

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1453 & 82-1509

TITLE ERNEST BADARACCO, SR., ET AL., Petitioners v. COMMISSIONER
OF INTERNAL REVENUE; and DELEET MERCHANDISING CORP., Petitioners
v. UNITED STATES

PLACE Washington, D. C.

DATE November 28, 1983

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(202) 628-9300
440 FIRST STREET, N.W.

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IN THE SUPREME COURT OF THE UNITED STATES

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ERNEST BADARACCO, SR., ET AL., :
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Petitioners :
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v. : No. 82-1453
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COMMISSIONER OF INTERNAL REVUENE; :
:
and :
:
DELEET MERCHANDISING CORP., :
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Petitioner :
:
v. : NO. 82-1509
:
UNITED STATES :
:
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Washington, D.C.
November 28, 1983

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 2:00 p.m.

APPEARANCES:

BARRY I. FREDERICKS, ESQ., New York, New York;
on behalf of the Petitioners.

ALBERT G. LAUBER, JR., ESQ., Office of the Solicitor
General, Department of Justice, Wasington, D.C.;
on behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Fredericks, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF BARRY I. FREDERICKS, ESQ.

ON BEHALF OF THE PETITIONERS

MR. FREDERICKS: Thank you, Mr. Chief Justice, and may it please the Court:

This matter comes to the Court from an appeal from the Third Circuit. The facts in the case are not in dispute. Basically it is a simple legal issue that is presented here today. Simply put the question is one of whether an individual who has initially filed a fraudulent tax return and subsequently comes forth and files an amended tax return, whether by that act he begins the running of the three-year statute of limitations applicable under the Internal Revenue Code or, as the government alleges, he is forever open to an assessment of tax upon the filing of the initial fraudulent return.

QUESTION: Where would your argument take you if when the amended return was offered, tendered, the Commissioner refused to accept it?

MR. FREDERICKS: I think, Your Honor, under that point the government could argue that there was no amended return filed and I think that we would be in a very difficult position to start the running of the amended

1 return. The government could, I would think, say that the
2 amended return is not filed.

3 In this case and the cases that have taken place
4 in the Second, Fifth, and Tenth Circuits that is not the
5 facts that we have to deal with. In fact, in all of those
6 cases, the amended return was taken and the tax that was
7 due on the amended return was collected by the Internal
8 Revenue Service.

9 QUESTION: Do you think that would bar them from
10 taking any other position, is that your point?

11 MR. FREDERICKS: Well --

12 QUESTION: By taking the amended return?

13 MR. FREDERICKS: I think that the issue of the
14 amended return is one that the government presses, which I
15 have always thought has been a question of an ostrich type
16 argument insofar as they can deny the existence of an
17 amended return except that the Internal Revenue Code at
18 length refers to an amended returns and it is a practice
19 that has been going on for some time and has been
20 recognized by the courts and in many cases, has been used
21 by the government in connection with their criminal
22 prosecution of people who have been filing fraudulent tax
23 returns in the first instance.

24 The Dowell case and the Klemp case, I believe,
25 in both instances the government used the amended return

1 as part of their case in chief to establish the question
2 of fraud.

3 I think the question the Chief Judge poses is an
4 interesting one. I really can't answer the question of
5 what would happen if the government refused to accept that
6 amended return, which they may or may not have a right to
7 do. But, in this case and in the cases that have the
8 issue as has been presented that has not been the
9 situation. The amended return has been fully accepted by
10 the government.

11 And, we suggest that upon the filing of that
12 amended return that the Tax Court ruling in Bennett, which
13 was decided in 1958, and acquiesced in by the United
14 States government, which was a case of the fraudulent
15 failure to file a tax return at all and a criminal
16 prosecution of that taxpayer for fraudulently failing to
17 file.

18 In a subsequent filing of a non-fraudulent
19 return, the Tax Court and the government concluded that at
20 that point the three-year statute of limitations provided
21 in 6501(a) began to run.

22 I suggest that there is no basis to distinguish
23 that case from the case at bar.

24 QUESTION: Well, Mr. Fredericks, the language of
25 the two subsections is different.

1 MR. FREDERICKS: I respectfully --

2 QUESTION: In the case of the original non-filing
3 of a return, the section says within three years after the
4 return is filed. There is language that doesn't appear.

5 MR. FREDERICKS: No. I think the subsection
6 language is not different, Your Honor. The subsection
7 language, (c)(3) and (c)(1), are identical. They both
8 provide that the statute shall not run --

9 QUESTION: Well, the language in 6501(a) does
10 say that the tax will be assessed within three years after
11 the return is filed, does it not?

12 MR. FREDERICKS: That is correct.

13 QUESTION: And that language would then apply
14 where there is originally no return filed, but later one
15 is filed. Now, I don't see how, when you compare that
16 with the language for the fraudulent return that is filed
17 and subsequently an honest return filed, the language is
18 so different that I don't see how you can make the
19 argument you are making.

20 MR. LAUDER: Well, I don't believe you -- the
21 language in 6501(c)(1) and (3) are identical. What you
22 are referring to

23 QUESTION: Right.

24 MR. FREDERICKS: -- is the initial language in
25 the first section as to the statute of limitations.

1 QUESTION: That is right.

2 MR. FREDERICKS: And, I would suggest, Your
3 Honor, that one must go back to 1918 when the statute was
4 first enacted and at that time Congress provided a
5 five-year statute of limitations and an exemption in the
6 case of filing a fraudulent tax return. No mention was
7 made at all on failure to file.

8 In 1921, Congress then enacted what is now the
9 predecessor of the sections we are dealing with. And, it
10 said the fraudulent failure to file or -- I am sorry, the
11 filing of a fraudulent return or the failure to file in a
12 single sentence. And, I suggest that that indicated an
13 intention by Congress to deal with these two situations
14 identically.

15 In fact, all of the Circuit Courts that have
16 considered this matter have all concluded that the two
17 sections must be read in pari materia. I don't think that
18 is in question here.

19 It is only in 1954 when the '54 Code comes into
20 being that the two section, which were in one sentence,
21 were split into two sections. And, there is no
22 substantial legislative history one way or the other to
23 indicate why.

24 I suggest that the legislative history, which
25 indicates that both of these sections were to be

1 identically when they were initially enacted, indicates
2 there should be identical treatment. Therefore, when one
3 fraudulently seeks to evade the tax law by failing to
4 fraudulently a tax return --

5 QUESTION: By failing to fraudulently file a tax
6 return?

7 MR. FREDERICKS: Well, that is what the facts
8 were then. The taxpayer, with an intent to evade the tax,
9 filed a return.

10 QUESTION: Isn't there a difference between
11 failing to fraudulently file and fraudulently failing to
12 file? I mean, failing to fraudulently file to me means --

13 MR. FREDERICKS: No, no, I am sorry.

14 QUESTION: -- that you had planned to file a
15 fraudulent report, but you didn't.

16 MR. FREDERICKS: I am sorry. What the Bennett
17 taxpayer did was with the intent to evade the tax, with
18 the fraudulent intent failed to file the return.

19 What the taxpayers in this case did was file the
20 fraudulently return and subsequently filed an amended
21 return. I suggest --

22 QUESTION: Well, now, if a taxpayer simply
23 negligently, not fraudulently, failed to include more than
24 25 percent of the income, then there is a six-year statute
25 of limitations, right?

1 MR. FREDERICKS: Which begins to run from the
2 day that return is filed irrespective of whatever
3 transpires, that is correct.

4 QUESTION: But, under you theory, you would be
5 better off if you had a fraudulently intent than a
6 negligent intent because then it would just be a
7 three-year statute of limitations.

8 MR. FREDERICKS: That is not true at all,
9 because if you filed and it was fraudulent you have two
10 other things, three things that have to come into play.
11 One, that you would be subject to criminal prosecution.
12 You would have six years in which the government could
13 indict you and try you.

14 Two, you would be subject to the 50 percent
15 penalty.

16 And, three, in order to have a statute of
17 limitations to begin at all, you would have had to have
18 filed an amended return.

19 Yes, if the fraudulent return was filed on April
20 15th and the amended return was filed on April 16th, now
21 in that case there is no running of a statute from our
22 position. The 16th for three years would begin to run.
23 That taxpayer might be in better position than the fellow
24 who negligently forgot his 25 percent, but that taxpayer
25 came in immediately, rectified his situation, and gave the

1 government the information it had.

2 QUESTION: But, that difference and the fact
3 that the Congress treated the negligent omission
4 differently does give some meaning to the language that I
5 referred to early. I mean, the scheme holds together a
6 little better, doesn't it, if that is the case?

7 MR. FREDERICKS: I suggest not for this reason.
8 Congress -- There is some legislative history on the
9 six-year -- the reason for the six-year statute of
10 limitations and that was that begins to run from the day
11 it is filed whether the government discovers it or not.
12 So, the government, without having the benefit of the
13 information, has got a six-year statute running on it and,
14 therefore, Congress said we are going to give them
15 additional time to catch up this possible mistake if it
16 was negligent. Obvioulsy, if it is fraudulent, there is
17 no statute of limitations of any kind.

18 QUESTION: Mr. Fredericks, can I ask on that
19 point, what is the law with respect to this situation?
20 Suppose you negligently file a return with more than a 25
21 percent -- you have got six years. Then six months later
22 you file a correct amended return. What is the statute of
23 limitations?

24 MR. FREDERICKS: The statute of limitations on
25 that is six years.

1 QUESTION: Still six years.

2 MR. FREDERICKS: The Court's ruling is that
3 since it is a running statute that no act, be it either --

4 QUESTION: Those holdings are somewhat
5 inconsistent with your position then.

6 MR. FREDERICKS: I think not. I think not,
7 because the statute is already running. Our position is
8 that there is no statute running. We are saying, as in
9 Bennett, where the filing of what the government
10 characterizes as a delinquent return now starts the
11 statute. So, in my case, the filing of the amended return
12 starts the statute.

13 In the 25 percent case, that statute begins to
14 run the day the return is filed, whether the government
15 discovers it or doesn't discover it, no matter what
16 happens, and neither the taxpayer nor the government can
17 stay off the running of that statute.

18 In our case, the government's position is that
19 they have forever, literally forever, because if you buy
20 the government's position, the taxpayer can have died, his
21 estate could have been passed on to three generations and
22 still the statute of limitations on transferees don't
23 begin to run until one year after the initial statute
24 would begin to run. The government can go on down three
25 generations to assess this tax if they so choose.

1 The other problem that we suggest exists is that
2 by not having a statute of limitations of any kind the
3 government is in a situation where they can come in after
4 the amended tax return has been filed and make numerous
5 denials of deductions claimed by the taxpayer and then
6 that burden shifts to the taxpayer, which is exactly what
7 happened in this situation. The taxpayer has the burden
8 of proof of establishing the propriety of certain
9 deductions that he has made.

10 Having now been ten years down the road we run
11 into the very reason that this Court says that statute of
12 limitations exist so that no issue shall be tried at a
13 time when evidence disappears, memories fade, and
14 witnesses are not available.

15 To give the government an open-ended position
16 after the amended return comes in, we suggest opens up a
17 substantial area of government abuse and we suggest that
18 when the government says --

19 QUESTION: Of course, if that is the rule, Mr.
20 Fredericks, I suppose the taxpayer has it within his
21 control to avoid that abuse by simply not filing an
22 amended return after he has filed a fraudulent return.

23 MR. FREDERICKS: Well, by not filing the amended
24 and taking the risk of non-disclosure. He could just sit
25 back and hope the government never catches him.

1 QUESTION: Yes. He presumably took that risk in
2 the first instance when he filed the fraudulent return.

3 MR. FREDERICKS: Well, that comes another way
4 around. Since our policy for taxation is really based, as
5 this Court has said many times, upon the voluntary
6 assessment of the taxpayer of his tax, and in this case, a
7 reassessment, we suggest, that I think your question
8 highlights very nicely, that to take the government's
9 position puts a premium on silence. It says to the
10 taxpayer, don't file the amended return because you have
11 no benefit. If anything, you are going to make an
12 admission against your own interest, subject yourself to
13 the 50 percent fraud penalties, and possibly criminal
14 prosecution. Sit back and run the risk of not being
15 disclosed, and, therefore, you have no problem.

16 QUESTION: Well, that is true of almost anybody
17 who commits fraud in all of the variety of ways that fraud
18 is prohibited, isn't it? That once they have committed
19 the fraud, they have committed an act which submits them
20 to rather extensive liability and there is very little way
21 to recover from that.

22 MR. FREDERICKS: Only if the government
23 discovers you. And, we suggest that one of the ways to
24 recover it and not to avoid -- We are not suggesting that
25 the penalties change. We are suggesting that by filing

1 the amended return, yes, you are subject to criminal
2 prosecution. Yes, you are subject to the tax penalty.
3 But, no, you should not be subject to an open-ended
4 statute of limitations. You have come forth and filed an
5 amended return. You have given the government all of the
6 information they need on the civil side to determine what
7 the tax is and there is no justification at that point for
8 allowing the government to sit back, armed with the
9 information necessary to determine the tax, to allow them
10 to sit back ad infinitum.

11 Here is a situation where the taxpayer has come
12 forward and filed his amended return. He has given them
13 the information requested and there is no justification
14 for the open-ended statute of limitations suggested by the
15 government.

16 Now, they still have their criminal remedy. We
17 are not suggesting for one moment that the filing of the
18 amended tax return deprives the government of its right to
19 prosecute the individual criminally or to impose its civil
20 50 percent penalty.

21 What we are suggesting is that the filing of the
22 amended return, as in the case of Bennett, the filing of
23 what the government called a delinquent return, should
24 prevent the government from sitting on their hands forever
25 and a day until they decide they want to take action,

1 particularly when that delay results in substantial
2 prejudice to this taxpayer who has now gone through a
3 self-assessment and has filed his return. There is no
4 government policy that warrants such an open-ended civil
5 statute of limitations.

6 The government disagrees. It says, well, it
7 needs this in order to allow them to proceed with their
8 criminal investigation. We suggest that that is really
9 not the case. Certainly the criminal investigation, at
10 the time that the government has referred the matter to
11 the Department of Justice for criminal investigation, they
12 will have gathered enough information to meet the civil
13 burden which is far less than their criminal burden.

14 Secondly, the amended return gives the
15 government one advantage. It has an admission against
16 interest by the would-be defendant to which they can
17 compare with the original return and clearly determine
18 right from the face of the amended return where the fraud
19 was and in what directions they have to go.

20 At the time that the government seeks an
21 indictment, it certainly has a more than prima facie case.
22 The government believes at the time it returns an
23 indictment against a citizens that it can prove its case
24 beyond a reasonable doubt. The burden on the civil side
25 is substantially less than that.

1 QUESTION: Has there been any indictment against
2 either of these taxpayers?

3 MR. FREDERICKS: The initial -- Badaracco was,
4 in fact, indicted and plead guilty. Deleet was not.
5 Deleet is not a criminal case and there has been no
6 criminal prosecution against Deleet. Deleet was a
7 situation where the taxpayer, which is a corporation, had
8 a change in the upper echelons of management and they came
9 forth and filed their amended returns. There has never
10 been a criminal prosecution in that regard.

11 But the point that we are making is that there
12 is no need for the government to sit back and wait on
13 these type of situations, particularly when armed with the
14 amended return. They have used the return in criminal
15 prosecutions against the taxpayer. And, to allow them on
16 the civil side to wait when it is clearly going to
17 prejudice the taxpayer, we suggest is illogical and
18 unconscionable.

19 I mean, Bennett was a classic case of a criminal
20 who was indicted, who had committed tax fraud, and the
21 court said, well, once you filed a return and have given
22 the government the very information it needs to apply the
23 tax, there is no reason to keep the statute of limitations
24 open.

25 Might I also add the Bennett case also dealt

1 with the very problem that was raised about the 25 percent
2 taxpayer and the government acquiesced in that situation
3 and there was no question that in the Bennett decision
4 they dealt with this problem and concluded that the 25
5 percent situation didn't affect their ability to deal with
6 the problem of the fraudulent non-filing.

7 And, also the Bennett case, again which
8 acquiesced in by the government in 1958, concluded that
9 Congress intended to have these two sections dealt with
10 identically. In fact, it used it as part of its reasoning
11 to reach the conclusion it did, that these two sections
12 were determined by Congress to be equally treated.

13 Now, the Bennett case is almost identical to the
14 case at bar with one minor exception and that is in
15 Bennett the taxpayer filed nothing and in this case the
16 taxpayer filed a return. And, then in both instances, one
17 filed a delinquent return and one filed an amended return
18 and we suggest tht there is no logical, legal reason to
19 make a distinction and say that a fraudulent non-filer
20 who files is entitled to the benefit of a statute of
21 limitations, acquiesced in by the government.

22 In 1979 it sent out a Revenue ruling which
23 expressly took that position. It said clearly that a
24 fraudulent non-filer was entitled to the benefit of the
25 statute of limitations upon filing a return.

1 We suggest that there is no distinction between
2 that case that is supported in either logic or law to say
3 that a fraudulent filer who files an amended return
4 shouldn't be treated in the same light and under the same
5 circumstances.

6 And there is nothing in the policy
7 considerations rendered by the government. There is
8 nothing in the statute to indicate to the contrary. I
9 suggest to have a distinction drawn on the filing of a
10 piece of paper moves away from the question of intent
11 which is what these sections were to get to.

12 The question of intent was the underlying basis
13 here in both Bennett and these sections, fraudulent
14 intent. Once that is dissipated and the taxpayer comes in
15 and either files what is known as the delinquent return or
16 the amended return --

17 QUESTION: Why do you say fraudulent intent is
18 dissipated by the filing of an amended return? Certainly
19 if the return was fraudulent at the time it was filed, it
20 is nonetheless fraudulent by virtue of an amended return
21 being filed later, is it?

22 MR. FREDERICKS: Yes, but the -- There is no
23 question about that, but the at the point the taxpayer
24 files his amended return, he has obviously abandoned his
25 initial intent. I don't think there is any question about

1 that.

2 QUESTION: Well, you don't have to a permanent
3 intention to commit fraud.

4 MR. FREDERICKS: No.

5 QUESTION: All you need is at the time you
6 commit it.

7 QUESTION: No, the attempt to escape punishment.
8 That is what --

9 MR. FREDERICKS: Yes, I acknowledge that, but at
10 the time he has filed the amended return, he has come
11 forth and met his obligation as a taxpayer to give the
12 government all of the information. If one would say he
13 has abandoned his sins of yesterday, he has --

14 QUESTION: It doesn't remove the fact that he
15 has committed fraud.

16 MR. FREDERICKS: But, it doesn't remove the
17 penalties either, Your Honor. The criminal sanctions are
18 still there, the 50 percent fraud penalty is still there.
19 All we are saying is that it should end the government's
20 open-ended statute of limitations so that the
21 government --

22 QUESTION: And prevent them from doing what?

23 MR. FREDERICKS: Sitting back and waiting --

24 QUESTION: Before they do what?

25 MR. FREDERICKS: Assess the tax. All we are

1 asking --

2 QUESTION: What did they try to do in this case?

3 MR. FREDERICKS: They waited six and a half
4 years to come in and assess the taxes.

5 QUESTION: What did they try to assess?

6 MR. FREDERICKS: Well, they denied certain of
7 the business deductions in question as to Deleet and they
8 attempted to impose the tax fraud penalty in Badaracco.
9 They attempted to --

10 QUESTION: That is what I am -- Did you say that
11 you could forever impose the 50 percent fraud penalty?

12 MR. FREDERICKS: No, I didn't. I said --

13 QUESTION: I thought you did.

14 MR. FREDERICKS: No. I said the filing of the
15 amended return does not relieve the taxpayer of his
16 exposure to that fraud penalty.

17 QUESTION: But only for three years.

18 MR. FREDERICKS: That is correct. That is the
19 exact ruling in Bennett and that is the ruling that the
20 government has acquiesced in and has put forth in their
21 own regulation.

22 QUESTION: The amended return is filed and the
23 very next day the government goes back and assesses
24 the -- more than three years after the original failure to
25 file or -- They go back the next day after the amended

1 return and impose the fraud penalties. Now you say that
2 is all right.

3 MR. FREDERICKS: I said they have three years
4 from the filing of the amended return.

5 QUESTION: I know you do. Why do you say that?

6 MR. FREDERICKS: Because it is the amended
7 return that has given them the knowledge and information
8 that they need to assess the tax. The fraud penalty, as
9 set up by Congress, is not a penalty as such, it is a
10 right to impose additional tax. The way the statute is
11 worded it is not that there is a penalty, it is in
12 computing the additional tax due the government has a
13 right to add 50 percent.

14 QUESTION: It is still a fraud penalty, isn't
15 it, for committing fraud?

16 MR. FREDERICKS: Right. And, it must be imposed
17 with the tax itself.

18 QUESTION: But, you say you can do that for
19 three years after filing the amended return.

20 MR. FREDERICKS: That is the position that we
21 take, Your Honor. And, that was the exact position that
22 was taken by the Court in Bennett, exactly the question in
23 Bennett where --

24 QUESTION: May I ask you a question about the
25 language of the statute? Are you arguing, just so I get

1 your argument clear, that within the meaning of Section
2 6501(a) that the amended return is "a return?"

3 MR. FREDERICKS: That was the position that the
4 Tenth Circuit took in Dowell.

5 QUESTION: I just wonder if you are taking that
6 position.

7 MR. FREDERICKS: Well, I don't want to abandon
8 it since the Dowell decision was favorable to me. I think
9 that there is much -- a good point can be made that the
10 amended return is a return.

11 QUESTION: Well, if it is, then don't you just
12 win from the plain language of 6501(a)?

13 MR. FREDERICKS: I think we do except --

14 QUESTION: But, you don't make that argument.
15 That is why I am kind of puzzled.

16 MR. FREDERICKS: Well, the reason I don't make
17 the argument is the problem that one comes into -- Again,
18 I am not abandoning the argument. I don't think -- It is
19 not the best argument we could have made. I think Bennett
20 is more dispositive since that is a case that the
21 government has agreed to and has passed a Revenue ruling
22 and were identical.

23 But the problem with the argument is that the
24 government will argue that the return is the original
25 return which was fraudulently filed.

1 QUESTION: Well, but the -- I don't -- I
2 understand what they can argue, but you argue going back
3 to these early statutes that a fraudulent return is not a
4 return.

5 MR. FREDERICKS: That is correct.

6 QUESTION: Just as no return at all was.

7 MR. FREDERICKS: That is correct.

8 QUESTION: But then why don't you say as soon as
9 they file an amended return they have now filed a
10 statutory return and the statute begins to run? Why isn't
11 that your argument?

12 MR. FREDERICKS: It is my argument based upon
13 Bennett. I accept that as my argument based upon Bennett
14 because Bennett has decided the prior situation of the
15 failure to file and if you analogize that the fraudulent
16 return is not a return, then you fail to file, and once
17 you file the amended return you are right within the
18 square corners of Bennett. And, to that extent --

19 QUESTION: But, you don't argue you are within
20 the square corners of what Congress has said the correct
21 rule should be.

22 MR. FREDERICKS: Well --

23 QUESTION: I think we would be more interested
24 in the language of the statute than in sort of a
25 convoluted reasoning from a bunch of cases.

1 MR. FREDERICKS: Well, I think that, Your
2 Honor --

3 QUESTION: But, you don't make the argument in
4 any event?

5 MR. FREDERICKS: No. I adopt the argument of
6 the Tenth Circuit and that was the argument that they made
7 in their opinion; that the return, the initial return was
8 not a Zellerbach return, it wasn't an honest evidence to
9 file a return and it was the amended return that was, in
10 fact, the first return filed.

11 I suggest that is in keeping with the position
12 we have taken in Bennett and which the government has
13 acquiesced and the logic of Bennett carries right through
14 to that direction.

15 But, I certainly suggest that a return, an
16 amended return can be reviewed as a return under the
17 statute and then within the arguments of 6501(a) as taking
18 this out of the exceptions that follow.

19 I would like to reserve the balance of my time
20 for rebuttal.

21 CHIEF JUSTICE BURGER: Mr. Lauber?

22 ORAL ARGUMENT OF ALBERT G. LAUBER, ESQ.

23 ON BEHALF OF THE RESPONDENTS

24 MR. LAUBER: Mr. Chief Justice, and may it
25 please the Court:

1 This case presents a straight forward question
2 of statutory construction. Section 6501(a) provides in
3 general that the Commissioner must assess the tax within
4 three years of the date a return is filed.

5 Section 6501(c)(1) has an exception to this
6 rule. It says that in the case of a false or fraudulent
7 return filed with the intent to evade tax, the tax may be
8 assessed at any time. The Code has allowed the
9 Commissioner to assess the tax at any time in broad cases
10 since 1918.

11 We think the words of the statute are clear and
12 unambiguous. Section 6501(c)(1), the at-any-time
13 provision, plainly came into operation when the taxpayers
14 filed their original returns here because those returns
15 were, or are deemed for present purposes, to have been
16 false and fraudulent. And, there is nothing in that
17 section which could serve to call off its operation by
18 reference to a fraudulent filer's later conduct, be it the
19 filing of an amended return or doing anything else.

20 Likewise, Subsection (a), with the three-year
21 rule, plainly did not come into play when taxpayers filed
22 their original returns here because that section, by its
23 terms, cannot apply when the return is false and
24 fraudulent. And, there is nothing in Subsection (a) which
25 could cause its general three-year rule to come into

1 effect later on depending on the filing of an amended
2 return.

3 When one recalls that --

4 QUESTION: Let me stop you right there. Why are
5 you so sure of that? Couldn't one say that the amended
6 return is a return within the meaning of the statute?

7 MR. LAUBER: Well, we would agree, Justice
8 Stevens, it is a return, but the phrase used in (a) is
9 "the return," and the Court early on --

10 QUESTION: But that is the only statutory return
11 then. Couldn't you say that?

12 MR. LAUBER: You are presupposing the argument
13 that Dowell made that the fraudulent return was not a
14 return. We think that must fall because (c)(1) uses the
15 phrase "fraudulent return." It must be a return within
16 the meaning of the section we are construing.

17 QUESTION: Let me just ask one question and I
18 won't interrupt any more. In your view, is an amended
19 return a return within the meaning of the Code?

20 MR. LAUBER: Our view is that an amended return,
21 if accepted by the Commissioner, is a return for the tax
22 year, but it is not the return referred to in (a).

23 QUESTION: But it is not the return. Right.

24 MR. LAUBER: That is because Congress, by using
25 a definite article, we think, indicated that it meant the

1 original return for the year, not an amended return.

2 QUESTION: So, your argument would fall if
3 instead of the word "the" in 6501(a), that Congress had
4 selected the word "a."

5 MR. LAUBER: No, because then we would still be
6 covered by (c)(1).

7 QUESTION: But, it wouldn't be quite as clear.

8 MR. LAUBER: It wouldn't be quite as clear.

9 QUESTION: You place a lot of weight on "the."

10 MR. LAUBER: It would give us only one string
11 rather than two to our bow which I think we have now.

12 But, one recalls that as this Court has held a
13 limitations period must be construed strictly in favor of
14 the government. We think the plain language of the Code
15 here, given a natural reading, indicates that once a false
16 return has been filed, the Commissioner has an unlimited
17 period to assess the tax, whatever the taxpayer does.

18 We think this natural reading of the statute is
19 confirmed if one looks to the structure and operation of
20 other Code provisions.

21 To begin with it is clear that a taxpayer who
22 has filed a false return remains liable for criminal and
23 civil fraud penalties on that account regardless of later
24 repentant conduct. The fraud is complete when the
25 fraudulent return is filed.

1 In short, the case remains a case of a false or
2 fraudulent return despite the filing of an honest amended
3 return indefinitely for purposes of imposing substantive
4 fraud liability. We think it is logical to infer from
5 that that the case should also remain a case --

6 QUESTION: It just doesn't make any difference
7 where you got your information that a fraud had been
8 committed. You may have gotten it from an amended return.

9 MR. LAUBER: Or from an anonymous tip or a third
10 party or bank or an accounting firm or anyone. We think
11 it is just another form of information the Commissioner
12 has to process in doing its fraud investigation.

13 QUESTION: In assessing any additional taxes in
14 either one of these cases, is there additional taxes
15 assessed after the filing of the amended return other than
16 the fraud penalty?

17 MR. LAUBER: Yes. What happened in Deleet --

18 QUESTION: So, you don't accept the accuracy of
19 the amended return?

20 MR. LAUBER: I believe after we investigated the
21 return of Badaracco, I think that turned out to be
22 accurate. In Deleet --

23 QUESTION: Because you couldn't really, after
24 three year, have assessed any additional taxes on the
25 amended return, could you?

1 MR. LAUBER: Yes, we could have.

2 QUESTION: Why?

3 MR. LAUBER: Because the Commission is empowered

4 not only to assess the fraud penalty but the tax at any

5 time in a fraud case.

6 QUESTION: Well, I know, but there may be -- You

7 might be able to impose the fraud penalty but could

8 you -- Say you made a mistake in calculating your tax on

9 the amended return other than the fraud penalty.

10 MR. LAUBER: That is what happened in Deleet,

11 Justice White. What Deleet did --

12 QUESTION: How can you do that after three years

13 from the amended return?

14 MR. LAUBER: Why? Because the amended return,

15 we submit, has no relevance in determining the limitations

16 period in fraud cases. The statute says "at any time."

17 What happened in the Deleet case was the amended

18 return reported the omitted gross income of the

19 corporation, but it also claimed a deduction in the exact

20 same amount.

21 QUESTION: Well, it seems to me arguably at

22 least there could be a difference between assessing more

23 taxes than shown on the amended return and assessing some

24 penalty for the fraud that was committed prior.

25 MR. LAUBER: No, there cannot, Justice White,

1 because, as counsel for Petitioner --

2 QUESTION: Well, that is your position.

3 MR. LAUBER: Well, Congress might have done
4 that, but they didn't, because a fraud penalty is a
5 colloquial phrase to refer to an addition to the tax on
6 account of fraud.

7 QUESTION: I understand that.

8 MR. LAUBER: It is all one ball of wax.

9 QUESTION: Suppose you hadn't attempted to
10 impose any fraud penalty at all. You just said your
11 amended return doesn't accurately state your taxes, so we
12 are assessing additional taxes.

13 MR. LAUBER: Then there would be no --

14 QUESTION: And, you did it more than three years
15 after the filing of the amended return.

16 MR. LAUBER: If there were no finding of fraud,
17 we wouldn't have the unlimited period.

18 QUESTION: Why not?

19 MR. LAUBER: Because it only applies in cases of
20 a false or fraudulent return.

21 QUESTION: Well, then I would tell you again.
22 Suppose you do two things more than three years after the
23 amended return is filed. One, you say you didn't state
24 your taxes correctly, wholly aside from there being any
25 fraud.

1 MR. LAUBER: You make another amended return.

2 QUESTION: No, we just say -- you do two things.
3 You say you failed to state your basic tax accurately in
4 your amended return. Also, we are assessing a fraud
5 penalty. Now, you say you can do both of those.

6 MR. LAUBER: We are saying if there is fraud
7 in the original return, we can assess additional tax
8 itself plus what we call the fraud penalty indefinitely,
9 no matter how many amended returns the taxpayer files.

10 QUESTION: On the basis of the original return
11 though.

12 MR. LAUBER: Exactly. It would not be a second
13 act of fraud if the amended return were honest. That
14 doesn't matter. We are going back to the antecedent fraud
15 on the original return.

16 QUESTION: And, you say that even at the time of
17 filing the amended return the taxpayer voluntarily pays
18 the fraud penalty. You would still say you can go on
19 forever.

20 MR. LAUBER: Well, if the taxpayer voluntarily
21 pays -- If his return is accurate and he voluntarily
22 pays --

23 QUESTION: He first filed a fraudulent return.

24 MR. LAUBER: Right.

25 QUESTION: And six months later he files an

1 accurate amended return and voluntarily tenders the fraud
2 penalty.

3 MR. LAUBER: If that return is completely
4 accurate and it correctly computes the fraud penalty,
5 there is nothing left for the government to do. We have
6 gotten all we can on --

7 QUESTION: Suppose --

8 QUESTION: He thinks it is accurate but, you
9 know, ten years later decide he overdeducted something
10 like his automobile expense.

11 MR. LAUBER: Well, then he would have
12 incorrectly computed his fraud penalty because if we audit
13 the return further and determine that he got the
14 deficiency wrong, although he tried to be honest, he got
15 it wrong, he got the fraud penalty wrong too.

16 QUESTION: He said the fraud penalty only gave
17 half a million where he should have given an extra \$500
18 say. What I am saying is he substantially paid it. You
19 would still say that you go on forever.

20 MR. LAUBER: We would.

21 QUESTION: Is there anything to prevent a
22 taxpayer from filing his initial return and then an
23 amended return and then a second amended return?

24 MR. LAUBER: No. A taxpayer can amend --

25 QUESTION: It is a matter of grace whether it

1 will be accepted.

2 MR. LAUBER: Accepted, that is right.

3 QUESTION: Now, suppose he put out a fraudulent
4 return initially, as you claim here, a less fraudulent or
5 correct return the second time, and still a fraudulent one
6 later, the third one. What is the starting date then?

7 MR. LAUBER: Well, the starting date is the
8 first return. The finishing date is perpetuity. Our
9 position is whenever the first return is fraudulent, we
10 have forever to come against the taxpayer. That is the
11 language the statute requires.

12 I think this language is also supported by the
13 fact that amended returns are not even recognized by the
14 Code. The Code does not permit, officially permit the
15 taxpayer to file amended returns nor does it require the
16 Commissioner to accept them if they are filed.

17 Indeed, this Court last term in Hillsboro Bank
18 noted that amended returns are entirely creatures of IRS
19 art and the Commissioner has discretion to reject them.

20 Now, because amended returns are not part of the
21 structure that Congress enacted in the Code, and because
22 the Commissioner can reject them in his discretion, we
23 think Congress is very unlikely to have intended that
24 these documents would have any kind of controlling effect
25 on the operation of the limitations rules.

1 QUESTION: May I ask one other question? I said
2 I wouldn't, but I -- Say you file an original return that
3 is valid, you think it is valid, but you forgot something,
4 so a year later you file an amended return correcting a
5 mistake.

6 MR. LAUBER: The first return is not fraudulent,
7 but inaccurate?

8 QUESTION: Not fraudulent, but just inaccurate.
9 What period of time does the government have in which
10 to -- When does the three years --

11 MR. LAUBER: Three years from the original
12 return.

13 QUESTION: So, if the government accepts an
14 amended return two and a half years after the original
15 one, why --

16 MR. LAUBER: This Court held in a companion case
17 to Zellerbach Paper that an amended return, if both the
18 amended and original are honest, it does not give the
19 Commissioner more time. It is three years from the
20 original return's filing date.

21 Now, because we think that language of the Code
22 is clear and unambiguous and because we think that the
23 plain reading of the statute is confirmed by the operation
24 of other Code provisions, there is no need here to go on
25 to look at tax policy as a basis for decision.

1 QUESTION: Mr. Lauber, may I ask you whether
2 fraud is easier to detect or to prove in the Bennett
3 situation than in the situation involved in these cases?

4 MR. LAUBER: Well, Bennett is where there is
5 fraudulent failure to file any return at all. I guess I
6 would have to say it is not easier to detect fraud there.
7 But, what happens in practice is the Commissioner brings
8 very, very few actions, prosecutions on the criminal front
9 for fraudulent non-filing. The reason for that is that it
10 is very hard to get a jury to buy the fact that a guy
11 committed fraud if he did nothing at all. So, in fact,
12 there are only a handful of those prosecutions.

13 What the government does is alternatively bring
14 a prosecution for willful failure to file where fraud need
15 not be proven and this is only a misdemeanor rather than a
16 felony.

17 So, in practice, the way we deal with that
18 problem is to go the other route.

19 QUESTION: What are the -- What element is
20 fraudulent failure to file have in it that a willful fail
21 to file doesn't?

22 MR. LAUBER: Well, it is hard to make up a jury
23 instruction on that. Willfull, I guess, is intentional
24 violation of a known legal duty and fraud connotes
25 something about bad acts beyond that.

1 QUESTION: But, fraud connotes intention to
2 deceive, doesn't it?

3 MR. LAUBER: Yes. But, in effect, the
4 Commissioner generally does not indict for fraudulent
5 failure to file.

6 Now, of course, the Petitioners, of course,
7 base their entire case on tax policy. Their view is that
8 once the Commissioner has an amended return that
9 ultimately turns out to be non-fraudulent, he doesn't need
10 the additional time provided by Section (c)(1).

11 At that point, Petitioners contend that the
12 Commissioner's fraud investigation should be limited by
13 the three-year rule that applies in non-fraud cases. We
14 think this argument is wrong and that the Court of Appeals
15 was correct in determining that, in fact, strong reasons
16 of tax policy support a plain reading of the statute.

17 First of all, the filing of an amended return,
18 however honest it ultimately proves to be, does not really
19 change the nature of a tax fraud investigation.

20 Congress chose to permit assessment at any time
21 in fraud cases for very good reasons. Fraud is hard to
22 investigate, both because the controlling issue is one of
23 intent and because fraud is often accompanied by its
24 badges such the falsification or destruction of records.

25 Beyond that the Commissioner has the burden of

1 proof on the fraud issue. But, the reasons that lead
2 Congress to enact the at-any-time rule in fraud cases
3 persists even though the taxpayer files an amended return.
4 The case is still a fraud case with all the attendant
5 problems of examination and the Commissioner still has the
6 burden of proof. An amended return comes with no
7 imprimatur upon it. Indeed, it comes from a taxpayer who
8 has already made false statements under penalties of
9 perjury.

10 In our view the data on the amended return are
11 no different from any other data that come into the
12 Commissioner's hand during a tax fraud investigation. It
13 must be examined just as carefully.

14 That point might be illustrated by the facts of
15 the cases before us today. In these cases, the fraud
16 consisted of diverting business receivables into the
17 secret bank accounts maintained on behalf of the
18 company's employees.

19 Now, the Commissioner could have been alerted to
20 that fraud, both the facts of the fraud and the amount of
21 the diverted receipts in any number of ways. It could
22 have been a tip from an unhappy employee, as indeed almost
23 happened in Deleet, it could have been a tip from a
24 competitor or supplier or customer of the business, or it
25 could have come from a bank or accounting firm.

1 We think it is clear that it could not possibly
2 be contended that had the Commissioner got this useful,
3 correct information from a third party, the three-year
4 rule would then all of a sudden applied in the fraud case.
5 We think there is no reason on grounds of tax policy for a
6 different result merely because that data happens to be
7 contained in the vehicle of an amended return.

8 In short, our view is that the Commissioner's
9 need for an unlimited period of assessment in fraud cases
10 is not materially diminished by the filing of an amended
11 return. And, we think there is no reason to hold that
12 amended returns of all the manifold documents and data
13 that might bear on tax fraud has the unique effect, the
14 singular effect, of shortening to three years the
15 unlimited period that governs fraud cases generally.

16 We think there is a second and discreet reason
17 for holding on grounds of tax policy, that the three-year
18 rule should not come into play in tax fraud cases. This
19 has to do with the Commissioner's duty to pursue criminal
20 tax enforcement.

21 As this Court has noted in the past, Congress
22 has charged the Commissioner with pursuing both criminal
23 and civil aspects in tax fraud. Limitations period for
24 prosecuting criminal tax fraud is not three but six years.

25 As a result, it will often be impossible on a

1 practical ground and unwise as a matter of efficient and
2 sound tax administration for the Commissioner to close
3 down his civil audit within three years of getting an
4 amended return on the taxpayer.

5 The practical problems here we think are fairly
6 evident. Once the Commissioner makes a referral to the
7 Department of Justice for criminal prosecution, he loses
8 his primary audit tool; that is his power to summons the
9 books, records, and testimony of the taxpayers and third
10 parties. This result is required by LaSalle Bank, from
11 this Court, and by Congress' later amendment of Code
12 Section 7602. But, that means, having lost the summons
13 power, the Commissioner must in effect close down or
14 suspend the civil audit because he has no way of getting
15 information from the taxpayer.

16 But, apart from these practical problems, the
17 Commissioner has long had a policy of suspending civil
18 audit pending the completion of criminal proceedings.
19 This policy is set forth in the Internal Revenue Manual
20 and it stems from the difficulty of conducting at the same
21 time a civil tax fraud litigation while a criminal tax
22 fraud investigation is continuing.

23 And, the most obvious problem, of course, is the
24 risk of killing the criminal case by making a premature
25 disclosure of evidence to the potential defendant.

1 If the three-year rule is held to apply here,
2 the Commissioner, right in the middle of his criminal tax
3 fraud investigation, is going to have to send a notice of
4 deficiency to the taxpayer asserting civil tax fraud. The
5 taxpayer will then go into Tax Court or the District Court
6 and the Commissioner will be required by the rules of
7 those Courts to allege fraud affirmatively in the answer
8 and then be subject to discovery, interrogatories and
9 depositions, about his fraud theory.

10 I think it is pretty clear that if the
11 Commissioner is required to open up his files right in the
12 middle of the on-going criminal investigation, laying out
13 his theory of fraud and the fact he expects to rely on in
14 proving fraud, that criminal case could probably be
15 killed.

16 Beyond that, we think there are other problems
17 in maintaining an on-going criminal investigation and a
18 parallel civil tax fraud litigation. In the civil case,
19 the taxpayer, for example, will probably assert the Fifth
20 Amendment privilege barring any introduction of evidence
21 on the issue of fraud.

22 There could be problems with witnesses because
23 of the premature disclosure of their names through
24 potential defendant and finally there can be problems
25 where the taxpayer puts up a defense as a beleaguered

1 defendant in a criminal action asserting the Commissioner
2 is trying to dun him on five different fronts at once,
3 grab his money, and juries occasionally have been
4 persuaded by that kind of evidence.

5 So, for all these reasons, we think that the
6 Commissioner's policy of suspending civil tax audit until
7 the completion of criminal proceedings is salutary both on
8 grounds of fairness to the taxpayer and on grounds of
9 sensible administration of the tax laws. Petitioners'
10 argument here would effectively kill that policy.

11 And, finally, we think there is one last reason
12 for tax policy that counsels in favor of a plain reading
13 of the Code here. And this has to do with the
14 Commissioner's overall duties to enforce the tax laws.
15 Tax laws are complicated. Taxpayers are well advised and
16 sometimes devious and the Commissioner has limited
17 resources. Every year about two million amended returns
18 are filed.

19 We think it would be a very bad idea to let
20 amended returns to become yet another tool in the hands of
21 people trying to evade the tax laws which they could use
22 to manipulate the limitations period to their own
23 advantage, depending on how, what, and when they file.

24 If there are no further questions, we think the
25 decision below should be affirmed.

1 CHIEF JUSTICE BURGER: Very well.

2 Do you have anything further, Mr. Fredericks?

3 MR. FREDERICKS: Yes, I do, very briefly, Your
4 Honor.

5 CHIEF JUSTICE BURGER: You have four minutes
6 remaining.

7 ORAL ARGUMENT OF BARRY I. FREDERICKS

8 ON BEHALF OF THE PETITIONERS -- REBUTTAL

9 MR. FREDERICKS: I would like to just respond to
10 one question that Justice White asked about the imposition
11 of the fraud penalty and I read from the government's
12 Revenue ruling that I referred to earlier. I think the
13 government's position is very simple.

14 The imposition of a civil fraud penalty under
15 Section 6635(b) of the Code does not necessarily indicate
16 that the tax can be assessed at any time under Section
17 6501(c) even though the taxpayer was subject to the
18 penalty for underpayment due to fraud. It goes on to hold
19 that that must be done within three years of -- That was
20 the Bennett case they were referring to, but within three
21 years of the filing of the delinquent return.

22 Judge Stevens, your question concerning the
23 original return which was subsequently modified by the
24 amended return, that case, I believe, was decided in the
25 Tenth Circuit, Alkire versus Nicholas, and in that case

1 the Court held that it was the amended return since the
2 original return was insufficient; that the amended return
3 was the return that started the running of the statute of
4 limitations. We have cited that case in both the
5 Badaracco brief and ours. But, it was not as the
6 government had indicated on that.

7 QUESTION: The government disagrees with you on
8 that though?

9 MR. FREDERICKS: Well, I am just citing the case
10 and giving Your Honor the authority for it.

11 QUESTION: Thank you.

12 MR. FREDERICKS: On the question of minimal tax
13 fraud questions, there is no such thing as a minimal
14 return. If a return is fraudulent in any degree, it is
15 deemed by the government to be totally fraudulent
16 irrespective of the amount, irrespective of the issue,
17 and, therefore, would be subject to this open-ended
18 statute of limitations urged by the government.

19 I suggest that the government's tax policies are
20 not well taken and we have covered each of them in our
21 briefs. But, the point at hand is the government has
22 several ways of avoiding this problem. One, as the Chief
23 Justice raised when they initially stepped to the podium,
24 and that is don't accept the amended return.

25 Two, the government can say, taxpayer, your time

1 is about to run out, extend the statute of limitations.
2 They do it all the time on a regular basis.

3 Three, simply take your figures and assess the
4 tax. This is not an attempt in any way to inhibit the
5 government's criminal investigation. It is not in any way
6 inhibited to avoid penalties. It is designed to say that
7 a taxpayer who has seen the error of his ways and has
8 filed an amended return shouldn't be open to a statute of
9 limitations that runs forever and the government shouldn't
10 be allowed to sit back and wait 10, 15, 20, 30 years and
11 then come in and deny certain deductions that the taxpayer
12 has made which places the burden on the taxpayer to prove
13 the validity of those deductions.

14 We suggest that the position in Bennett
15 acquiesced in by the government is identical here; that
16 the policy considerations are, in fact, in favor of the
17 taxpayer; that nothing we are requesting strains or
18 prevents the government from enforcing the tax laws, and
19 for those reasons we respectfully suggest that the
20 decision of the Third Circuit be reversed and the decision
21 of the lower courts be reinstated.

22 Thank you all.

23 CHIEF JUSTICE BURGER: Thank you, gentlemen, the
24 case is submitted.

25 THE CLERK: The Honorable Court is now adjourned

1 until tomorrow at 10:00.

2 (Whereupon, at 2:50 p.m., the case in the
3 above-entitled matter was submitted.)

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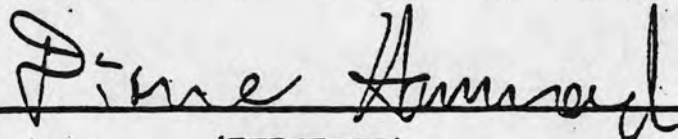
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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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