

No. ~~09-86~~ JUL 20 2009

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In The

**Supreme Court of the United States**

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MICHAEL H. BOULWARE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In *Boulware v. United States*, 128 S. Ct. 1168 (2008), this Court rejected the Ninth Circuit's "contemporaneous intent" gloss on the return of capital rule under 26 U.S.C. §§ 301 and 316, declined to determine whether petitioner Boulware had made an adequate proffer on the "with respect to its stock" limitation in § 301(a), and remanded for "further proceedings consistent with this Court's opinion." On remand, the court of appeals held (1) on the "with respect to its stock" issue, that Boulware "failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder"; and (2) that Boulware had failed to establish sufficient "basis" in his stock.

The questions presented are:

1. Did the court of appeals require Boulware to meet an impermissible procedural and substantive burden on the "with respect to its stock" component of the return of capital rule?
2. Did the court of appeals disregard this Court's mandate by considering the basis issue that the government expressly declined to raise before this Court and that this Court treated as undisputed?

**PARTIES TO THE PROCEEDING**

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner Michael Boulware and Respondent United States.

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## PETITION FOR A WRIT OF CERTIORARI

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Michael Boulware petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. 1-16) is reported at 558 F.3d 971. The court of appeals' order denying Boulware's petition for rehearing (App. 88) is unreported. The district court's oral rulings (App. 74-83) are unreported. The court of appeals' rulings on Boulware's prior appeals (App. 17-32 and App. 33-73) are reported at 470 F.3d 931 and 384 F.3d 794. This Court's prior decision in this case is reported at 128 S. Ct. 1168.

### JURISDICTION

The court of appeals entered judgment on March 9, 2009. App. 1. The court denied a timely petition for rehearing on April 22, 2009. App. 88. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

Section 301 of Title 26, United States Code, provides in relevant part:

- (a) In general. Except as otherwise provided in this chapter, a distribution

of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c).

....

(c) Amount taxable. In the case of a distribution to which subsection (a) applies--

(1) Amount constituting dividend. That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

(2) Amount applied against basis. That portion of the distribution which is not a dividend shall be applied against and reduce the adjusted basis of the stock.

(3) Amount in excess of basis.

(A) In general. . . . [T]hat portion of the distribution which is not a dividend, to the extent that it exceeds the adjusted basis of the stock, shall be treated as gain from the sale or exchange of property.

....

Section 316 of Title 26, United States Code, provides in relevant part:

(a) General rule. For purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders--

(1) out of its earnings and profits accumulated after February 28, 1913  
.....

.....

Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection.

#### **STATEMENT OF THE CASE**

Petitioner Michael Boulware founded Hawaiian Isles Enterprises ("HIE") in the 1980s and served as chairman and president of the company. HIE and its subsidiaries sell coffee, bottled water,

and other products. At all relevant times, Boulware owned 50 percent of the HIE stock and controlled the company.

In 2001, the government obtained an indictment against Boulware in the District of Hawaii, charging him with tax evasion and tax perjury. The tax counts alleged that Boulware failed to report as income approximately \$10 million allegedly diverted from HIE in various ways over a period of years. ER 23, 521.<sup>1</sup> Following a guilty verdict in Boulware's first trial, the United States Court of Appeals for the Ninth Circuit reversed his conviction because the district court erroneously excluded crucial evidence. *United States v. Boulware*, 384 F.3d 794 (9th Cir. 2004) (App. 33), *cert. denied*, 546 U.S. 814 (2005).

As a key element of his defense at the retrial, Boulware sought to negate the "tax deficiency" and false statement elements of the tax evasion and tax perjury charges by establishing that the money he received from HIE constituted nontaxable returns of capital he had invested in the company. ER 259, 369, 372, 540-48, 608, 629-30. The district court precluded this evidence and refused to give a return of capital jury instruction. App. 74-83; ER 488-89, 596-99, 629-30, 746. The jury found Boulware guilty.

On December 13, 2006, the court of appeals affirmed Boulware's conviction. *United States v. Boulware*, 470 F.3d 931 (9th Cir. 2006) (App. 17).

<sup>1</sup> The Excerpts of Record from the court of appeals will be cited as "ER."

Finding that Boulware's proffered evidence in support of his return of capital defense did not satisfy the "contemporaneous intent" requirement that the Ninth Circuit added to the return of capital rules in *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), the court of appeals concluded that the district court did not err in excluding the return of capital evidence and in refusing to instruct on the defense. App. 20-23.

This Court granted certiorari. After having urged the court of appeals to follow *Miller*, the government largely abandoned that decision and its reasoning before this Court. See *Boulware v. United States*, 128 S. Ct. 1168, 1180 (2008). The government raised new issues, including (as significant here) the contention that Boulware had not established that HIE's distributions to him were "with respect to its stock" for purposes of 26 U.S.C. § 301(a).

This Court unanimously vacated the Ninth Circuit's decision. The Court rejected the *Miller* "contemporaneous intent" requirement. 128 S. Ct. at 1180. It declared that the phrase "with respect to its stock" in § 301(a) "requires that the distribution of property by the corporation be made to a shareholder because of his ownership of its stock . . . and that an amount paid by a corporation to a shareholder be paid to the shareholder in his capacity as such." *Id.* (quotations omitted). It noted that facts bearing on the issue "may range from the distribution of stock ownership to conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to a good reason to

treat payment of property as salary)." *Id.* at 1180-81 (footnote omitted). The Court observed that "[t]he facts in this case have yet to be raked over with the stock ownership condition in mind, since *Miller* seems to have pretermitted a full consideration of the defensive proffer, and if consideration is to be given to that condition now, the canvas of evidence and Boulware's proffer should be made by a court familiar with the whole evidentiary record." *Id.* at 1181. The Court remanded "for further proceedings consistent with this opinion." *Id.* at 1182.

The Court noted that the government did not "dispute that Boulware offered sufficient evidence of his basis and HIE's lack of earnings and profits." *Id.* at 1180 n.12.<sup>2</sup> Nothing in the Court's opinion suggests that it intended the Ninth Circuit to re-open the basis issue on remand.

The court of appeals rendered its decision on remand on March 9, 2009. The court found that, following this Court's decision, the return of capital defense has three parts: "(1) a corporate distribution with respect to a corporation's stock, (2) the absence of corporate earnings or profits, and (3) the stockholder's stock basis be in excess of the value of

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<sup>2</sup> The Court cited the Brief for the United States at 34 n.11. In that footnote, the government stated: "Although petitioner's proffer is insufficient on its face with respect to the other two elements [basis and earnings and profits] as well, the government did not raise that issue in its opposition to the petition for a writ of certiorari. Nor did the government present the argument in the courts below, except when it argued in opposition to the petition for rehearing in the court of appeals that petitioner's proffer made no assertion that he had a sufficient stock basis to cover the amount of the diverted funds."

the distribution." App. 8-9. It observed that "[t]he legal standard is generous: a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. . . . A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense." App. 6 (quoting *United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007)) (internal quotations omitted).

The Ninth Circuit concluded that Boulware had not satisfied this standard either on the "with respect to its stock" prong of the return of capital theory or on the "basis" prong. The court of appeals "recognize[d] . . . that the argument before the trial court primarily involved the application of *Miller* and that we are viewing this case in hindsight." App. 13 n.5. Nonetheless, the court refused to "relieve the defendant of making an offer of proof that satisfies all the elements of the theory asserted," *id.*, and it refused to permit Boulware to supplement his offer of proof, App. 9-10.

On the "with respect to its stock" aspect of the return of capital theory, the panel--like this Court--declined to "define the contours" of that phrase. It concluded, however, that "at the very least a taxpayer must tender some evidence of nexus between the corporate distribution and stock ownership, or show that there were no other alternate explanations, in order to proceed with a return of capital theory at trial." App. 14 (footnote omitted).

The court of appeals found that Boulware had not met this burden. It declared that he had "failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder. To the contrary, Boulware offered evidence and alternate theories that the distribution was a loan or was distributed in trust. Moreover, the proffer only referenced corporate earnings, without any offer to prove that the distribution was 'with respect to stock,' or that any nexus existed between the distribution and Boulware's stock ownership." App. 13. The court of appeals acknowledged that "a defendant may pursue alternative theories," but observed that "when one attempts to characterize a transaction solely by negative inference, rather than affirmative proof, one usually must eliminate other possible theories, not prove their viability." App. 14 n.7.<sup>3</sup>

The court of appeals also found that Boulware had not met his burden on the "basis" prong of the return of capital theory. It recognized that the government did not raise this issue at trial or on appeal (until opposing Boulware's petition for rehearing) and that this Court treated the matter as conceded. App. 15 n.9. It observed that "[u]nder other circumstances, we might well consider the objection waived and decline to exercise our discretion to entertain it." App. 15-16 n.9. Under these circumstances, however, the court decided to "exercise our discretion . . . to analyze whether the element has been satisfied sufficiently to allow

<sup>3</sup> The court of appeals overlooked that the jury did not accept—and thus that Boulware did not "prove [the] viability" of—his alternate theories that the distributions were loans or in trust.

presentation of the theory to a jury at a new trial." App. 16 n.9.

Turning to the substance of the proffer, the Ninth Circuit declared that "[t]he corporate distributions to Boulware totaled \$10 million. Thus, in order for the distributions to be considered returns of capital, his stock basis must equal or exceed that amount." App. 15. The court found that Boulware presented evidence at trial from which "a jury could conclude that Boulware was a shareholder with a stock basis, but the evidence was insufficient to meet the threshold requirement that he have a stock basis in excess of \$10 million." *Id.*

#### **REASONS FOR GRANTING THE WRIT**

The Court should grant the writ for three reasons. *First*, the court of appeals' decision on remand improperly heightens a criminal defendant's burden of producing evidence to obtain an instruction on a defense that negates an element of the offense. The decision thus conflicts with settled law from this and other courts. *Second*, the Ninth Circuit's decision establishes an unprecedented and ill-advised substantive hurdle that a party must surmount to establish that a payment by a corporation to a controlling shareholder is a constructive distribution under 26 U.S.C. § 301. The court's decision, if permitted to stand, will radically alter the standards that govern the taxability of payments by corporations to controlling shareholders and reintroduce uncertainty that the Tax Court and this Court sought to eliminate. *Third*, by choosing to address the basis issue that the government forfeited

below and did not dispute in this Court, the court of appeals exceeded the scope of this Court's remand.

**I. THE COURT SHOULD GRANT THE WRIT TO RESTORE THE PROCEDURAL AND SUBSTANTIVE STANDARDS THAT GOVERN THE RETURN OF CAPITAL DEFENSE.**

The Ninth Circuit's conclusion that Boulware's proffer was insufficient on the "with respect to its stock" aspect of the return of capital rule conflicts with cases establishing the burden of production a criminal defendant must meet to obtain an instruction on a defense that negates an element of the charged crime. The court of appeals' decision also creates an unprecedented and ill-advised substantive barrier to treatment of distributions from corporations to shareholders as constructive dividends and reintroduces uncertainty that the Tax Court and this Court took pains to eliminate.

**A. The Ninth Circuit's Decision Places an Unconstitutional Burden of Proof on a Criminal Defendant.**

Boulware invoked the return of capital rule to negate the government's proof on the "tax deficiency" element of tax evasion and the falsity element of tax perjury. *See Boulware*, 128 S. Ct. at 1174, 1178 & n.9. When a defendant seeks to present a defensive theory that negates an element of the offense, as Boulware did here, he need only meet a burden of production; the government bears the "ultimate burden of persuasion" on the element beyond a

reasonable doubt. *E.g.*, *United States v. Bruce*, 394 F.3d 1215, 1222-23 (9th Cir. 2005); *see Boulware*, 128 S. Ct. at 1181 n.14 (noting burden of production issue); *Sandstrom v. Montana*, 442 U.S. 510 (1979) (due process limits shifting of burden of proof to defendant).

As the court of appeals purported to recognize, "[t]he legal standard is generous: a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. . . . A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense." App. 6 (quotations omitted); *see, e.g., Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable juror to find in his favor.") (considering affirmative defense of entrapment). Every court of appeals to consider the question has adopted some variation of this standard.<sup>4</sup>

Although the court below recited the correct standard, it held *Boulware* to a far more stringent burden. It declared that *Boulware* "failed to

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<sup>4</sup> *See United States v. Bok*, 156 F.3d 157, 163 (2d Cir. 1998) (return of capital defense); *see also, e.g., United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007) (unreported tax deductions); *United States v. Walters*, 913 F.2d 388, 391 (7th Cir. 1990) (advice of counsel defense); *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (advice of accountant defense); *United States v. Casperson*, 773 F.2d 216, 223 n.12 (8th Cir. 1985) (good faith defense).

establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder." App. 13.

The Ninth Circuit's requirement that Boulware "establish" the fact that the jury would be asked to determine, as a condition for getting an instruction on the return of capital defense, conflicts with the settled burden of production in the Ninth Circuit and elsewhere. That onerous burden violates Boulware's Fifth Amendment right to due process and his Sixth Amendment right to have a properly instructed jury determine the facts. Contrary to the court of appeals' analysis, the question plainly is *not* whether Boulware "established" that he could "only" have received the distributions in his capacity as a shareholder; it is whether "there exists evidence sufficient for a reasonable juror to find in his favor." *Mathews*, 485 U.S. at 63; *see, e.g., Kayser*, 488 F.3d at 1076. That is a far different, and lighter, burden than the court of appeals imposed.

Under a proper application of the standard that governs a criminal defendant's burden of production, Boulware easily satisfied his burden on the "with respect to its stock" issue. He founded HIE in the 1980s. ER 638. He owned fifty percent of the stock at all relevant times and served as chairman and president. The other fifty percent of the stock was held by a trust that Boulware created for his son, with the boy's mother as trustee. ER 304, 565, 624, 638; T. 7/1/05 (Vol. 5) at 6, 38. For at least part of the relevant period, Boulware was the only signatory on the HIE bank accounts. T. 7/1/05 (Vol.

5) at 23. It was undisputed at trial and on appeal that he controlled HIE.

Boulware drew a substantial salary from HIE for his service as president and chairman, which he reported each year on his personal tax returns. ER 304-05; GX 1, 2, 3, 4, 5, 6, 7, 8, 9 (tax returns reflecting salary from HIE). The distributions at issue here--which were not reported on Boulware's individual tax returns--do not include the HIE salary that he reported. Nor does the record evidence compel a finding that those distributions constitute loans from HIE to Boulware or repayments by HIE of loans from Boulware to the company.

This evidence provides a sufficient ground for a jury rationally to infer that HIE made the distributions to Boulware because of his stock ownership and not in any nonshareholder capacity, such as employee or creditor. In the language of the court of appeals' opinion, the jury could infer from the evidence in the record that there was a "nexus between [HIE's distributions to Boulware] and [Boulware's] stock ownership." App. 14. No case of which we are aware, civil or criminal, has required a greater showing than this to satisfy the "with respect to its stock" requirement of 26 U.S.C. § 301(a).

**B. The Ninth Circuit's Decision  
Creates a New and Ill-Advised  
Substantive Hurdle for  
"Constructive Dividend" Treatment  
of Corporate Distributions.**

In addition to imposing an impermissible burden of proof on a criminal defendant, the Ninth

Circuit's ruling on remand creates an unprecedented and ill-advised substantive hurdle to treatment of distributions from corporations to controlling shareholders as "constructive dividends." The court of appeals' interpretation of the "with respect to its stock" requirement in § 301(a) radically alters the settled application of that language and reintroduces uncertainty that the Tax Court and this Court took pains to eliminate.

At least since the Tax Court's seminal decision in *Truesdell v. Commissioner*, 89 T.C. 1280 (1987), courts have analyzed corporate distributions to controlling shareholders in strict binary fashion: *either* the shareholder receives the distribution in a nonshareholder capacity (as salary or as a loan, for example) *or* the shareholder receives the distribution in his capacity as a shareholder. In the *first* circumstance--where the shareholder receives the distribution other than in a shareholder capacity--the tax effect of the distribution at the corporate and individual levels is determined according to the nature of the transaction. For example, if the distribution is salary to the shareholder for services rendered to the corporation, the corporation generally can deduct the payment as a business expense under 26 U.S.C. § 162, and the shareholder must pay tax on the salary received as ordinary income. To cite another example, if the distribution is a loan from the corporation to the shareholder, the corporation generally may not claim a deduction for the amount transferred to the shareholder, but the shareholder is not taxed individually on the amount received as a loan.

In the *second* circumstance--where the shareholder receives the distribution in a shareholder capacity--the corporation is not entitled to a deduction, and the rules set out in §§ 301 and 316 determine whether the shareholder must pay tax on the amount received (and whether the ordinary income or capital gain tax rates apply). *See Boulware*, 128 S. Ct. at 1173-74.

Both *Truesdell* (89 T.C. at 1298) and this Court (*Boulware*, 128 S. Ct. at 1179-80) squarely reject the notion that distributions from corporations to controlling shareholders can fall into a *third* category--described by this Court as "tax limbo"--subject to the general definition of income in 26 U.S.C. § 61(a). Those cases leave no doubt that distributions to shareholders are either in their capacity as such--and thus governed by §§ 301 and 316--or in a nonshareholder capacity, and thus governed by other specific provisions of the Tax Code.

Of crucial significance here, the phrase "with respect to its stock" in § 301(a) serves to distinguish these two circumstances; that is its sole function. *See* S. Rep. 1622, 83d Cong., 2d Sess. 231 (1954) ("Subsection (a) accordingly makes clear that section 301 has applicability only to distributions of property to shareholders in their capacity as such. For example, a distribution of property to a shareholder who is a creditor of the corporation in satisfaction of his claim against the corporation is not within the scope of section 301."). As Professors Bittker and Eustice explain, "Even though such transfers are 'distributions,' in the sense of being transfers, they

are not made to a shareholder 'with respect to [his] stock,' as required by § 301(a), because the corporation receives equal value . . . ; hence, the tax consequences of such transfers are governed by other sections of the Code." 1 Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 8.05[1], at 8-39 (7th ed. 2006) (footnote omitted).

The court of appeals' decision overlooks this simple function of the "with respect to its stock" language in § 301(a) and creates precisely the "tax limbo" that this Court rejected. *Boulware*, 128 S. Ct. at 1180. Under the Ninth Circuit's decision, if no affirmative evidence is produced of a "nexus" between "the distribution and [the stockholder's] stock ownership" (App. 14), and if it is not shown that the stockholder "only could have received the distribution in his capacity as a shareholder" (App. 13), then the distribution presumably falls into some undefined third category--neither subject to the constructive dividend rules of §§ 301 and 316 nor subject to the specific rules governing funds that a shareholder receives in a nonshareholder capacity.

The Ninth Circuit's novel construction of the "with respect to its stock" language in § 301(a) will, of course, make it more difficult for criminal defendants to assert the return of capital defense. But the decision has even greater potential ramifications in the civil tax context.

No civil tax case since *Truesdell* has required, as a condition to application of the constructive dividend rules in §§ 301 and 316, *express* evidence of

a nexus between a distribution to a controlling shareholder and the shareholder's stock ownership, nor has any decision required proof (in the Ninth Circuit's words) that the shareholder "only could have received the distribution in his capacity as a shareholder." App. 13. Instead, courts simply infer (usually without comment) that a controlling shareholder receives the distribution because of his stock ownership in the absence of affirmative evidence that he received it in some other, nonshareholder capacity.<sup>5</sup> That is why the court of appeals did not discuss the "with respect to its stock" requirement in *Miller* or in its prior decisions in this case, why the government never raised the issue before the district court or the court of appeals (until opposing the petition for rehearing in Boulware's prior appeal), and why the civil tax cases addressing corporate distributions to controlling shareholders similarly do not address the issue.<sup>6</sup>

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<sup>5</sup> For a small sample of the many such cases, see, e.g., *Neonatology Associates, P.A. v. Commissioner*, 299 F.3d 221, 231-32 (3d Cir. 2002); *Pittman v. Commissioner*, 100 F.3d 1308, 1314-15 (7th Cir. 1996); *Crowley v. Commissioner*, 962 F.2d 1077, 1081 (1st Cir. 1992); *Green v. United States*, 460 F.2d 412, 419-20 (5th Cir. 1972); *King's Court Mobile Home Park v. Commissioner*, 98 T.C. 511, 514 (1992); *Federbush v. Commissioner*, 34 T.C. 740, 750-54 (1960), *aff'd*, 325 F.2d 1 (2d Cir. 1963) (per curiam).

<sup>6</sup> Ironically, in a civil tax proceeding involving HIE and Boulware, the IRS recently succeeded in convincing the Tax Court that certain professional fees that HIE paid on Boulware's behalf are constructive dividends taxable to Boulware personally. *HIE Holdings, Inc. v. Commissioner*, T.C. Memo 2009-130, 2009 Tax Ct. Memo LEXIS 142, at \*308-\*321 (June 8, 2009). The Tax Court based its constructive dividend holding on its conclusion that the fee payments were made primarily to benefit Boulware and without expectation of repayment. *See id.* at \*310. The Tax Court did not require any

The Ninth Circuit's decision has reintroduced the "tax limbo" that the Tax Court and this Court have rejected. The Court should grant review to ensure that the court of appeals' decision does not substantially upset settled law.

**II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS EXCEEDED THE SCOPE OF THIS COURT'S REMAND.**

The Ninth Circuit's "basis" decision also warrants this Court's review and reversal. The court of appeals' consideration of the basis issue does not comply with the remand from this Court. Having addressed only the government's "with respect to its stock" argument and treated basis as undisputed, this Court remanded to the panel "for further proceedings consistent with this opinion." *Boulware*, 128 S. Ct. at 1182. It is not "consistent with" this Court's opinion to address an issue that the government did not dispute before the trial court, before the court of appeals panel, or before this Court and that this Court treated as conceded and thus did not address. This Court has not hesitated in the past to review a case a second time to ensure

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(continued...)

further showing on the "with respect to its stock" issue; the court inferred, as other courts routinely have done, that distributions to a controlling shareholder not made in a nonshareholder capacity satisfy the "with respect to its stock" standard in § 301(a). It is remarkable--and strikingly unfair--that Boulware would face different interpretations of the same statutory language before different courts, with both interpretations to his disadvantage.

compliance with its directives on remand, and we ask it to do so here. *See, e.g., Sumner v. Mata*, 455 U.S. 591, 598 (1982) (per curiam); *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978); *Stanton v. Stanton*, 429 U.S. 501, 503-04 (1977); *In re Potts*, 166 U.S. 263, 268 (1897).

It was particularly unfair for the court of appeals to allow the government to raise an issue it had long since forfeited and at the same time to hold Boulware strictly to the terms of the proffer he had made in the district court, when the sole issue in dispute was the *Miller* "contemporaneous intent" requirement that this Court later rejected. *Compare* App. 9-10, 13 n.5 (holding Boulware to his district court proffer) *with* App. 15 n.9 (permitting government to raise basis issue). Had the government raised the basis requirement in the district court, of course, Boulware could have supplemented his proffer to the extent it fell short.<sup>7</sup>

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<sup>7</sup> The panel erred in concluding that Boulware must show either \$10 million in basis or forgo the return of capital defense. Boulware was entitled to present that defense up to the amount of his basis, regardless of whether that defense eliminated \$3 million of the alleged unreported income, or \$5 million, or the entire amount. The alleged \$10 million in unreported income consisted of money in varying amounts from various sources received over a period of years. Boulware's alternative explanations (other than return of capital) varied from one sum of money to another. The jury returned a general verdict. Thus, it is impossible to know if the jury credited some aspects of Boulware's defense but found enough of the money unexplained to create a tax deficiency under 26 U.S.C. § 7201. Under these circumstances, there is a substantial likelihood that proof that millions of dollars of the total amount was nontaxable would have changed the outcome.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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