

No. 14-1085

In the Supreme Court of the United States

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, in construing a substantive Internal Revenue Code provision that addresses taxpayers' entitlement to interest on tax overpayments, improperly applied the interpretive canon that waivers of sovereign immunity should be narrowly construed.

2. Whether the court of appeals improperly frustrated the taxpayer's right to rely on the Internal Revenue Service's published guidance materials.

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 1a-29a) is reported at 768 F.3d 580. An earlier opinion of the court of appeals (Pet. App. 33a-52a) is not published in the *Federal Reporter* but is reprinted in 508 Fed. Appx. 506. This Court's decision vacating that opinion (Pet. App. 30a-32a) is reported at 134 S. Ct. 510. The order of the district court (Pet. App. 53a-70a) is not published in the *Federal Supplement* but is available at 2010 WL 2231894.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2014. A petition for rehearing was denied on December 8, 2014 (Pet. App. 71a-72a). The petition for a writ of certiorari was filed on March 6, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATEMENT

1. When a taxpayer overpays her taxes, she is entitled to interest from the government for the period between the payment and the ultimate refund. To that end, Section 6611 of the Internal Revenue Code provides that “[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax.” 26 U.S.C. 6611(a). Such interest begins to accrue on “the date of the overpayment.” 26 U.S.C. 6611(b)(1) and (2). Although the Code does not define the term “date of the overpayment,” Treasury regulations provide that “the dates of overpayment of any tax are the date of payment of the first amount which (when added to previous payments) is in excess of the tax liability * * * and the dates of payment of all amounts subsequently paid with respect to such liability.” 26 C.F.R. 301.6611-1(b).¹

2. This case involves petitioner’s claims for additional interest on overpayments of tax with respect to nine tax years between 1983 and 1994. See Pet. App. 57a. Portions of the overpayments were attributable to funds that petitioner initially had remitted to the IRS as deposits in order to stop the accrual of interest that petitioner would have owed on any underpayments of tax that might have ultimately resulted from ongoing IRS audits. *Id.* at 2a-3a; see 26 U.S.C. 6601;

¹ Section 6611 contains a cross-reference to 26 U.S.C. 6513 for purposes of determining the date of payment in the case of, *inter alia*, an “[a]dvance payment of tax.” 26 U.S.C. 6611(d). The relevant provision of Section 6513, however, is limited to payments “made before the last day prescribed for the payment of the tax,” 26 U.S.C. 6513(a), and therefore is not applicable to this case.

Rev. Proc. 84-58, 1984-2 C.B. 501 (Rev. Proc. 84-58).² Petitioner subsequently requested that the IRS convert the deposits into advance payments of additional tax—*i.e.*, payments of asserted (but yet to be assessed) deficiencies in tax resulting from proposed IRS adjustments—in various amounts with respect to the years at issue. Pet. App. 3a.

The parties ultimately determined that petitioner had overpaid its taxes in the relevant years. Pet. App. 3a. Accordingly, Section 6611 required the government to pay interest to petitioner for the period after petitioner had made the overpayments. The parties disagreed, however, as to when that period began—*i.e.*, “the date of the overpayment.” 26 U.S.C. 6611(b)(1) and (2). Petitioner contended that the date of the overpayment was the date on which it originally had remitted the relevant amounts to the IRS as deposits. Pet. App. 3a. The government maintained that the date of the overpayment was the date on which petitioner had requested that the remittances be converted into payments of tax. *Ibid.*

3. Petitioner filed suit on its overpayment-interest claims in the United States District Court for the Eastern District of Michigan, invoking 28 U.S.C. 1346(a)(1) as the basis for subject matter jurisdiction. See 28 U.S.C. 1346(a)(1) (“The district courts shall have original jurisdiction * * * of * * * [a]ny civil action against the United States for the recovery of * * * any sum alleged to have been excessive or in any manner wrongfully collected under the internal-

² Revenue Procedure 84-58 has been superseded by Revenue Procedure 2005-18, which applies to deposits made after October 22, 2004, the effective date of 26 U.S.C. 6603. Rev. Proc. 2005-18, 2005-1 C.B. 798, 801.

revenue laws.”). Consistent with its interpretation of Section 6611, petitioner argued that it was entitled to interest accruing from the date that it submitted the remittances to the IRS as deposits. Petitioner relied in large part on the IRS’s longstanding administrative practice in the context of *underpayment* interest (*i.e.*, interest that a taxpayer owes the government on late tax payments). That form of interest is governed by a different provision of the Internal Revenue Code, 26 U.S.C. 6601. The IRS has long allowed taxpayers to submit a deposit in the nature of a cash bond as a means of tolling the accrual of underpayment interest under Section 6601 as of the date the deposit is made. See *Rosenman v. United States*, 323 U.S. 658, 662-663 (1945); Rev. Proc. 84-58. Petitioner argued that, since the IRS had adopted the practice of affording a deposit in the nature of a cash bond the same legal effect as a payment of tax for purposes of underpayment interest under Section 6601, the principle of statutory “symmetry” requires that such a deposit be treated as a payment for purposes of overpayment interest under Section 6611. Pet. App. 19a.

After a hearing, the district court issued an order and opinion granting the government’s motion for judgment on the pleadings and denying petitioner’s motion for summary judgment. See Pet. App. 53a-70a. The court concluded that the “remittances at issue in this case were not ‘tax payments,’” and that petitioner therefore “is not entitled to additional overpayment interest from the dates that it remitted deposits in the nature of a cash bond to the dates those remittances were converted to tax payments.” *Id.* at 68a; see *id.* at 65a-68a.

4. The court of appeals affirmed in an unpublished opinion. See Pet. App. 33a-52a. The court found each party’s interpretation of Section 6611 to be “plausible,” but it adopted the government’s interpretation after applying the canon that waivers of sovereign immunity must be narrowly construed. *Id.* at 44a-46a, 52a.

Petitioner filed a petition for rehearing. In that filing, petitioner argued for the first time that the only relevant waiver of sovereign immunity in this case is contained in 28 U.S.C. 1346(a)(1), and that Section 6611 therefore is not subject to the strict-construction canon for sovereign-immunity waivers. The court of appeals denied rehearing en banc after no judge requested a vote. Pet. App. 73a-74a.

5. Petitioner filed a petition for a writ of certiorari on the issue whether Section 6611 is a waiver of sovereign immunity. In its brief in opposition, the government noted its view that 28 U.S.C. 1346(a)(1)—the provision invoked by petitioner as the basis for jurisdiction in the district court—does not apply to this suit. 13-113 U.S. Br. in Opp. 3 n.3, 16-17 & n.9. The government explained that, in its view, the Tucker Act, 28 U.S.C. 1491(a), is the only applicable jurisdictional provision and required this suit to be brought in the Court of Federal Claims. 13-113 U.S. Br. in Opp. 3 n.3; see 28 U.S.C. 1491(a) (“The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department.”). The government further explained, however, that “[b]ecause binding Sixth Circuit precedent held that Section 1346(a)(1) vests district courts with juris-

diction over suits like this one, [it] did not argue below that the district court lacked jurisdiction over this case.” 13-113 Br. in Opp. 17 n.9; see *id.* at 3 n.3 (citing *E.W. Scripps Co. & Subsidiaries v. United States*, 420 F.3d 589, 596-598 (6th Cir. 2005) (*E.W. Scripps*)).

This Court granted the petition, vacated the judgment of the Sixth Circuit, and remanded for further proceedings, stating that “[t]he Sixth Circuit should have the first opportunity to consider the Government’s new contention with respect to jurisdiction in this case.” Pet. App. 32a. The Court added that, “[d]epending on that court’s answer, it may also consider what impact, if any, the jurisdictional determination has on the merits issues, especially whether or not § 6611 is a waiver of sovereign immunity that should be construed strictly.” *Ibid.*

6. On remand, the court of appeals concluded, contrary to its original opinion, that Section 6611 does not constitute a waiver of sovereign immunity. Pet. App. 8a-13a. The court adhered, however, to its prior holding that the term “overpayment” in Section 6611 does not encompass cash-bond deposits. *Id.* at 13a-28a. The court accordingly again held that, under Section 6611, overpayment interest accrues from the date the taxpayer requests that a deposit be converted into an advance tax payment, not from the date on which the deposit is initially made.

a. The court of appeals first rejected the government’s contention that the district court lacked jurisdiction in this case. See Pet. App. 6a-7a. The court explained that it was bound by the prior panel decision in *E.W. Scripps* on that question, and it declined to “poll the *en banc* court to gauge its interest in revisiting the issue decided in” that case. *Id.* at 7a.

b. The court of appeals then turned to the parties' disagreement over the meaning of the term "overpayment" in Section 6611. Pet. App. 7a-28a. The court noted that this Court had "specifically invited [the court of appeals] to reconsider" the vacated opinion's "assumption, propounded by the United States and unchallenged by [petitioner], that § 6611 provided the applicable waiver of sovereign immunity" and thus must be strictly construed. *Id.* at 8a. Analyzing the issue afresh, the court adopted petitioner's view that Section 6611 is a substantive provision, not a waiver of sovereign immunity, and so is not subject to the strict-construction canon. See *id.* at 9a-13a. It accordingly explained that there is "no basis in the Supreme Court's sovereign-immunity jurisprudence for applying the canon of strict construction to interpret the word 'overpayment' in § 6611 to bar taxpayers from demanding interest on remittances that are designated as deposits in the nature of a cash bond." *Id.* at 12a-13a.

The court of appeals therefore proceeded to "employ the usual tools of statutory interpretation" to resolve the parties' dispute over the meaning of "overpayment." Pet. App. 13a. Examining "the plain language of the statute," the court stated that the interpretive question turned on whether a deposit in the nature of a cash bond constitutes a "payment," *i.e.*, an "act of paying or giving compensation" or "the discharge of a debt or an obligation." *Id.* at 14a-15a (quoting *Webster's Third New International Dictionary* 1659 (1981)). The court found it irrelevant that petitioner had "remitted its deposits before the IRS had finally determined its tax liability," explaining that under 26 U.S.C. 6401(c), "a corporation such as

[petitioner] may ‘pay’ its tax obligations upon receipt of a preliminary notice of tax deficiency, even before the obligations are finalized or otherwise become due.” Pet. App. 15a.

The court of appeals concluded, however, that petitioner’s deposits did not constitute “payments.” The court observed that, under the IRS procedures in place when petitioner made the deposits, there was an important difference between a deposit and a tax payment: “A taxpayer could demand the immediate return of a deposit anytime, while an advance tax payment would be returned only through the IRS’s formal refund process.” Pet. App. 15a-16a. The court explained that, although petitioner “could have designated its remittances as advance tax payments,” in which case it could not have demanded their immediate return, petitioner had designated the remittances as deposits instead because it specifically intended “*not* to make a ‘payment.’” *Id.* at 16a-17a. By doing so, petitioner was able to toll the accrual of any potential underpayment interest while retaining the ability to demand the return of the deposits at its election. See *id.* at 15a, 18a-19a. The court of appeals found petitioner’s clear “purpose” not to make a payment to be “determinative.” *Id.* at 17a.

The court of appeals rejected petitioner’s various statutory arguments. See Pet. App. 17a-28a. Petitioner invoked the purported “use of money principle, a general federal policy favoring compensation for the use of taxpayer money.” *Id.* at 17a. The court of appeals held that the principle was inapplicable here, where petitioner did not actually make a payment to the United States, but merely posted a bond that it could recall at any time. See *id.* at 17a-18a. Petitioner

also renewed its argument that the court of appeals' construction was inconsistent with the IRS's long-standing administrative practice of allowing a cash bond to toll the accrual of underpayment interest under Section 6601. See *id.* at 19a; see also p. 4, *supra*. The court explained that, although “[a] common canon of construction compels courts to interpret statutory terms consistently,” that canon does not require “courts to defer to agencies’ interpretations of parallel statutory terms,” and the IRS had not sought “formal interpretive deference in this case.” Pet. App. 20a. The court of appeals further explained that, although petitioner “may be right to criticize the IRS for treating a deposit as a payment under § 6601 while refusing to treat it as a payment under § 6611, * * * that tells [the court] nothing about which of the two treatments is correct.” *Ibid.*

Petitioner also relied on an “isolated provision” of Revenue Procedure 84-58 to support its reading of Section 6611. Pet. App. 21a-26a. The court of appeals held that it “need not decide whether the IRS’s revenue procedures should influence [its] interpretation of § 6611 because [the court] reject[ed] [petitioner’s] reading of Revenue Procedure 84-58.” *Id.* at 22a. The court also rejected the government’s previously advanced theory of how the revenue procedure might treat converted deposits, ultimately finding that the relevant provision simply “does not apply to the circumstances of this case.” *Id.* at 26a; see *id.* at 23a-26a.

Finally, the court of appeals rejected petitioner’s reliance on the 2004 enactment of 26 U.S.C. 6603. Section 6603 “provides that, contrary to previous practice, taxpayers who remit cashbond deposits to the IRS and subsequently request the return of those

funds are entitled to interest in certain circumstances,” albeit at a rate lower than the one provided for Section 6611 overpayments. Pet. App. 26a-27a. The court observed that “§ 6603 had not been enacted when [petitioner] remitted its deposits” and so does not apply to this case. *Id.* at 28a.

c. Judge Rogers issued a concurrence in which he declined to join the portion of the majority opinion holding that the strict-construction canon does not apply to the interpretation of the word “overpayment” in Section 6611. Pet. App. 28a-29a. In his view, there was “no need at all to address the applicability of the strict construction canon for waivers of sovereign immunity” in this case because “the compelling reasons given in the remainder of the majority’s opinion” demonstrate that “the Government does not owe interest on the amounts paid by [petitioner] as a deposit.” *Id.* at 28a.

7. Petitioner again sought en banc review in the court of appeals. The court denied petitioner’s request after no judge requested a vote. Pet. App. 71a-72a.

ARGUMENT

The court of appeals correctly held that, when a taxpayer elects to convert a deposit in the nature of a cash bond into an advance payment of tax, overpayment interest under 26 U.S.C. 6611 does not begin to accrue until the date of the conversion. Petitioner does not contend that any other court has adopted a different construction of the word “overpayment” in that provision.

Petitioner instead seeks review of two issues that are not implicated by this case. First, petitioner asserts that the court of appeals “improperly held [peti-

tioner] to a heightened burden in construing the substantive interest provision.” Pet. i. But, far from subjecting petitioner to a “heightened burden,” the court of appeals squarely held that the strict-construction canon that governs waivers of sovereign immunity does *not* apply to the interpretation of Section 6611. In rejecting petitioner’s proposed reading of Section 6611, the court simply applied “the usual tools of statutory interpretation,” not the strict-construction canon. Pet. App. 13a; see *id.* at 13a-28a. Second, petitioner argues that the court of appeals “improperly frustrated [petitioner’s] right to rely on the Internal Revenue Service’s own published guidance materials.” Pet. i. The court of appeals, however, expressly declined to consider what weight the IRS’s guidance would warrant, because it rejected petitioner’s interpretation of that guidance. Pet. App. 22a. Because neither of the questions presented is actually implicated by the decision below, further review is not warranted.

1. The court of appeals correctly held that Section 6611 does not obligate the government to pay overpayment interest for the period between the date a taxpayer makes a deposit in the nature of a cash bond and the date the taxpayer elects to convert the deposit into a payment.

a. The text of Section 6611, in conjunction with pertinent Treasury regulations, establishes that overpayment interest begins to accrue only when a deposit in the nature of a cash bond is converted into a payment that results in an overpayment of tax. Section 6611 states that interest on an overpayment of tax runs from “the date of the overpayment.” 26 U.S.C. 6611(b)(1) and (2). Treasury regulations explain that

the date of an overpayment of tax is “the date of payment of the first amount which (when added to previous payments) is in excess of the [taxpayer’s] tax liability.” 26 C.F.R. 301.6611-1(b); see *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947) (construing the word “overpayment” in the Internal Revenue Code of 1939). That regulation is entitled to deference. See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (“The principles underlying our decision in *Chevron* apply with full force in the tax context.”).

When petitioner made the remittances at issue here, it did not request that the remittances be treated as advance tax *payments*, but instead directed that they be held as deposits in the nature of a cash bond. Pet. App. 3a. As a result of that election, petitioner was entitled to demand return of the remittances at any time, which would not have been the case if petitioner had designated them as advance payments of tax. See *id.* at 15a-16a, 25a. At the time they were made, the remittances therefore could not have given rise to any overpayments of tax because they were not “payments” as that term is ordinarily understood—*i.e.*, they were not “made for the purpose of discharging [petitioner’s] estimated tax obligations.” *Id.* at 15a; see *id.* at 14a.

Petitioner does not contend that the remittances were payments when they originally were made. Petitioner also does not dispute that, if it had instructed the IRS to return the deposits, it would not have been entitled to any interest for the period during which the IRS held the funds. Rather, petitioner maintains that the subsequent conversions of its deposits into advance payments of tax—at petitioner’s

request—had the effect of *retroactively* converting those deposits into payments made on the dates of remittance.

That view finds no support in the plain language of Section 6611 or the relevant Treasury regulations. That a remittance originating as a deposit in the nature of a cash bond is converted into a payment at some later point in time could not retroactively render the remittance a “payment” before that point. Cf. *Commissioner v. Indianapolis Power & Light Co.*, 493 U.S. 203, 211-212 (1990) (holding that the determination whether certain customer deposits constituted income to the recipient when received depends on the parties’ respective rights and obligations at the time of remittance). Petitioner offers no reason to question that common-sense judgment. The court of appeals therefore correctly held that petitioner did not begin to accrue overpayment interest until it elected to convert its deposits into actual tax payments.

b. Petitioner contends (Pet. 17) that, in reaching the determination that an “overpayment” requires an actual payment, the court of appeals “flouted settled principles of statutory interpretation and the decisions of this Court and other circuits applying those principles.” See Pet. 17-25. None of petitioner’s objections has merit.

i. Petitioner contends (Pet. 17-19) that the decision below fails to harmonize Section 6611 with Section 6601, which governs the payment of interest by a taxpayer to the government on an *underpayment* of tax. As a matter of administrative practice, the IRS long has allowed deposits to toll the accrual of underpayment interest. That practice is favorable to tax-

payers because it allows them to stop the accrual of interest during the period of an audit without the loss of control over the funds that a payment would entail. See Pet. App. 19a, 25a. Petitioner essentially argues that, because the policy of the IRS was to give such deposits the same *practical effect* as payments for purposes of Section 6601, the word “overpayment” in Section 6611 must be construed as though the “payments” that can give rise to an overpayment include deposits.

That argument is flawed for multiple reasons. First, the text of Section 6601 does not speak to whether the IRS may allow taxpayers to *toll* the accrual of underpayment interest by posting a cash bond. The resolution of that question would not necessarily turn on whether a cash bond constitutes a “payment” under Section 6601, much less whether it constitutes a payment for Section 6611 purposes.³ There is nothing anomalous, moreover, about a legal regime in which a cash bond stops the accrual of un-

³ The court of appeals suggested that the IRS’s practice of allowing deposits to toll underpayment interest amounts to an administrative determination that the words “payment” and “paid” in Section 6601 include deposits. See Pet. App. 19a-20a. Revenue Procedure 84-58 stated, however, that “[a] deposit in the nature of a cash bond is not a payment of tax.” Rev. Proc. 84-58 § 2.03, at 501. Nor can such an interpretation of the statute by this Court or by Congress be inferred from past acknowledgement of the administrative practice. See *Rosenman v. United States*, 323 U.S. 658, 662-663 (1945); *Baral v. United States*, 528 U.S. 431, 439 n.2 (2000); H.R. Rep. No. 548, 108th Cong., 2d Sess. Pt. 1, at 304 (2004) (each accepting, either implicitly or explicitly, that a remittance need not constitute a “payment” in order to toll the running of potential underpayment interest).

derpayment interest but does not earn overpayment interest.

More fundamentally, “neither rule nor canon counsels * * * court[s] to interpret one statutory provision consistently with” the manner in which an agency administers another statutory provision. Pet. App. 20a. That is particularly so where, as here, no court has passed on the validity of that other agency policy (perhaps because the IRS’s practice with respect to the tolling of underpayment interest benefits taxpayers and is therefore unlikely to provoke a judicial challenge). As the court of appeals correctly recognized, even if the IRS’s treatments of cash deposits for purposes of Sections 6601 and 6611 were demonstrably irreconcilable, identifying that inconsistency would “tell[] us nothing about which of the two treatments is correct.” *Ibid.*

Finally, the court of appeals did not endorse the IRS’s tolling policy for Section 6601. Indeed, petitioner suggests (Pet. 19) that the court of appeals’ interpretation of Section 6611 casts “doubt on [whether] the IRS’s longstanding practice” of allowing deposits to toll the running of underpayment interest could be reconciled with Section 6601. If that is correct, the decision below creates no conceivable tension between Sections 6611 and 6601. But in any event, the proper interpretation of Section 6601 was not before the court of appeals, and it is not at issue here.

ii. Petitioner suggests (Pet. 22) that the court of appeals rested its decision on the fact that, when the deposits at issue here were made, “the IRS had yet to definitively establish [petitioner’s] tax liability.” Petitioner cites Section 6401(c), which makes clear that an amount remitted can be a payment of tax—and there-

fore give rise to an “overpayment”—even if it is made before the relevant tax liability has been finally determined. Petitioner’s argument rests on a misunderstanding of the court of appeals’ opinion. Far from relying on the fact that petitioner’s tax liability was still undetermined when the deposits were made, the court specifically disclaimed any suggestion that the timing of the IRS’s tax liability determination had any bearing on whether petitioner’s remittances were payments of tax. See Pet. App. 15a (“That [petitioner] remitted its deposits before the IRS had finally determined its tax liability is of no moment.”) (citing 26 U.S.C. 6401(c)).

iii. Petitioner also contends (Pet. 22) that the court of appeals “construed § 6611 in a manner that flouts” the “time-value-of-money principle that underlies both §§ 6601 and 6611.” See Pet. 19-22. But petitioner acknowledges that, as applied to overpayment interest, that general principle “allow[s] for the time value of money when the Government has had the use for a period of time of money *to which it is not lawfully entitled.*” Pet. 20 (emphasis added) (quoting *International Bus. Machs. Corp. v. United States*, 201 F.3d 1367, 1374-1375 (Fed. Cir. 2000), cert. denied, 531 U.S. 1183 (2001)). That principle has no application here.

When a taxpayer voluntarily deposits funds with the IRS for the purpose of tolling the accrual of underpayment interest, the IRS is lawfully entitled to that money until the taxpayer requests its return (which the taxpayer may do at any time). If petitioner’s expansive conception of the “time-value-of-money principle” were correct, a taxpayer would be entitled to overpayment interest even on deposits returned at the taxpayer’s request—a view that petitioner con-

spicuously does not endorse. See Pet. 6-7, 26. In contrast, if the taxpayer requests that the deposit be converted to an advance *payment* of tax (or if the IRS applies the deposit to a later-assessed tax), and an overpayment is ultimately determined, then the IRS was not lawfully entitled to the amount overpaid after the conversion. In that circumstance, overpayment interest is owed from that point forward. That scheme fully comports with the time-value-of-money principle. And even if there were some tension between that general background principle and the text of Section 6611, the statutory text would control.

iv. Finally, petitioner relies (Pet. 22-23) on 26 U.S.C. 6603, a provision enacted in 2004 that petitioner acknowledges does not apply here. Section 6603 requires the IRS to pay interest on returned deposits in certain circumstances (though at a rate lower than the overpayment rate). Petitioner contends that “[t]he enactment of § 6603 is * * * utterly at odds with the Sixth Circuit’s reading” of Section 6611, because “[i]t is absurd to conclude that Congress would have intended to grant interest on deposits that are *returned*, but not on deposits that are actually used to pay taxes.” Pet. 23.

Petitioner’s argument rests on the erroneous premise that deposits used to pay taxes will not accrue Section 6603 interest. As the government explained below, where a cash bond is converted into a tax payment, “the taxpayer would be paid interest under § 6603 from the deposit date until” the date the deposit is converted to a tax payment “and would then be paid at the higher [overpayment] interest rate” until the overpayment is refunded. Pet. App. 27a. Accordingly, even if Section 6603 were relevant to events that

occurred before its enactment, it would not cast doubt on the decision below.⁴

c. Petitioner contends (Pet. 26-28), contrary to the conclusion of the court of appeals (Pet. App. 21a-26a), that Sections 2.03, 5.01, and 5.05 of Revenue Procedure 84-58 supported its interpretation of Section 6601. The first sentence of Section 5.05 indicated that remittances treated as advance (pre-assessment) payments of tax under the revenue procedure would be treated like any other payment of tax for purposes of determining overpayment interest, *i.e.*, they would accrue overpayment interest from the date of remittance. The second sentence clarified that, in the case of a deposit that was subsequently “posted to the taxpayer’s account as a[n] [advance] payment of tax” pursuant to Section 4.02(3) of the procedure, overpayment interest would run only from the date of such posting (rather than from the earlier date of remittance).

From that second sentence, petitioner draws a negative inference that, whenever a remittance that was initially treated as a deposit was subsequently converted into an advance payment of tax under circumstances other than those described in Section 4.02(3) (which does not apply to this case), interest on any later-determined overpayment would run from the

⁴ The legislative history of Section 6603 reflects Congress’s understanding that, under prior law, interest would not accrue on deposits. See H.R. Rep. No. 548, 108th Cong., 2d Sess. Pt. 1, at 304 (2004) (stating that, under “[p]resent [l]aw,” “[a] deposit in the nature of a cash bond will stop the running of interest on an amount of underpayment equal to the deposit, but the deposit does not itself earn interest”); S. Rep. No. 192, 108th Cong., 1st Sess. 207 (2003) (same); H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. 647 (2004) (same).

date the amount was originally remitted to the IRS. See Pet. 27. That argument fails to recognize, however, that Section 4.02(3) described the only set of circumstances in which the revenue procedure contemplated that the status of a remittance initially treated as a deposit could subsequently change to that of an advance (pre-assessment) payment of tax. The revenue procedure simply did not address other circumstances under which a conversion might occur.

In addition, the negative inference petitioner would have this Court draw would contradict decades of IRS practice. See *Rosenman v. United States*, 323 U.S. 658, 663 (1945). It is implausible to suppose that the IRS undertook in Revenue Procedure 84-58 so significant a reversal of its policy regarding overpayment interest in such an oblique manner. That is particularly so because one of the provisions on which petitioner relies stated, consistent with the government's position in this case, that “[a] deposit in the nature of a cash bond is not a payment of tax.” Pet. 26 (brackets in original) (quoting Rev. Proc. 84-58 § 2.03, at 501).

2. Petitioner does not assert that any other court of appeals has construed Section 6611 differently from the court below. Instead, petitioner raises two questions that are not actually implicated by the court of appeals' decision. Neither question warrants this Court's review.

a. Although the court of appeals expressly *agreed* with petitioner that the strict-construction canon for waivers of sovereign immunity does not apply to Section 6611, petitioner claims that “the proper application of the strict construction rule is still a central issue in this case.” Pet. 12. That is incorrect.

Petitioner relies on the principle that “the strict construction canon applies only to waivers of sovereign immunity and not to separate, substantive provisions.” Pet. 14 (capitalization altered). The court of appeals expressly agreed both with that general principle, see Pet. App. 9a-10a, and with petitioner’s view that Section 6611 is a substantive provision, see *id.* at 12a-13a. The court accordingly found “no basis in the Supreme Court’s sovereign-immunity jurisprudence for applying the canon of strict construction to interpret the word ‘overpayment’ in § 6611.” *Ibid.* The court explained that “[t]he distinction between deposits and advance tax payments * * * does not implicate the government’s sovereign immunity” but rather “relates only to the scope of the substantive right.” *Id.* at 13a. It therefore proceeded to construe Section 6611 using only “the usual tools of statutory interpretation.” *Ibid.*

This case thus does not present any question about applying a “heightened burden in construing [a] substantive interest provision.” Pet. i; but accord Pet. 12 (acknowledging the court’s holding “that the canon does *not* apply to a substantive interest provision like § 6611”). Petitioner’s apparent contention (Pet. 16-17, 24-25) that the court of appeals applied the strict-construction canon *sub silentio*, even while expressly disclaiming reliance on that canon, provides no sound basis for further review.

Although Judge Rogers declined to join the portion of the majority opinion that held the strict-construction canon to be inapplicable, see Pet. App. 28a-29a, that difference in approach between individual judges on the same appellate panel does not create a conflict warranting this Court’s resolution. Judge

Rogers did not even disagree with the majority's view that the strict-construction canon is inapplicable here. Rather, Judge Rogers described that issue as "close and conceptually difficult," and he found "no need at all to address the applicability of the * * * canon" in this case given the other "compelling reasons" to conclude that "the Government does not owe interest on the amounts paid by [petitioner] as a deposit." *Id.* at 28a. The fact that all three panel members agreed that petitioner is not entitled to interest, even though they dealt with the strict-construction canon in somewhat different ways, reinforces the conclusion that the canon is irrelevant to the ultimate disposition of this case.

b. Petitioner also contends that the court of appeals' decision "conflicts with the decisions of other circuits on a taxpayer's right to rely on IRS guidance." Pet. 25 (capitalization altered) (referring to Rev. Proc. 84-58). That question is not implicated by this case either. The court of appeals concluded that it "need not decide whether the IRS's revenue procedures should influence [the court's] interpretation of § 6611 because [the court] reject[ed] [petitioner's] reading of Revenue Procedure 84-58." Pet. App. 22a. Accordingly, this case does not present the question whether the court of appeals "improperly frustrated [petitioner's] right to rely on the Internal Revenue Service's own published guidance materials." Pet. i.

3. Finally, petitioner contends (Pet. 28) that "the Solicitor General's position on jurisdiction heightens the need for review by this Court." See Pet. 28-31. That contention lacks merit. In granting petitioner's earlier petition for a writ of certiorari, this Court vacated the judgment of the court of appeals and

remanded the case so that the court of appeals could consider the government's jurisdictional argument. Pet. App. 32a. At petitioner's urging (Pet. C.A. Supp. Br. 3-6), the court of appeals then declined to revisit its prior holding in *E.W. Scripps Co. & Subsidiaries v. United States*, 420 F.3d 589 (6th Cir. 2005) (*E.W. Scripps*), that 28 U.S.C. 1346(a)(1) conferred jurisdiction on the district court to adjudicate claims for additional interest on administratively refunded overpayments. See Pet. App. 6a-7a. The United States (which of course prevailed on the merits) has not sought review of that jurisdictional holding in this case.

Petitioner commenced this suit in district court; it successfully urged the Sixth Circuit not to reconsider its prior jurisdictional holding in *E.W. Scripps*; and it does not contend that the jurisdictional question itself warrants this Court's review. The government's disagreement with the lower courts and petitioner on Section 1346(a)(1)'s applicability to this suit provides no reason for the Court to grant certiorari on the merits issues presented in the petition. To the contrary, the existence of a potential jurisdictional obstacle to the Court's resolution of those merits issues provides an additional reason to deny review.

Contrary to petitioner's suggestion (Pet. 30), the jurisdictional position of the United States will not deprive any taxpayer of her day in court. Under *E.W. Scripps*, taxpayers in the Sixth Circuit can bring suit in district court on a claim for additional overpayment interest. Taxpayers living outside of the Sixth Circuit may bring their suits in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a), which the United States agrees is the proper basis for subject matter jurisdiction of a claim for additional overpay-

ment interest on an administratively granted refund of tax. If such a taxpayer elects instead to file suit in district court, and the district court or the court of appeals agrees with the United States that jurisdiction is lacking, the suit can be transferred to the Court of Federal Claims. See 28 U.S.C. 1631. No taxpayer will lose the opportunity to litigate a claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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