

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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JOHN FINNEGAN & JOAN FINNEGAN,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 8637-13.
)	
COMMISSIONER OF INTERNAL)	
REVENUE,)	
)	
Respondent)	

ORDER

This case was tried on April 9, 2014, following which the Court issued its opinion. Petitioners on July 18, 2016, timely filed a Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161 (Motion) and a Memorandum of Law in Support of Motion for Reconsideration of Opinion (Memo). On July 25, 2016, the American College of Tax Counsel filed a Motion For Leave to File Amicus Brief. Respondent filed an objection to petitioners' Motion for Reconsideration on August 25, 2016.

The sole issue tried by the parties was whether petitioners' return preparer engaged in fraud in the preparation of their tax returns for years 1994 through 2001 so as to extend the statute of limitations for such years. See sec. 6501(c)(1)¹. At trial, petitioners could not remember or understand many of the entries on their returns, and instead contended that, without the return preparer's testimony, respondent failed to prove that the entries were fraudulently made. The Court found that petitioners' return preparer had in fact made fraudulent entries on petitioners' returns with the intent to evade tax, and, relying on Allen v. Commissioner, 128 T.C. 37 (2007), held that the preparer's fraud extended the statute of limitations.

¹All section references are to the Internal Revenue Code in effect for the years in issue.

In their Motion and Memo, petitioners contend, for the first time, that Allen was incorrectly decided. On July 29, 2015, the US Court of Appeals for the Federal Circuit issued BASR P'ship v. United States, 795 F.3d 1338 (Fed. Cir. 2015), in which the majority opinion of a three-judge panel criticized Allen and held that section 6501(c)(1) applies only when it is the taxpayer who commits fraud. Petitioners contend that BASR P'ship provides a “reason to justify relief” from our opinion because it is a “Court of Appeals [decision] that affects the decided issues” and shows that Allen constitutes an error of law. T.C. Rule 1(b); Fed. R. Civ. P. 60(b); Ritter v. Smith, 811 F.2d 1398, 1401 (11th Cir. 1987).

We conclude that the BASR P'ship decision does not justify reconsidering our opinion. Reconsideration is an extraordinary remedy and is not a substitute for an appeal. Id. at 1400. As we stated in our opinion in this case, the Federal Circuit’s holding is not binding authority on this Court. The BASR P'ship case is also distinguishable on its facts, as it was neither the taxpayer nor the return preparer who committed fraud. In that case, a third party promoted a fraudulent scheme and provided tax opinion letters to a partnership. There was no allegation that the partners or the partnership’s accountant knew the scheme was fraudulent. BASR P'ship, 795 F.3d at 1347 (“Even if we were to find the Allen court’s reasoning persuasive, that decision would be distinguishable on the facts.”). Additionally, the BASR P'ship concurring opinion would not apply to the instant case because it discussed a completely different issue, i.e., that it involved a partnership and so the statute of limitations was governed by section 6229 rather than section 6501, the section governing the limitations period in Allen and this case. Id. at 1351. Although agreeing with the majority that section 6501(c)(1) should be limited to the fraud of a taxpayer, the concurring opinion also stated it should possibly include the fraud of an “authorized agent”. Id.

Furthermore, the dissent filed in BASR P'ship adopted the same interpretation of section 6501(c) as Allen and shows there was no consensus even among the three-judge panel that Allen was incorrectly decided. Moreover, Allen has been applied several times in the nine years since it was issued. See City Wide Transit, Inc. v. Commissioner, 709 F.3d 102, 107 (2nd Cir. 2013), rev’g T.C. Memo. 2011-279 (decided on the basis of Allen while the Tax Court did not reach the Allen issue); Ames-Mechelke v. Commissioner, T.C. Memo. 2013-176; Eriksen v. Commissioner, T.C. Memo. 2012-194. In light of these circumstances, petitioners have failed to persuade us that Allen is an “error of law” to be remedied. See Ritter, 811 F.2d at 1401 (“* * * it is also clear that a change in the law will not *always* provide the truly extraordinary circumstances necessary to

reopen a case. * * * [S]omething more than a “mere” change in the law is necessary to provide the grounds for Rule 60(b)(6) relief.”)

Additionally, it would be improper to grant the Motion on procedural grounds. A motion for reconsideration is not the proper mechanism by which to raise new legal theories. Robin Haft Trust, et al. v. Commissioner, 62 T.C. 145. Petitioners, who were represented at trial, failed to challenge Allen despite having multiple opportunities to do so. Although the appeal of BASR P’ship had not been decided at the time of trial and briefing, the Court of Federal Claims decision in BASR P’ship, 113 Fed. Cl. 181 (2013), had been. Yet it was respondent, not petitioners, who noted the case in his brief. The Model Rules of Professional Conduct did not prohibit petitioners from challenging Allen at that time, because the argument could have been made in good faith. It was also respondent who alerted the Court when the decision of the Federal Circuit on appeal was issued. Although an additional 11 months passed before this Court issued its opinion in the instant case, petitioners still failed to challenge Allen at that time.

For the foregoing reasons, it is

ORDERED that the Motion For Leave to File Amicus Brief, filed July 25, 2016, is denied as moot. It is further

ORDERED that petitioners’ Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161, filed July 18, 2016, is denied.

The Clerk of the Court shall provide additional service of this Order upon the American College of Tax Counsel, c/o Paula M. Junghans, Zuckerman Spaeder LLP, 1800 “M” Street, N.W., Suite 1000, Washington, D. C. 20036-5807.

(Signed) Thomas B. Wells
Judge

Dated: Washington, D.C.
October 3, 2016