Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## BOULWARE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–1509. Argued January 8, 2008—Decided March 3, 2008

One element of tax evasion under 26 U. S. C. §7201 is "the existence of a tax deficiency." *Sansone* v. *United States*, 380 U. S. 343, 351. Petitioner Boulware was charged with criminal tax evasion and filing a false income tax return for diverting funds from a closely held corporation, HIE, of which he was the president, founder, and controlling shareholder. To support his argument that the Government could not establish the tax deficiency required to convict him, Boulware sought to introduce evidence that HIE had no earnings and profits in the relevant taxable years, so he in effect received distributions of property that were returns of capital, up to his basis in his stock, which are not taxable, see 26 U. S. C. §§301 and 316(a). Under §301(a), unless the Internal Revenue Code requires otherwise, a "distribution of property" "made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in [§301(c)]." Section 301(c) provides that the portion of the distribution that is a "dividend," as defined by §316(a), must be included in the recipient's gross income; and the portion that is not a dividend is, depending on the shareholder's basis for his stock, either a nontaxable return of capital or a taxable capital gain. Section 316(a) defines "dividend" as a "distribution" out of "earnings and profits." The District Court granted the Government's *in limine* motion to bar evidence supporting Boulware's return-of-capital theory, relying on the Ninth Circuit's *Miller* decision that a diversion of funds in a criminal tax evasion case may be deemed a return of capital only if the taxpayer or corporation demonstrates that the distributions were intended to be such a return. The court later found Boulware's proffer of evidence insufficient under *Miller* and declined to instruct the jury on his theory. In affirming his conviction, the Ninth Circuit held that

Boulware's proffer was properly rejected under *Miller* because he offered no proof that the amounts diverted were intended as a return of capital when they were made.

*Held:* A distributee accused of criminal tax evasion may claim return-of-capital treatment without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital. Pp. 6–17.

(a) Tax classifications like "dividend" and "return of capital" turn on a transaction's "objective economic realities," not "the particular form the parties employed." *Frank Lyon Co.* v. *United States*, 435 U. S. 561, 573. In economic reality, a shareholder's informal receipt of corporate property "may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend," *Palmer* v. *Commissioner*, 302 U. S. 63, 69, or as effective a means of returning a shareholder's capital, see *ibid*. Economic substance remains the touchstone for characterizing funds that a shareholder diverts before they can be recorded on a corporation's books. Pp. 6–8.

(b) *Miller*'s view that a return-of-capital defense requires evidence of a corresponding contemporaneous intent sits uncomfortably not only with the tax law's economic realism, but also with the particular wording of §§301 and 316(a). As these sections are written, the tax consequences of a corporation's distribution made with respect to stock depend, not on anyone's purpose to return capital or get it back, but on facts wholly independent of intent: whether the corporation had earnings and profits, and the amount of the taxpayer's basis for his stock. The *Miller* court could claim no textual hook for its contemporaneous intent requirement, but argued that it avoided supposed anomalies. The court, however, mistakenly reasoned that applying §§301 and 316(a) in criminal cases unnecessarily emphasizes the deficiency's amount while ignoring the willfulness of the intent to evade taxes. Willfulness is an element of the crimes because the substantive provisions defining tax evasion and filing a false return expressly require it, see, *e.g.,* §7201. Nothing in §§301 and 316(a) relieves the Government of the burden of proving willfulness or impedes it from doing so if there is evidence of willfulness. The *Miller* court also erred in finding it troublesome that, without a contemporaneous intent requirement, a shareholder distributee would be immune from punishment if the corporation had no earnings and profits but convicted if the corporation did have earning and profits. An acquittal in the former instance would in fact result merely from the Government's failure to prove an element of the crime. The fact that a shareholder of a successful corporation may have different tax liability from a shareholder of a corporation without earnings and profits merely follows from the way §§301 and 316(a) are written and

from §7201's tax deficiency requirement. Even if there were compelling reasons to extend §7201 to cases in which no taxes are owed, Congress, not the Judiciary, would have to do the rewriting. Pp. 8–12.

(c) *Miller* also suffers from its own anomalies. First, §§301 and 316 are odd stalks for grafting a contemporaneous intent requirement. Correct application of their rules will often become possible only at the end of the corporation's tax year, regardless of the shareholder or corporation's understanding months earlier when a particular distribution may have been made. Moreover, §301(a), which expressly provides that distributions made with respect to stock "shall be treated in the manner provided in [§301(c)]," ostensibly provides for all variations of tax treatment of such distributions unless a separate Code provision requires otherwise. Yet *Miller* effectively converts the section into one of merely partial coverage, leaving the tax status of one class of distributions in limbo in criminal cases. Allowing §61(a) of the Code, which defines gross income, "[e]xcept as otherwise provided," as "all income from whatever source derived," to step in where §301(a) has been pushed aside would sanction yet another eccentricity: §301(a) would not cover what it says it "shall," (distributions with respect to stock for which no more specific provision is made), while §61(a) would have to apply to what by its terms it should not (a receipt of funds for which tax treatment is "otherwise provided" in §301(a)). *Miller* erred in requiring contemporaneous intent, and the Ninth Circuit's judgment here, relying on *Miller*, is likewise erroneous. Pp. 12–14.

(d) This Court declines to address the Government's argument that the judgment should be affirmed on the ground that before any distribution may be treated as a return of capital, it must first be distributed to the shareholder "with respect to . . . stock." The facts in this case have not been raked over with that condition in mind, and any canvas of evidence and Boulware's proffer should be made by a court familiar with the entire evidentiary record. Nor will the Court take up in the first instance the question whether an unlawful diversion may ever be deemed a "distribution . . . with respect to [a corporation's] stock." Pp. 14–17.

470 F. 3d 931, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.