59 percent of all prosecutions, indictments and sentences recorded by the IRS-CI, while self-preparers should account for approximately 41 percent.

But the Criminal Investigations Division's statistics on abusive tax preparers tell a different story. IRS-CI began compiling statistics on preparer fraud in 2013 and has published data through 2015 on both (1) the total number of federal tax fraud prosecutions, indictments and sentences and (2) the number of preparers prosecuted, indicted and sentenced for federal tax fraud.[184] Analysis of these data demonstrates with a 99.999 percent degree of confidence that preparers accounted for a smaller proportion of federal tax prosecutions, indictments and sentences than their 59 percent share of tax returns filed. The data further reveal that self-preparers are more than 20 times more likely than professional preparers to be indicted for tax fraud.

2. U.S. Tax Fraud Prosecutions

From 2013 through 2015, IRS-CI recommended a total of 11,131 suspected tax criminals for prosecutions by the Department of Justice (DOJ). Of these, only 780 were professional preparers, while the other 10,351 were taxpayers. Thus, IRS-CI recommended only seven percent of federal tax prosecutions be undertaken against tax preparers and more than 93 percent against self-preparers, even though those numbers should have been closer to 59 percent and 41 percent, respectively, if the two groups prepared fraudulent returns in equal numbers.

3. U.S. Tax Fraud Indictments

Over the last three years, 93 percent of IRS-CI's recommendations for prosecutions have resulted in indictments for tax fraud, resulting in a total of 10,345 indictments against suspected tax criminals. Only 687 of these indictments were secured against tax professionals, while the other 9,658 were issued against self-preparers. Instead of 59 percent of such indictments being issued to abusive preparers since the IRS began keeping track, the number is seven percent.[185]

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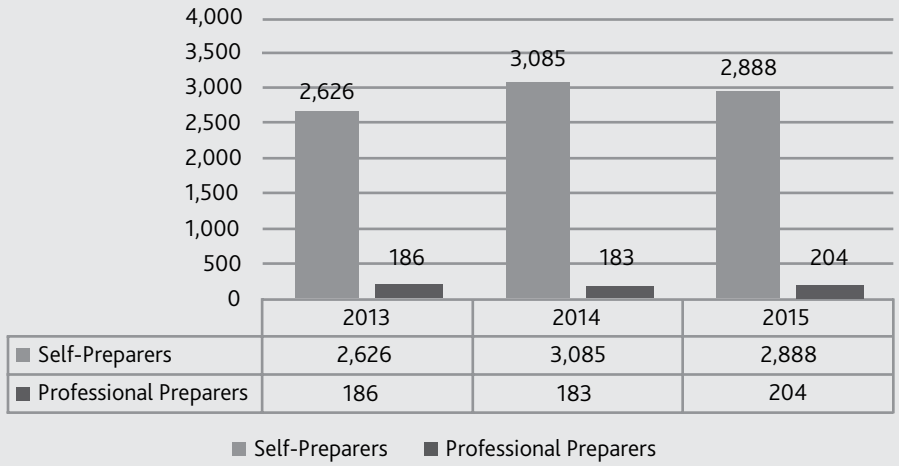
4. U.S. Tax Fraud Sentences

Finally, 8,803 tax evaders were convicted of federal crimes from 2013 to 2015, including 9,658 self-preparers and only 204 professional preparers. Thus, where 59 percent of those convicted and sentenced as tax evaders would be expected to be preparers based on the number of returns filed, they actually accounted for only six percent.[186]

FIGURE 4. U.S. TAX FRAUD SENTENCES*



* I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data: Abusive Return Preparers, Oct. 13, 2015, https://www.irs.gov/uac/Statistical-Data-Abusive-Return-Preparers (last visited: May 2, 2016); I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data for Three Fiscal Years: Criminal Investigation (CI), Oct. 13, 2015, https://www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI), https://www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI) (last visited: May 2, 2016).

5. Results and Conclusions

The proportions of preparers prosecuted, indicted and convicted of fraud are remarkably consistent and much lower than we would expect if third-party preparers committed fraud at the same rate as self-preparers.[187] This hypothesis was tested on IRS-CI indictments over the last three years.

Unlike recommendations for prosecution, the IRS is not responsible for bringing indictments, which are always handled by U.S. prosecutors with the DOJ. Although Assistant U.S. Attorneys generally work side-by-side with IRS counsel in prosecuting tax crimes, indictments require both agencies to agree that there is probable cause to initiate a prosecution. Such indictments are also issued in judicial proceedings where an independent federal judge will ultimately decide whether probable cause exists. Although "probable cause" is less demanding than "guilt beyond a reasonable doubt" required for criminal conviction, it is something more than the mere suspicion required for IRS-CI to recommend prosecutions.[188] All of these factors introduce a degree of interrater reliability into the indictment stage that makes federal statistics on indictments for tax fraud less susceptible to bias than data on prosecutions and sentencing.[189]

A chi-squared test with one degree of freedom was run against IRS-CI statistics on indictments from 2013 to 2015 in order to test whether professional preparers were less likely than self-filers to be indicted for federal tax fraud.[190] This test compares actual to expected numbers of indictments issued against tax professionals and self-preparers as a function of each group's total returns filed: 59 percent for paid preparers and 41 percent for individual filers.[191] The chi-squared test is designed to evaluate how likely it is that paid preparers were indicted for tax fraud at similar rates as self-preparers. If professionals were indicted at lower rates, this statistical test would tend to demonstrate that self-preparers are more likely to file fraudulent returns when they do not have professional help, although, as always, correlation is not causation (*see* Table 1).

The test's null hypothesis, that professional preparers are indicted in the same proportion as self-preparers,

TABLE 1.*

Expected	Indicted	Not Indicted	Total
Self-Preparers	4,248	562,665,752	562,670,000
Professional Preparers	6,097	807,723,903	807,730,000
Total	10,345	1,370,389,655	1,370,400,000
Observed	**Indicted**	**Not Indicted**	**Total**
Self-Preparers	9,658	562,660,342	562,670,000
Professional Preparers	687	807,729,313	807,730,000
Total	10,345	1,370,389,655	1,370,400,000

* I.R.S. Office of Research, Analysis & Statistics, Return Preparer Industry Analysis, June 20, 2013, https://www.irs.gov/pub/irs-soi/13resconreturnprepar.pdf (last visited: May 2, 2016); I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data: Abusive Return Preparers, Oct. 13, 2015, https://www.irs.gov/uac/Statistical-Data-Abusive-Return-Preparers (last visited: May 2, 2016); I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data for Three Fiscal Years: Criminal Investigation (CI), Oct. 13, 2015, https://www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI), https://www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI) (last visited: May 2, 2016).

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yielded a p-value of less than 0.00001. That is highly statistically significant and allows us to reject the null hypothesis with a 99.999-percent degree of confidence. In other words, there is a less than 0.001-percent chance that preparers are indicted in proportion to their number of tax returns filed.

From these data, we calculated an odds ratio of 20.18, meaning that taxpayers were 20.18 times more likely than preparers to be indicted for defrauding the IRS. Each return prepared and filed by taxpayers without professional assistance was thus 2,018 percent more likely to result in a tax-fraud indictment than those completed by professional preparers. Since such indictments are based on "probable cause," it should follow that individuals are 2,018 percent more likely to commit tax fraud on their own than when they hire professionals to prepare their tax returns. Pricing some taxpayers out of professional tax preparation should therefore lead to a corresponding rise in fraudulent filings with the IRS.

With the aim of preventing tax fraud, the IRS has made it riskier and costlier than ever to hire professional preparers, whose returns are more than 20 times less likely to be fraudulent than those taxpayers prepare themselves. On any measure of effective tax policy, therefore, this doctrine must fail because it increases tax fraud under the guise of preventing it.

ENDNOTES

1 *See, e.g.,* Code Sec. 6501(c)(1)–(2); Revenue Act of 1928 (P.L. 70-562) 45 Stat. 791, 857 (May 29, 1928); Act Sec. 278(a) of the Revenue Act of 1921, 42 Stat. 265 (Nov. 23, 1921) (providing that no statute of limitations on assessment or collection shall apply "in the case of a false or fraudulent return with intent to evade tax."); Act Sec. 250(d) of the Revenue Act of 1918, 40 Stat. 1083 (Feb. 25, 1919) ("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.").

2 *See Lilienthal's Tobacco*, SCt, 97 US 237 (1877) (holding tobacco manufacturer liable for taxes under the Revenue Act of July 14, 1866 § 9, 14 Stat. 104, because, although the limitations period had passed, the company's agents had fraudulently invoiced items to avoid taxation); *Clifton*, SCt, 45 US 242 (1846) (upholding assessment of tariff against importer in transit from New York to Philadelphia even though the statute required assessments to be made at New York Harbor because his captain had fraudulently-invoiced British goods).

3 *See* Code Sec. 6501(c)(1) ("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."); Act Sec. 250(d) of the Revenue Act of 1918, 40 Stat. 1083 (Feb. 25, 1919) ("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.").

4 Code Sec. 6501(a) (setting forth the "general rule" that the IRS must assess returns within three years of filing); Code Sec. 6501(b)(1) (establishing that the IRS has three years from the statutory due date of the return to commence assessment); Code Sec. 6212(a) (setting forth the requirements of the 90-Day Letter); *J. Bendheim*, CA-2, 54-2 USTC ¶9446, 214 F2d 26, 28 (J. Medina) (holding that the IRS's sending of a valid notice of deficiency is the prerequisite for commencing an assessment).

5 Code Sec. 6501(e)(1)(A).

6 *Compare V. Allen*, 128 TC 37, 38, Dec. 56,851 (2007); *City Wide Transit, Inc.*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102, 107–108, *rev'g*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279 (2011) (holding taxpayers perpetually liable for fraudulent filings made by signing tax-return preparers), *with BASR P'ship*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338, 1339–1357, *aff'g*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181 (rejecting *Allen*'s doctrine of preparer fraud).

7 *See* H.R. 12863, 65th Cong., 2d Sess., Document No. 1267, at *21 (Sept. 3, 1918) (emphasis added).

8 *Compare* FSA 200104006 (Sept. 15, 2000) (finding no liability in cases of preparer fraud), with FSA 200126019 (Mar. 30, 2001) (imposing perpetual liability on same or similarly-situated preparer from his preparer's fraud).

9 *See* Reg. §301.7701-15(f)(1)(ix) (excluding from the definition of "tax return preparers" individuals who prepare a return for any "by whom the individual is regularly and continuously employed"). IRS Pub. 4832, *Return Preparer Review*, at *7 (Dec. 2009) [hereinafter *Return Preparer Review*] (providing statistics on preparers).

10 Patrick Langetieg, Mark Payne & Melissa Vigil, I.R.S. Office of Research, Analysis & Statistics, *Return Preparer Industry Analysis*, June 20, 2013, *www.irs.gov/pub/irs-soi/13resconreturnprepar.pdf* (last visited: May 2, 2016)) [hereinafter *Return Preparer Statistics*].

11 *Allen*, 128 TC 37, 42, Dec. 56,851 (2007) (describing the IRS's policy position). *See also Opening Brief for Respondent*, at 18–20, *Allen*, 128 TC 37, Dec. 56,851 (2007) (No. 11016-05), 2006 WL 4719797, at 1 [hereinafter IRS Brief in *Allen*].

12 The IRS's policy on preparer fraud apparently changed between approximately January and June 2001. *Compare* FSA 200104006 (Sept. 15, 2000) (finding no liability in cases of preparer fraud), with FSA 200126019 (Mar. 30, 2001) (imposing perpetual liability on same or similarly-situated preparer from his preparer's fraud).

13 *Allen,* 128 TC 37, Dec. 56,851 (2007).

14 *Id.,* at 37 (emphasis added).

15 *Allen*, 128 TC, at 40. *See also City Wide Transit Inc.*, 709 F3d, at 107 (construing the fraudulent-return provision in light of *Allen*). *But see BASR P'ship*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338, at 1349–1350 (2015), *aff'g*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181 (rejecting *Allen*'s doctrine of preparer fraud).

16 *See* The Honorable L. Paige Marvel, *The Evolution of Trial Practice in the United States Tax Court*, 68 Tax Law. 289, 289 (2014) (stating that the Tax Court is the court of choice for over 95 percent of tax litigants).

17 *S.M. Eriksen*, 104 TCM 46, Dec. 59,117(M), TC Memo. 2012-194, at *1–14 (2012).

18 This concept is defined by statute in Code Sec. 7701(a)(36), as well as Reg. §301.7701-15(a)–(g).

19 *BASR P'ship,* FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181, *aff'd*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338.

20 *BASR P'ship*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338, 1347 (2015), *aff'g*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181 (finding the Tax Court's reasoning in *Allen* unpersuasive). *But see City Wide Transit, Inc.*, 709 F3d, at 107 (affirming *Allen*).

21 *BASR P'ship*, 795 F3d, at 1342 ("[W]e conclude that § 6501(c)(1) suspends the three-year limitations period only when the IRS establishes that the taxpayer acted with the intent to evade tax."); *Id.,* at 1351 (J. O'Malley) (concurring) ("More specifically, I agree with both BASR and the majority that, under § 6501(c)(1), it is the taxpayer (or possibly his authorized agent) who must have the requisite 'intent to evade tax' before the IRS is authorized to go beyond the three year statute of limitations in § 6501.").

22 *W.W. Flora*, SCt, 58-2 USTC ¶9606, 357 US 63,

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75, 78 SCt 1079, *aff'd on reh'g*, SCt, 60-1 USTC ¶9347, 362 US 145, 80 SCt 630.

[23] *Id*.

[24] *See* Part V, *infra*, showing that IRS can best prevent fraud by abolishing *Allen*'s doctrine of preparer fraud.

[25] *New York Life Ins. Co. v. Nashville Trust Co.*, 200 Tenn. 513, 523 (1956), *citing Smith v. Smith*, 49 Tenn. 230 (1870) ("Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract.").

[26] *See, e.g.,* Code Sec. 6501(c)(1)–(2); Revenue Act of 1928 (P.L. 70-562) 45 Stat. 791, 857; Act Sec. 278(a) of the Revenue Act of 1921, 42 Stat. 265 (providing that no statute of limitations on assessment or collection shall apply "in the case of a false or fraudulent return with intent to evade tax."); Act Sec. 250(d) of the Revenue Act of 1918, 40 Stat. 1083 ("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.").

[27] Code Sec. 6501(c)(1). *See also* Act Sec. 250(d) of the Revenue Act of 1918, 40 Stat. 1083.

[28] *See* H.R. 12863, 65th Cong., 2d Sess., Document No. 1267, at *21 (Sept. 3, 1918) (stating that the purpose of the fraudulent-return statute-of-limitations exception was to allow collection of tax whenever the taxpayer sought to defraud the revenues).

[29] *Compare F.A. Weinstein*, 33 BTA 105, Dec. 9080 (1935) (applying principles of joint-and-several liability to allow an otherwise-untimely tax assessment in a case where an innocent spouse's husband committed tax fraud); *M. Karger*, 38 BTA 209, 219–220, Dec. 10,104 (1938) (refusing to permit assessment of an innocent spouse's separately filed tax return on the basis of her husband's tax fraud even though the couple lived in a community-property state where she would benefit from the husband's crimes).

[30] *See* H.R. 12863 (House Report No. 767), 65th Cong., 2d Sess., Doc. No. 1267, at 20–21 (Sept. 3, 1918); Revenue Act of 1918, 40 Stat. 1083.

[31] H.R. 12863 (House Report No. 767), 65th Cong., 2d Sess., Doc. No. 1267, at 21 (Sept. 3, 1918) (emphasis added).

[32] S. Res. 376, Revenue Bill of 1918: H.R. 12863, 65th Cong., 3d Sess, Doc. No. 310, at 70–72 (Dec. 6, 1918) (emphasis added).

[33] S. Rep. 617, to accompany H.R. 12863, 65th Cong., 3d Sess., at 10 (Dec. 6, 1919) (emphasis added).

[34] *See Allen*, 128 TC, at 42.

[35] Code Sec. 6501(a) (providing the general three-year assessment period); Code Sec. 6501(b) (providing special rules for tax returns filed early).

[36] Code Sec. 6501(e)(1)(A).

[37] *L.R. Ames-Mechelke*, 106 TCM 77, Dec. 59,595(M), TC Memo. 2013-176 (2013).

[38] "For purposes of this chapter [Code Secs. 6501–6533], 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*)." Code Sec. 6501(a) (emphasis added). "In the case of a false or fraudulent return with the intent to evade tax," taxes may be assessed or collect "at any time." Code Sec. 6501(c)(1).

[39] Code Sec. 6501(a).

[40] Code Sec. 7454(a).

[41] Code Secs. 7422(e) and 7454(a).

[42] To satisfy his burden under Code Sec. 7454(a), the Tax Court has traditionally required "the Commissioner [to] show that (1) an underpayment exists; and (2) *the taxpayer* intended to evade taxes known to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of taxes." *K. Christians*, 85 TCM 1267, Dec. 55,141(M), TC Memo. 2003-130, at *5 (T.C. 2003) (emphasis added). *See also* Tax Ct. R. 142(a)-(b) (establishing a clear and convincing standard for tax fraud cases).

[43] *See* Code Sec. 6512(a) (authorizing "the taxpayer" to petition the Tax Court for redetermination of a deficiency); Code Sec. 7422(e) (authorizing "a taxpayer" to petition the Claims Court or U.S. District Court for a refund of taxes paid).

[44] *See* Code Sec. 7454(a) (varying the presumption of correctness only where the taxpayer is guilty of fraud with intent to evade tax).

[45] *See Ames-Mechelke*, 106 TCM 77, Dec. 59,595(M), TC Memo. 2013-176, at *16–18 (2013), citing Code Sec. 7454(a); U.S. Tax Ct. R. 142(b) (requiring the IRS to "prove by clear and convincing evidence that petitioner's return preparer, Larson, filed false or fraudulent returns with the intent to evade tax"); *Eriksen*, 104 TCM 46, Dec. 59,117(M), TC Memo. 2012-194, at *9 (2012) (stating the test for preparer fraud).

[46] Cases of preparer fraud have so far all involved preparers who have been found guilty of tax fraud beyond a reasonable doubt. Federal prosecutions of abusive preparers have resulted in conviction and incarceration 81.5 percent of the time over the last three years, with an average prison stint of 2.29 years. That has helped the government coerce tax criminals into testifying against their innocent clients in civil cases in which the preparer has no economic stake. As a result, each of the Tax Court's decided cases on preparer fraud has held at least one taxpayer liable for a preparer's fraudulent conduct based on "clear and convincing" proof of fraud. *See Eriksen*, 104 TCM 46, Dec. 59,117(M), TC Memo. 2012-194, at *10–13 (T.C. 2012) (holding one of the taxpayers liable because she acknowledged that she had not purchased a gun during any of the years in which her convicted preparer claimed one as a deduction on her behalf); I.R.S. Office of Research, Analysis & Statistics, Return Preparer Statistics, *supra* note 10, at *19.

[47] *R.L. Mulvania*, CA-9, 85-2 USTC ¶9634, 769 F2d 1376, at 1379.

[48] *S. Loving*, CA-DC, 2014-1 USTC ¶50,175, 742 F3d 1013, 1017–1022.

[49] *See* Reg. §301.7701-15(b)(2) (defining "nonsigning tax return preparers" as anyone who contributes to a sufficiently valuable and complex return position).

[50] *Id*. *See also BASR P'ship*, 795 F3d, at 1342 n. 3.

[51] *Return Preparer Review*, *supra* note 10, at *4–7 (describing the growth of professional tax preparation after World War II).

[52] *Id.,* at *6.

[53] *See generally Pollock v. Farmers' Loan & Trust Co.*, SCt, 157 US 429, 15 SCt 673 (1895) (ruling the federal income tax unconstitutional as "direct tax" not apportioned by population under Article I of the Constitution); U.S. Const., Amend. XVI (1913) (authorizing imposition of federal income taxes).

[54] Office of Mgmt. & Budget, *Historical Tables: Summary of Receipts, Outlays, and Surpluses or Deficits: 1789–2021,* available online at *www.whitehouse.gov/omb/budget/Historicals* (Mar. 7, 2016).

[55] *Return Preparer Review*, *supra* note 9, at *6 n. 4.

[56] *Id.,* at *6 n. 5.

[57] Internal Revenue Code of 1954 (P.L. 83-591), 68A Stat. 3.

[58] For 2015 Instructions to Form 1040 and Schedules, available online at *see www.irs.gov/uac/Form-1040-Schedules* (Aug. 5, 2015) (totaling 231 pages).

[59] James E. Long & Steven B. Caudill, *The Usage and Benefits of Paid Tax Return Preparation*, 40 NAT'L TAX J. 35, 35 (1987).

[60] The Revenue Act of 1918, 40 Stat. 1057 ran only 47 pages of U.S. Statutes at Large, while the Internal Revenue Code of 1954 (P.L. 83-591) (Aug. 16, 1954) runs 907 pages in the federal statute book.

[61] IRS Pub. 4832, *Return Preparer Review*, at *6 (Dec. 2009).

[62] Staff of Joint Comm. on Tax'n, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, reprinted in 1976-3 (vol. 2) CB 346–347. *See also* Boris Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts,* ¶ 110.3.1 (Thomson Reuters 2016).

[63] *Return Preparer Review*, *supra* note 9, at *7–9.

[64] *Id.,* at *7.

[65] IRS, *SOI Tax Stats—Historical Data Tables*, available online at *www.irs.gov/uac/SOI-Tax-Stats-Historical-Data-Tables* (Mar. 1, 2016) [hereinafter IRS Tax Stats].

[66] *See BASR P'ship*, 795 F3d, at 1347 (refusing to apply *Allen* in the context of a lawyer, who was likely a "nonsigning tax return preparer" under IRS regulations, while also rejecting the doctrine of preparer fraud).

[67] *See* Reg. §301.7701-15(a) (defining the concept of "tax return preparer"); Rev. Proc. 2009-11, §3.02, 2009-3 IRB 313 (listing those returns which can qualify their makers as "tax return preparers").

[68] Reg. §301.7701-15(b)(3)(iv), Ex. 1 (establish-

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ing that a person who prepares a Form 8886, *Reportable Transaction Disclosure Statement*, is not a "tax return preparer" because the return is not directly related to the characterization of an item on the taxpayer's income tax return).

[69] Reg. §301.7701-15(f)(xi) (exempting federal tax litigators); Reg. §301.7701-15(f)(ii)–(vii) (exempting various preparers working in low-income taxpayer assistance programs).

[70] Tax positions are substantial to the extent they equal or exceed (1) $400,000 in gross income or (2) 20 percent of the amount shown on the return.

[71] *See* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on Torts, at 502–507 (West 1984) (collecting cases on imputed liability).

[72] Staff of Joint Comm. on Tax'n, 94th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1976, reprinted in 1976-3 (vol. 2) CB 346–347.

[73] Reg. §301.7701-15(b)(2).

[74] *Compare* Reg. §301.7701-15(b)(2) (defining "nonsigning tax return preparer"), with *Browning*, 102 TCM 460 (2011) (not considering the actions of taxpayer's lawyers/advisors as relevant to the analysis of preparer fraud under Code Sec. 6501(c)(1) even though they were "nonsigning tax return preparers" within the meaning of Reg. §301.7701-15(b)(2)).

[75] *See* Reg. §301.7701-15(b)(2) (defining a "nonsigning tax return preparer" as anyone who preparers as "substantial" item on the taxpayer's return, measured in terms of the item's value and complexity); *BASR P'ship*, 795 F3d, at 1347 (describing Mayer's contributory role in the preparation of the taxpayer's Schedule K-1).

[76] *Loving*, CA-DC, 2014-1 USTC ¶50,175, 742 F3d 1013, 1017–1022.

[77] W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on Torts, at 502–507 (West 1984) (collecting cases on imputed liability).

[78] *See R.L. Mulvania*, CA-9, 85-2 USTC ¶9634, 769 F2d 1376, 1377.

[79] *Id*., at 1379.

[80] *Id*.

[81] *Id*.

[82] *Allen*, 128 TC, at 37 (emphasis added).

[83] *Loving*, 742 F3d, at 1017–1022 (distinguishing "tax return preparers" from agents).

[84] *Compare Allen*, 128 TC, at 41 ("Petitioner [Allen] cannot hide behind *an agent's fraudulent preparation of his returns* and escape paying tax if the Government is unable to investigate fully the fraud within the limitations period.") (emphasis added), *with Id*., at 42 ("Taxpayers whose returns are fraudulent owing to *fraud committed by the preparers* would escape their tax liability if the Commissioner were unable to identify or investigate the fraud within the normal 3-year period.") (emphasis added).

[85] *Allen*, 128 TC, at 40 (emphasis added). *See also IRS Brief in Allen*, *supra* note 11, at 18–20.

[86] *See Eriksen*, 104 TCM 46, Dec. 59,117(M), TC Memo. 2012-194, at *9 (2012) (requiring the IRS to prove that "the return preparer intended to evade taxes known").

[87] *See* Keeton, Dobbs, Keeton & Owen, Prosser and Keeton on Torts, at 509–510 (describing professionals who are not regularly employed by someone as independent contractors).

[88] *See Mulvania*, 769 F2d, at 1379 (noting, *in dicta*, that a particularly broad power of attorney would confer liability on the taxpayer for acts undertaken by an agent).

[89] *Mitchell*, CA-5, 118 F2d 308, 309–310.

[90] *Compare City Wide Transit, Inc.*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102 (holding taxpayer liable for fraudulent acts of a defalcating accountant), *with BASR P'ship*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338, 1349–1350 (rejecting vicarious liability for a nonsigning-tax-return preparer's fraud).

[91] *Rothensies v. Elec. Storage Battery Co.*, SCt, 329 US 296, 301 (1946).

[92] H.R. 12863, 65th Cong., 2d Sess., Document No. 1267, at *21 (Sept. 3, 1918) (emphasis added).

[93] Studies have confirmed a statistically-significant positive correlation between the complexity of a taxpayer's return and usage of professional tax preparers. James E. Long & Steven B. Caudill, *The Usage and Benefits of Paid Tax Return Preparation*, 40 Nat'l Tax J. 35, 35 (1987) ("We also find that professional tax assistance is directly related to the complexity of tax return and the marginal tax rate on income.").

Compare FSA 200104006 (Sept. 15, 2000) (finding no liability in cases of preparer fraud) with FSA 200126019 (Mar. 30, 2001) (imposing perpetual liability on same or similarly-situated preparer from his preparer's fraud).

[94] *See supra* note 9.

[95] *See* FSA 200104006 (Sept. 15, 2000) (concluding that truck driver was not responsible for his accountant's tax fraud for purposes of statutory tolling under Code Sec. 6501(c)(1)).

[96] *Id*.

[97] Although Kyl Christians did not file his lawsuit in the first litigated case of preparer fraud until August 6, 2001, which was 37 days after the IRS issued FSA 200126019, it is likely that audit had been completed and litigation was being contemplated by the parties by the time of issuance. *See Christians*, Docket No. 9814-01 (Aug. 6, 2011) (raising the fraud of an innocent taxpayer's preparer as grounds to toll the statute for the first time); FSA 200126019 (Mar. 30, 2001), *rev'g*, FSA 200104006 (Sept. 15, 2000) (holding that accountant's tax fraud was attributable to the taxpayer for purposes of statutory tolling under Code Sec. 6501(c)(1) even though fraud penalties under Code Sec. 6663(a) would not be imposed).

[98] *Christians*, 85 TCM 1267, Dec. 55,141(M), TC Memo. 2003-130, at *7–8 (2003) (finding no evidence that "petitioner's father/return preparer intended to evade tax" without deciding "the question of whether [the IRS's] interpretation of section 6501(c)(1) is correct"); *Allen*, 128 TC, at 37–38 (holding that fraud by a taxpayer's preparer tolled the statute under Code Sec. 6501(c)(1)).

[99] *See* Part V, *infra*.

[100] *Id.,* at 37.

[101] *See G.D. Goosby*, CA-6, 2008-1 USTC ¶50,331, 523 F3d 632, 635.

[102] *See IRS Brief in Allen*, *supra* note 11, at 15–29.

[103] *Id.*

[104] *Id*.

[105] *Id*.

[106] *IRS Brief in Allen*, *supra* note 11, at 18–29.

[107] *See Lilienthal's Tobacco*, 97 US, at 261.

[108] The Tax Court does mention principals of agency in two sentences toward the end of the opinion, but the primary focus of the Court's effort is clearly to establish that agency is not required because the focus of Code Sec. 6501(c)(1) is on fraud committed with respect to the return rather than any responsibility on the taxpayer's part. *Allen,* 128 TC, at 40.

[109] Code Sec. 6501(c)(1).

[110] *City Wide Transit Inc.,* CA-2, 2013-1 USTC ¶50,211, 709 F3d 102.

[111] *City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *1 (2011), *rev'd*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102.

[112] *Id.*

[113] Opening Brief for the Appellant, *City Wide Transit, Inc.*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102 (No. 12-1040), 2012 WL 2501145, at *6.

[114] *City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *1 n. 5.

[115] *City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *1 n. 4; Opening Brief for the Appellant, *City Wide Transit, Inc.*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102 (No. 12-1040), 2012 WL 2501145, at *14 (stating that the amount of City Wide's deficiency from Beg's fraudulent returns was $371,651.43).

[116] *City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *1.

[117] *Id*.

[118] *Id*.

[119] *Id.*

[120] *City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *1–2.

[121] *Id.,* at *2–3.

[122] *Id.,* at *2.

[123] *See City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *15–16.

[124] Technically, *City Wide* involved Code Sec. 6501(c)(2) rather than (c)(1) but the Tax Court and Second Circuit construed the fraudulent intent required under both provisions as the same. *City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *3 n. 10.

[125] W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on Torts, at 502–507 (West 1984) (collecting cases on imputed liability).

[126] *City Wide Transit, Inc.,* 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-2792 (2011), *rev'd*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102.

[127] *City Wide Transit, Inc.*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279, at *6 (TC

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2011), *rev'd*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102.

[128] *Id*.

[129] *Id.*

[130] *City Wide Transit, Inc.*, CA-2, 2013-1 USTC ¶50,211, 709 F3d 102, 107, *rev'g*, 102 TCM 542, Dec. 58,821(M), TC Memo. 2011-279 (TC 2011).

[131] *City Wide Transit, Inc.*, 709 F3d, at 107.

[132] *Id*., at 107–108.

[133] *Id*., *citing H. Ingram*, SCt, 59-2 USTC ¶15,245, 360 US 672, 679–680, 79 SCt 1314; *M.R. Spies*, SCt, 43-1 USTC ¶9243, 317 US 492, 499, 63 SCt 364; *J. Klausner*, CA-2, 96-1 USTC ¶50,173, 80 F3d 55, 63 (internal quotations omitted).

[134] *Id*., at 107–108.

[135] *See J.E. Golsen*, 54 TC 742, Dec. 30,049 (1970), *aff'd*, CA-10, 71-2 USTC ¶9497, 445 F2d 985, *cert. denied,* SCt, 404 US 940, 92 SCt 284 (1971) (requiring the Tax Court to apply the rule of law for the circuit in which appeal would lie).

[136] *BASR P'ship*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181, *aff'd*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338 (rejecting the doctrine of preparer fraud).

[137] *BASR P'ship*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338.

[138] *Flora*, SCt, 58-2 USTC ¶9606, 357 US 63, 75, 78 SCt 1079, *aff'd on reh'g*, SCt, 60-1 USTC ¶9347, 362 US 145, 80 SCt 630.

[139] *BASR P'ship*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181, 183 (describing the six-step process).

[140] Brief of the United States in Opposition to Plaintiff's Motion for Summary Judgment, *BASR P'ship*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181 (No. 10-244 T), 2013 WL 9797020, at *11 (Jan. 22, 2013).

[141] *BASR P'ship,* 113 FedCl, at 184.

[142] Brief of Appellees, *BASR P'ship*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338 (No. 14-5037), 2014 WL 3586042, at *3–11 (July 8, 2013).

[143] Benjamin Horney, *Ex-Jenkens & Gilchrist Att'y Seeks Probation for $7B Tax Fraud*, Law 360, available online at *www.law360.com/articles/560837/ex-jenkens-gilchrist-atty-seeks-probation-for-7b-tax-fraud* (July 24, 2014) (describing the tax crimes of Erwin Mayer who structured BASR Partnership's transaction).

[144] *BASR P'ship*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181, 190–191, *aff'd*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338.

[145] *Id*.

[146] *BASR P'ship*, FedCl, 2013-2 USTC ¶50,527, 113 FedCl 181, 190–191, *aff'd*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338.

[147] *Id.,* at 191.

[148] *BASR P'ship*, 113 FedCl, at 193. *See also BASR P'ship*, 795 F3d, at 1347 ("[T]he Tax Court's reasoning in *Allen* does not persuade us that § 6501(c)(1) necessarily encompasses situations where an attorney advising on financial transactions, but not involved with the preparation of the taxpayer's return, acts with intent to evade tax.").

[149] *See* Reg. §301.7701-15(a), (b)(2) (defining the concept of "tax return preparer" to include both signing and nonsigning return preparers).

[150] *BASR P'ship*, 113 Fed Cl, at 192–193.

[151] Code Sec. 6501(a), (c)(1).

[152] *BASR P'ship*, 113 FedCl, at 192.

[153] *Id*., at 192–193.

[154] *Id.*

[155] *BASR P'ship*, CA-FC, 2015-2 USTC ¶50,412, 795 F3d 1338, 1339–1350 (rejecting *Allen* as controlling under Code Sec. 6501(c)(1)); *Id*., at 1350–1357 (J. O'Malley concurring) (rejecting *Allen* as controlling under Code Sec. 6229(c)(1)); *Id*., at 1357–1361 (C.J. Prost dissenting).

[156] *BASR P'ship*, 795 F3d, at 1344 (emphasis original).

[157] Sen. Rep. 617, to accompany H.R. 12863, 65th Cong., 3d Sess., at 10 (Dec. 6, 1919); H.R. 12863, 65th Cong., 2d Sess., Document No. 1267, at *21 (Sept. 3, 1918) (emphasis added).

[158] *BASR P'ship*, 795 F3d, at 1357–1358 (C.J. Prost) (dissenting).

[159] *See* Sen. Rep. 617, to accompany H.R. 12863, 65th Cong., 3d Sess., at 10 (Dec. 6, 1919); H.R. 12863, 65th Cong., 2d Sess., Document No. 1267, at *21 (Sept. 3, 1918).

[160] *Bendheim*, CA-2, 54-2 USTC ¶9446, 214 F2d 26, 28.

[161] Code Sec. 6512(a) (stating the Tax Court's jurisdictional prerequisite of a "deficiency"); *Flora*, SCt, 58-2 USTC ¶9606, 357 US 63, 75, 78 SCt 1079, *aff'd on reh'g*, SCt, 60-1 USTC ¶9347, 362 US 145, 80 SCt 630.

[162] Code Sec. 7422(e).

[163] *See BASR P'ship*, 113 FedCl, at 193–194 (preventing the IRS from collecting taxes assessed more than six years after the partnership's return was filed on the basis of a tax-return preparer's fraud).

[164] *See Eriksen*, 104 TCM 46, Dec. 59,117(M), TC Memo. 2012-194, at *1 (2012) (consolidating six cases of preparer fraud brought by sheriff's department employees); *Allen*, 128 TC 37, Dec. 56,851 (2007) (upholding the IRS's assessment against a truck driver on the basis of preparer fraud). *See also* FSA 200104006 (Sept. 15, 2000) (finding no liability where truck driver had relied on a fraudulent preparer), *rev'd*, FSA 200126019 (Mar. 30, 2001) (holding the truck driver liable on the basis of the preparer's fraud).

[165] *Id.*, at 558.

[166] *Allen*, 128 TC, at 41.

[167] *Id.,* at 42. *But see E. Badaracco, Sr.*, SCt, 84-1 USTC ¶9150, 464 US 386, 398, 104 SCt 756 (stating that the tax fraud's special disadvantage lies in the possible destruction of records and the taxpayer's personal culpability).

[168] *Allen*, 128 TC, at 41, *citing Badaracco*, 464 US, at 398–399.

[169] *Allen*, 128 TC, at 42.

[170] *Badaracco*, 464 US, at 398.

[171] *Id.,* at 395.

[172] *Id.,* at 398.

[173] *Badaracco*, 464 US, at 400 (emphasis added).

[174] *Id.,* at 399 (emphasis added).

[175] *Id*.

[176] *See Badaracco*, 464 US, at 400; *Allen*, 128 TC, at 42; *BASR P'ship*, 113 FedCl, at 193–194.

[177] *Return Preparer Review*, *supra* note 9, at *9. *See also* IRS FS-2014-11, 2014 WL 7188945.

[178] *Return Preparer Review*, *supra* note 9, at *6–9.

[179] *See Id.,* at *6; Revenue Act of 1932 (P.L. 72-154), 47 Stat. 169, at 169–290 (June 6, 1932).

[180] *Compare* Revenue Act of 1932 (P.L. 72-154), 47 Stat. 169, at 169–290 (June 6, 1932), *with* Instructions to Form 1040 and Schedules A–SE (2013), available online at *www.irs.gov/pub/irs-prior/i1040--2013.pdf*.

[181] *Return Preparer Review*, *supra* note 9, at *7.

[182] *Id.,* at *9.

[183] *See* Guido Calabresi, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS, 54–60 (Yale, 1970) (stating that one of the principle goals of legal rules must be to effectively spread the risk of loss in a way that reduces informational burdens).

[184] I.R.S. Office of Research, Analysis & Statistics, Return Preparer Statistics, *supra* note 10, at *19; IRS Tax Stats, *supra* note 65; IRS Criminal Investigation Div., Statistical Data for Three Fiscal Years—Criminal Investigation (CI), available online at *www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI)* (Mar. 9, 2016).

[185] *See* I.R.S. Office of Research, Analysis & Statistics, Return Preparer Statistics, *supra* note 10, at *19; I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data: Abusive Return Preparers, Oct. 13, 2015, *www.irs.gov/uac/Statistical-Data-Abusive-Return-Preparers* (last visited: May 2, 2016); I.R.S. Criminal Investigation Mgmt. Info. Sys., Statistical Data for Three Fiscal Years: Criminal Investigation (CI), Oct. 13, 2015, *www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI), www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-(CI)* (last visited: May 2, 2016).

[186] *See supra* note 185.

[187] *See* text accompanying *supra* notes 185–187.

[188] *See* Adam S. Wallwork, *U.S. Government Counterterrorism Asset Freezes: Regulatory Seizures in A Digital Age of Terrorism*, 41 S.U. L. REV. 1, 42 (2013) (collecting cases on the standard of proof in criminal cases).

[189] Given the remarkable similarity of the data, however, this choice of tax-fraud indictments over prosecutions and sentences should make very little, if any, difference in our analysis.

[190] For sources of these statistics, *see supra* note 185.

[191] *See supra* note 185.

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