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Gurpreet Bal

BRINGING IT ALL BACK HOME: *BOULWARE* AND THE UNFORTUNATE DEMISE OF THE *MILLER* RULE

Gurpreet Bal[*]

I. INTRODUCTION

For the ten-year period beginning in 1989, Michael Boulware siphoned income from his Hawaiian Isles Enterprises, for which he was president and CEO.[1] Boulware hid the money from the corporation's accountants, making false invoices, and setting up secret off-shore bank accounts.[2] When caught, he implicated his accountant, a well-respected former state senator into his schemes, and even tried to shift the blame to the deceased father of a federal district judge.[3] After a three-year protracted pre-trial legal battle, he was tried, and in 2004, the jury found him guilty on all counts, only to have their conviction set aside by the Ninth Circuit.[4] He was tried again, and again in 2006 the jury found him guilty on all counts.[5] With the help of a high-powered corporate legal team, he appealed, this time taking his case to the Supreme Court.[6] In March of 2008 the Supreme Court again set aside his conviction, and almost 10 years after being charged, and after having been found guilty twice, the Supreme Court gave Boulware yet another retrial, while his bookkeeper and personal accountant served time for aiding and abetting his fraud.[7]

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* J.D. Candidate, University of California, Hastings College of the Law, 2009.

1. United States v. Boulware, 470 F.3d 931, 933 (9th Cir. 2006) (*Boulware II*).
2. Brief for the Respondent, Boulware v. United States, 470 F.3d 931 (9th Cir. 2006) (No. 06-1509).
3. *Id.*
4. *Boulware II*, 470 F.3d at 932.
5. *Id.*
6. United States v. Boulware, 128 S. Ct. 1168 (2008).
7. *Id.*

A. THE INQUEST ON THE ISLAND

Michael Boulware was the founder and majority owner of Hawaiian Isles Enterprises.[8] Hawaiian Isles Enterprises was a closely held corporation which dealt in tobacco distribution, coffee processing and sales, arcade games, vending machines, and bottled water.[9] In 1999, Boulware was charged with four counts of tax evasion, five counts of filing a false tax return, and one count of conspiracy to make false statements to a financial institution.[10] For the years 1989 to 1997, Miller was accused of using a variety of methods to divert over $10 million from Hawaiian Isles Enterprises and to conceal the income in order to evade tax.[11] Among other things, Boulware was accused of diverting approximately $1.3 million of company funds directly to his mistress; diverting $3.6 million of company funds to bank accounts that he hid from his company's controller; using fake invoices and lease agreements to obtain loan funding; and expensing $1 million of personal payments to his ex-wife to his corporation.[12] The government also alleged that after becoming aware that he was the target of an IRS investigation, Boulware set up a series of off-shore corporations in Tonga and Hong Kong to launder diverted funds from Hawaiian Isles Enterprises and created approximately $1.8 million in fraudulent corporate expenses.[13]

A jury in the U.S. District Court in Hawaii found Boulware guilty and convicted on all counts.[14] Boulware appealed his conviction, and the Ninth Circuit reversed his conviction due to the district court's erroneous exclusion of evidence of a Hawaii state court's adjudication of Hawaiian Isles Enterprises certain property rights and remanded.[15] Upon the Ninth Circuit's instruction, Boulware was retried in the United States District Court for the District of Hawaii, before the Honorable Edward Rafeedie.[16]

In order to prove a charge of tax evasion, the Government must prove beyond a reasonable doubt (1) an affirmative attempt to evade or defeat tax (2) willfulness (3) and an actual tax deficiency.[17] In Boulware's second trial, his defense team attempted attacked the third required element, an actual tax deficiency, by raising a return-of-capital defense, a variation of

8. *Boulware II*, 470 F.3d at 932.

9. *Id.*

10. *Id.*

11. Brief for the Respondent, Boulware v. United States, 470 F.3d 931 (9th Cir. 2006) (No. 06-1509).

12. *Id.*

13. *Id.*

14. *Boulware II*, 470 F.3d at 933.

15. United States v. Boulware, 384 F.3d 794, 798 (9th Cir. 2004) (*Boulware I*).

16. *Boulware II*, 470 F.3d at 932.

17. Sansone v. United States, 380 U.S. 343, 351 (1965).

the no-tax owed defense.[18] A no-tax due defense generally claims that either unreported income on which the evasion charge is alleged either constituted non-taxable income or would have netted no income tax liability due to unreported deductions.[19] For example, if a taxpayer knowingly did not report a stock transaction that netted four thousand dollars in capital gain income, but also failed to report a second stock transaction which netted a capital loss of five thousand dollars, the taxpayer though making affirmative attempts to hide his income would not have an actual tax deficiency for the year in question. Because an "actual tax deficiency" can be legally determined, the lack of an actual tax deficiency is a form of legal impossibility defense. The defendant claims that he or she did not have an actual tax deficiency for the year in question, and therefore it was legally impossible to evade taxes.[20]

The return-of-capital defense is a claim of no actual tax deficiency. It is raised by defendants who are alleged to have been skimming funds from corporations of which they are majority shareholders. Section 301 of the Internal Revenue Code governs the tax treatment of distributions of property that are "made by a corporation with respect to its stock.[21] Subsection (c) of Section 301 if the distribution is dividend as defined by Section 316, it will be considered as part of recipient's taxable income.[22] If the distribution is not a dividend, then the distribution will be considered a nontaxable return of capital up to the shareholder's basis for his stock.[23] Section 316 defines a dividend as "any distribution of property made by a corporation to its shareholders . . . out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made."[24] In a year in which the corporation has no profits, a shareholder can receive a nontaxable distribution of funds with a concurrent reduction in the shareholder's basis in his stock.[25]

During to the second trial, Boulware's attorneys sought to raise the return-of-capital defense against the tax evasion charges.[26] They contended that if the funds that Boulware diverted from 1989 through 1997 were

18. *Boulware II*, 470 F.3d at 934.

19. The court first recognized the validity of the no-tax due defense in *United States v. O'Brien*, 51 F.2d 193 (7th Cir. 1931).

20. For a more thorough discussion of the no tax due defense, see Ronald H. Jensen, Article, *Reflections on United States v. Leona Helmsely: Should 'Impossibility' be a Defense to Attempted Income Tax Evasion*, 12 VA. TAX REV. 335 (1993).

21. I.R.C. § 301(c) (2008).

22. *Id.*

23. *Id.*

24. I.R.C. § 316 (2008).

25. § 301(b).

26. *Boulware II*, 470 F.3d 931, 934 (9th Cir. 2006).

characterized as returns of capital, there would be no actual tax deficiency on the funds, as they would be considered nontaxable constructive distributions.[27] In response, the Government moved *in limine* to preclude the return-of-capital defense, relying on a *United States v. Miller.*[28] To which Boulware's legal team filed a response, proffering the testimony of an expert who would explain that the diverted funds could have been a return of capital, depending on whether the corporation had earnings and profits for the years in question.[29] Judge Rafeedie precluded the defense, ruling that Boulware had not laid the proper foundation to meet the threshold requirements established in *Miller*[30] to proceed with the defense.

B. *MILLER* MAKES ITS MARK

In *Miller*, the Ninth Circuit faced a strikingly similar situation as the one Judge Rafeedie faced in deciding the Government's motion in Boulware. In *Miller,* the defendant had diverted income from his corporation, booking the income as loans.[31] The defendant used corporate funds pay "virtually all of his personal bills (from his mortgage on his home to his 'Book-of-the-Month' Club obligations)."[32] Miller was convicted of filing false corporate tax returns and of income tax evasion.[33] On appeal, Miller argued that the diverted funds had to be treated as a constructive distribution to a shareholder, and that the distribution was a non-taxable return of capital since the corporation had no profits for the years at issue.[34] The *Miller* court refused to automatically apply the constructive distribution rules in the context of criminal tax evasion, on the basis that doing so ignores the most important element of tax evasion-willful intent to evade taxes.[35]

> Where the taxpayer has sought to conceal income by filing a false return, he has violated the tax evasion statutes. It does not matter that that amount could have somehow been made nontaxable if the taxpayer had proceeded on a different course. To apply the constructive distribution rules to this situation would nullify all of the taxpayer's prior unlawful acts.[36]

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*; *see also* United States v. Miller, 545 F.2d 1204, 1215 (9th Cir. 1976).
31. *Miller*, 545 F.2d at 1209.
32. *Id.*
33. *Id.* at 1207-08.
34. *Id.* at 1209.
35. *Id.* at 1214.
36. *Id.*

The *Miller* court went on to point out that, to allow the return of capital defense would result in "anomalous" situation where a taxpayer who diverted funds from his corporation when it was in financial trouble and had no profits would be immune from punishment, but the very same taxpayer would be convicted if he diverted funds from his corporation when it had experienced a financially successful year.[37] The *Miller* court went on to say that such a result would constitute an "extreme example of form over substance."[38]

The *Miller* court found that for diverted funds to be considered a return of capital, that where the Government has made a prima facie case of failure to report diverted corporate funds, the defendant must demonstrate an intent on the part of the defendant or the corporation that the funds constitute a return of capital.[39] The defendant must produce some evidence that demonstrated the return of capital distributions were made, not just that they could have been made.[40]

Based on the standard set forth in *Miller*, Judge Rafeedie granted the Government's motion to preclude Boulware's return of capital defense on the grounds that Boulware had failed to proffer any evidence that the diverted funds were in considered, intended, or recorded as a return of capital.[41] In fact, whereas the defendant in *Miller* had at least provided evidence that the corporation had no earnings or profits, Boulware merely posited that whether the corporation had earnings or profits could be left to the jury.[42]

Upon completion of the second trial, the jury once again found Boulware guilty on all counts. Judge Rafeedie upped Boulware's term of custody from the 51 months that Boulware had received on his first conviction to 60 months based on evidence adduced in the second trial that Boulware had perpetuated his fraudulent activities even after he knew that he was being investigated by the Government.[43] At sentencing, Judge Rafeedie said Boulware had displayed "unnecessary greed" in his extreme measures to hide his income.[44] Boulware apologized, saying that he was sorry and that it would never happen again.[45] However, Boulware would soon thereafter appeal his conviction on a number of grounds, including the district court's decision to preclude Boulware from raising the return-of-

37. *Id.*
38. *Id.*
39. *Id.* at 1214-15.
40. *Id.* at 1215.
41. *Boulware II*, 470 F.3d 931, 934-35 (9th Cir. 2006).
42. *Id.*
43. *Id.* at 932.
44. Curtis Lim, *Sentence is Stiffer Second Time Around*, THE HONOLULU ADVERTISER, Oct. 25, 2005.
45. *Id.*

capital defense.[46]

C. *MILLER* MEETS ITS MAKER

Boulware appealed the district court's decision on the basis that the *Miller* rule failed on three counts: (1) requiring intent for return of capital when raised as a defense against tax evasion created a disconnect between application of Internal Revenue Code in criminal and civil cases, (2) *Miller* unconstitutionally shifts the burden of proof on the defendant (3) that the *Miller* decision puts the Ninth Circuit in conflict with the Second Circuit's recent decisions in *United States v. D'Agostino*[47] and *United States v. Bok.*[48]

The Ninth Circuit agreed that the rule in *Miller* created a distinction between the application of the Internal Revenue laws in a criminal and civil context.[49] However, the Ninth Circuit held that the different treatment was justified in the context the return of capital provisions of the Internal Revenue Code were being applied, approving *Miller*'s holding that "civil classifications of diverted corporate funds do not control in criminal cases."[50] The court further cited to more recent decisions, *United States v. Williams* and *United States v. Schmidt*, from the 11th and 4th Circuits that approved *Miller*'s distinction between civil and criminal application of constructive distribution rules.[51]

In regards to the defendant's burden of proof, the Ninth Circuit restated the *Miller* rule, and held that once the government had meet its prima facie burden the taxpayer failed to report diverted corporate funds, the burden shifted to the taxpayer to show that the diverted funds were a return of capital.[52] However, in *D'Agostino*, the Second Circuit found that requiring "contemporaneous" intent fashioned under the *Miller* rule would result in lower burden of proof for the government in criminal tax evasion cases than in civil tax collection cases.[53] The Second Circuit ruled that the *Williams* approach (in which the Eleventh Circuit adopted the *Miller* rule) "effectively eliminates proof of a tax deficiency as an element of a 26

46. Brief for the Respondent, Boulware v. United States, 470 F.3d 931 (9th Cir. 2006) (No. 06-1509).

47. United States v. D'Agostino, 145 F.3d 69, 72 (2d Cir. 1998).

48. United States v. Bok, 156 F.3d 157, 162 (2d Cir. 1998). *See Boulware II*, 470 F.3d at 935.

49. *Boulware II*, 470 F.3d 931, 934 (9th Cir. 2006).

50. *Id.*

51. *Id.*; *see also* United States v. Williams, 875 F.2d 846, 849-852 (11th Cir. 1989); United States v. Schmidt, 935 F.2d 1440, 1446 (4th Cir. 1991)

52. *Boulware II*, 470 F.3d at 935.

53. *D'Agostino*, 145 F.3d at 71.

U.S.C. 7201 violation."[54] The Second Circuit further concluded that by that token, under the *Miller* rule, the government only needed to prove that a taxpayer willfully diverted funds under its control, and took affirmative acts to evade taxation.[55] The Second Circuit found this result unacceptable, stating that "[i]f Congress intended this showing to suffice to establish a violation of 7201, it would not have included a tax *deficit* as a requisite element." (emphasis added)[56]

The Ninth Circuit recognized that the *Miller* rule was in conflict with Second Circuit's recent decisions, but noted that the Second Circuit's view was not the prevailing view among federal courts and that the *Miller* rule still stood in the Ninth Circuit, and therefore the district court's decision to preclude return of capital defense due to lack of foundation was proper.[57]

The Ninth Circuit, however, was not unanimous in its approval of the reasoning behind *Miller*. In concurrence, Judge Thomas criticized *Miller* because it allows that "a defendant may be criminally sanctioned for tax evasion without owing a penny in taxes to the government. Not only does this result indicate a logical fallacy, but it is in flat contradiction with the *tax evasion statute's requirement* of a tax deficiency."[58] Judge Thomas further stated that if he was not constrained by *Miller*, he would adopt the Second Circuit's approach in *D'Agostino*.[59] However, bound by *Miller*, Thomas concurred with the majority and Boulware's conviction was unanimously affirmed.[60]

With a concurrence unfriendly to the *Miller* rule and circuit split on the issue, the Boulware case seemed ripe for appeal. The Supreme Court granted certiorari soon thereafter.[61] The Supreme Court does not grant certiorari often to cases involving tax law, but it does however seem to have a keen interest in overruling the Ninth Circuit, and the Court was not going to pass up the opportunity here.

II. THE DEMISE OF THE *MILLER* RULE

At oral arguments it was clear that the struggle between criminal intent and tax code that the Ninth Circuit had found themselves enmeshed in, was not on the forefront of the Justices minds. During oral arguments,

54. *Id.* at 72.
55. *Id.*
56. *Id.*
57. *Boulware II*, 470 F.3d at 935.
58. *Id.* at 938.
59. *Id.*
60. *Id.* at 937.
61. Boulware v. U.S., 128 S. Ct. 32 (2007).

Justice Ginsburg mistakenly alluded to the case's origin in tax court and had to be informed that this was not a civil tax case, but one for criminal tax evasion.[62]

In a unanimous decision, the Supreme Court struck down the *Miller* rule, requiring a showing of what the Court called "contemporaneous intent" to raise the return of capital defense in criminal tax evasion cases.[63] Justice Souter wrote the opinion for the court. The Court held that:

> It is neither here nor there whether the *Miller* court was justified in thinking it would improve things to convict more of the evasively inclined by dropping the deficiency requirement and finding some other device to exempt returns of capital. Even if there were compelling reasons to extend § 7201 to cases in which no taxes are owed, it bears repeating that "[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components *contemplated by the words used in the statute*."[64]

The Court stressed that neither Section 301 nor Section 316 governing the return of capital were written to include an intent requirement.[65] But even more importantly, the Court accused the Ninth Circuit of removing a statutory element of the crime of tax evasion.[66] The Court held that though the *Miller* court had held that the acquittal of a taxpayer of tax evasion based on automatic application of the return of capital provisions[67] "would constitute an extreme example of form over substance," what such a situation would really constitute was the government's failure to prove an essential element of the crime of tax evasion, an actual tax deficiency.[68] The Court stated that by requiring the taxpayer to prove contemporaneous intent, the *Miller* rule unconstitutionally shifted the burden of proving an essential element of the crime onto the defendant.[69] The Court acknowledged that § 7201 "could stand amending," but held that it was bound by the words of the statute requiring that an actual tax deficiency be proven.

With that, the Supreme Court vacated the holding of the Ninth Circuit, and remanded the case back to the district court in Hawaii for

62. Oral Argument, Boulware v. United States, 128 S. Ct. 1168 (2008) (No. 06-1509)
63. Boulware v. U.S., 128 S. Ct. 1168, 1180 (2007).
64. *Id.*; Morissette v. United States, 342 U.S. 246, 263 (1952) (emphasis added).
65. *Boulware,* 128 S. Ct. at 1177.
66. *Id.*
67. United States v. Miller, 545 F.2d 1204, 1209 (9th Cir. 1976).
68. *Boulware,* 128 S. Ct. at 1177.
69. *Id.*

retrial yet again.[70]

A. OH WHAT A WICKED WEB WE WEAVE . . .

Section 7201 of the I.R.C. reads:

> Any person who *willfully attempts* in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by the law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of the prosecution. (emphasis added)[71]

While the first two elements of the charge of tax evasion—willfulness and an affirmative attempt—are readily apparent from the statute, the third element, and actual tax deficiency seems to be missing. The words "any tax imposed" arguably could be interpreted as such, if the word "tax" is defined as a specific dollar amount of tax deficiency owed. However, the word "tax" could just as easily be defined as a system of fees or tariffs imposed on a person's wealth. For example, when one says "I still owe taxes," that statement can be interpreted as a statement that the person still owes a certain known dollar amount of tax deficiency, or conversely that the person still has yet to fulfill his burden of paying his yearly income tax.

Yet it seems as if it must be less ambiguous than that, as the Supreme Court in *Boulware* makes repeated reference to the "statutory" element of tax evasion—an actual tax deficiency.[72] In fact, the Supreme Court centered its decision to strike down the *Miller* rule based on the perceived harm the *Miller* rule had on this statutory element of criminal tax evasion.[73] However, if we look back at the origins of the so called "element" of an actual tax deficiency, we find that the long string of authority recognizing this element were not founded in the bedrock of statute, but in dictum,a foundation of sand.

Almost without fail, every Supreme Court case, and lower court cases cite *Sansone v. United States* for the supposition of the three elements of tax evasion: (1) willful intent (2) an affirmative act of evasion (3) and an actual tax deficiency.[74] The Court in *Sansone* itself cited two prior cases as authority for the actual tax deficiency element of tax evasion, *Lawn v. United States*[75] and *Spies v. United States.*[76] However, a closer look finds

70. *Id.* at 1175.
71. I.R.C. § 7201 (2008).
72. *Boulware,* 128 S. Ct. at 1179
73. *Id.*
74. Sansone v. United States, 380 U.S. 343, 351 (1965).
75. Lawn v. United States, 355 U.S. 339, 361 (1958)

that neither provides strong support for this so-called statutory element of tax evasion. In *Spies*, the Court does not even address the issue directly, only going so far as to say that criminal tax evasion should be distinguishable from the lesser crime of filing false tax returns.[77] In *Lawn*, the Court states in dictum:

> [w]hile, of course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of fraudulent return cannot stand in the absence of proof of a deficiency, the court's charge did not create the credit claimed by Livorsi. It only withdrew from the jury's consideration the government's claim that his income from Eatsum in that year was . . . more than he reported in his return.[78]

And on that dictum, the third statutory element of tax evasion was born: actual tax deficiency.

B. . . . WHEN FIRST WE PRACTICE TO DECEIVE.

Even if the Court would concede that perhaps the requirement of an "actual tax deficiency" is really a court made rule, the question still stands whether a requirement for an actual tax deficiency *sans* intent, derived from the word "tax" in § 7201, is the correct interpretation of the tax evasion statute.

The answer ironically enough can be gleaned from a more complete look at a case often cited by critics of tax evasion, and cited by the Court in *Boulware*.[79] In *Helvering v. Gregory*, arguably the most famous judicial opinion on tax, Judge Learned Hand proclaimed that "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[80] What critics often overlook is the discussion that immediately follows. In *Helvering*, the Second Circuit[81] faced a situation where a taxpayer had used the corporate reorganization rules[82] to circumvent paying taxes on income from a corporation of which he was sole shareholder, in a manner that was technically correct.[83] The taxpayer claimed that all the transactions being correct, the purpose was

76. Spies v. United States, 317 U.S. 492 (1943)

77. *Id.* at 495.

78. *Lawn*, 355 U.S. at 361.

79. Boulware v. U.S., 128 S. Ct. 1168, 1176 n.7 (2007).

80. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).

81. *Helvering* was also cited as supporting precedent in the Second Circuit's later opinion in *D'Agostino*.

82. At the time *Helvering* was decided, the corporate restructuring statute was section 112 of the Internal Revenue Code of 1928.

83. *Helvering*, 69 F.2d at 810.

irrelevant.[84] After famously stating a taxpayer's right to arrange his affairs, Judge Hand followed:

> Therefore, if what was done here, was what was intended by section 112(i)(1)(B) [corporate reorganization rules], it is of no consequence that it was all an elaborate scheme to get rid of income taxes, as it certainly was. Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition . . . *the meaning of a sentence may be more than that of the separate words*, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the *setting in which all appear*, and which all collectively create . . . the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the shareholder's taxes is not one of the transactions *contemplated* as corporate "reorganizations."[85]

The Second Circuit's decision in *Helvering*, argued that a tax statute cannot be interpreted solely by the definitions of the word in the statute.[86] Instead, the Second Circuit stated that "as a melody is more than the notes" and that in interpreting the statute, the intention of the statute itself must be examined.[87] Justice Sutherland, writing the Supreme Court's decision affirming the Second Circuit's decision, stated "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."[88]

The Court similarly needs to look beyond the definitions of the words in the tax evasion statute, and examine the statute's purpose. The tax evasion statute's purpose was to punish taxpayers who attempt to evade or defeat tax. The statute includes that the attempt must be willful, making it clear the purpose is to punish criminal intent.[89] The Court is distorting the purpose of § 7201 when it disallows the punishment of individuals who made every attempt to evade taxation in a criminal manner, but after being caught can show their attempt could be made futile based on a technical application of rules governing distribution of corporate property. The Court in Boulware hinges the allowance of return of capital defense on the Court's interpretation of the "any tax imposed" to mean requiring the strict adherence to the existence of an actual tax deficiency. Such an interpretation is wrong as far as it contravenes the purpose of the tax

84. *Id.*
85. *Id.* at 811 (emphasis added).
86. *Id.*
87. *Id.*
88. Gregory v. Helvering, 293 U.S. 465, 470 (1935).
89. I.R.C. § 7201 (2008).

evasion statute.

The *Helvering* guide to statutory interpretation can also apply to the Court's interpretation of Section 301 itself. In *Boulware*, the Court held that an intent prerequisite cannot be imposed on the return-of-capital defense, because Section 301(c), in its text "expressly provides that distributions made by a corporation to a shareholder with respect to its stock 'shall be treated in the manner provided in [§ 301(c)].'"[90] The Court further emphasized that the word "shall" preclude any modification or condition, such as prerequisite intent in a criminal tax evasion case, from being imposed on the application of Section 301(c) on corporate distributions to shareholders.[91]

This interpretation goes against Judge Hand's teaching in *Helvering* that a tax statute must be defined by more than it's separate words and should be considered in the setting in which it appears.[92] The interpretation the Court adopts in *Boulware* disregards both the purpose of Section 301(c) and the setting in which it is being applied. If the Court did analyze the purpose of Section 301(c) it could not reasonably conclude that purpose of the return of capital provisions of the Internal Revenue Code were to provide a defense to tax evasion charges brought in result of a shareholder's deceitful diversion of corporate funds. As far as analyzing the setting in which Section 301(c) is being applied, the Court not only failed to do so but it harshly admonished the Ninth Circuit for doing so.[93] In the court of appeals opinion in *Boulware*, the Ninth Circuit recognized that by imposing a prerequisite intent, it was interpreting the application of Section 301(c) differently in a criminal tax evasion case, as it would in a civil context.[94] Very shortly after citing *Helvering* for the proposition that a taxpayer can arrange his affairs the manner that he wishes to, the Court stated that this dual interpretation of Section 301(c) was wrong as it had no basis in the text of the section, going so far as mocking the Ninth Circuit by revealing its failure to find the written word "intent" in Section 301.[95] The Court did not take the setting into account, but instead did what Judge Learned Hand had warned against doing in *Helvering*, interpret the statute based on the literal definition of its words alone.[96]

90. Boulware v. U.S., 128 S. Ct. 1168, 1179 (2007).
91. *Id.*
92. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).
93. *Id.* at 1178.
94. *Boulware II*, 470 F.3d 931, 934 (9th Cir. 2006).
95. *Boulware*, 128 S. Ct. at 1178.
96. *Helvering*, 69 F.2d at 811.

III. CONCLUSION: LOOKING FORWARD

Right or wrong, *Boulware* marked the demise of the *Miller* rule and the setting of a rigid, literalist standard for judicial interpretation of tax statutes. A majority shareholder could divert corporate funds with the most malicious and evil intent to evade tax, make repeated attempts to evade tax, subject others to criminal tax prosecution and yet still not be guilty of tax evasion based solely on the fact that through an application of a tax statute of which he or she was totally unaware of at the time could have made his or her hidden income nontaxable.

Such a result seems morally reprehensible. Yet, as long as the Court refuses to interpret the return of capital provisions outside of the strict definition of the text, and the requirement of an actual tax deficiency continues to be recognized the result in Boulware can continue to be justified as another extension of the Legal Impossibility Doctrine.[97] With retrospective application of the return of capital provisions, the government cannot prove a so-called element of the offense of tax evasion, an actual tax deficiency, and thus the deceitful tax payer defeats the charge.

Our tax system relies on the good faith of the taxpayers to honestly self-report their income. The malicious and deceitful practice of tax evaders undermines the trust that serves as the bedrock of the self-reporting system, and should be criminally prosecuted. The Court's interpretation of the return of capital and tax evasion statutes in *Boulware* contravenes that very principle. However, *Boulware* is now the law of the land, and without the *Miller* rule, we must look elsewhere to assure Section 7201 can fulfill its purpose to maintain the integrity of the capital markets.

The first solution, as the Supreme Court alluded to in dicta in *Boulware*, would be for Congress to amend Section 301 to build in an intent requirement in criminal tax cases, effectively overruling the Court's decision in *Boulware*.[98] However, such a statute may face challenge in the Supreme Court for creating the same "tax limbo" which the Court found repulsive, by distinguishing between statutory application in a criminal and civil context.[99] Further, even if the statute was upheld, it would only preclude the abuse of the return of capital provision by criminal tax evaders, merely inciting tax evaders to find yet another leak in the tax code to exploit.

Conversely, Congress can amend Section 7201 to put an end to the

97. For more on the Legal Impossibility doctrine in tax evasion, see Ronald H. Jensen, Article, *Reflections on United States v. Leona Helmsely: Should 'Impossibility' be a Defense to Attempted Income Tax Evasion*, 12 VA. TAX REV. 335.

98. *Boulware*, 128 S. Ct. at 1178.

99. *Id.* at 1180.

so-called "statutory" element of an actual tax deficiency. Of course, Congress would need to do so very explicitly to prevent another loose judicial interpretation from rebirthing the actual tax deficiency. Congress could perhaps amend the statute by altering "any tax imposed"[100] to "any manner or method of taxation imposed, regardless of the existence of an actual tax deficiency." This would assuredly preclude an interpretation that the statute required an actual tax deficiency to exist.

However, in considering that the requirement of an actual tax deficiency is really more a court fashioned rule than a statutory element of tax evasion, and that the Court in *Boulware* implied that the dropping of the element might be justified[101], the Court itself should act to remedy the problem. Justice Black, in a stinging dissent to a Supreme Court case that denied a jury award to children of victims of railroad death, famously stated that "[w]hen precedent and precedent alone is all the argument that can be made to support a court fashioned rule, it is time for the rule's creator to destroy it.[102] The Court should revisit the wisdom of those who have sat on the bench before it. Perhaps it is the time for the Court to acknowledge that it is time to do away with the actual tax deficiency rule, born in dictum and forged in repetition.

100. I.R.C. § 7201 (2008).
101. *Boulware*, 128 S. Ct. at 1178.
102. Francis v. Southern Pacific Co., 333 U.S. 445, 471 (1948) (Black, J., dissenting).