No. ____

In the Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit—in conflict with the decisions of this Court and other circuits—improperly held the taxpayer to a heightened burden in construing the substantive interest provision at issue.

2. Whether the Sixth Circuit—in conflict with the decisions of other circuits—improperly frustrated the taxpayer's right to rely on the Internal Revenue Service's own published guidance materials.

RULE 29.6 STATEMENT

Ford Motor Company (Ford) has no parent corporation. State Street Corporation, a publicly traded company whose subsidiary State Street Bank and Trust Company is the trustee for Ford common stock in the Ford defined contribution plans master trust, has disclosed in filings with the U.S. Securities and Exchange Commission that as of December 31, 2014, it holds 10% or more of Ford's common stock, including 5.9% of Ford's common stock that is beneficially owned by the master trust.

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company (Ford) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App. 1a-29a) is reported at 768 F.3d 580. The order of the court of appeals denying rehearing (App. 71a-72a) is not reported. The prior opinion of the court of appeals (*id.* at 33a-52a) is reported at 508 F. App'x 506. This Court's decision vacating that opinion (App. 30a-32a) is reported at 134 S. Ct. 510. The order of the district court granting the government's motion for judgment on the pleadings (App. 53a-70a) is available at 2010 U.S. Dist. LEXIS 54987.

JURISDICTION

The court of appeals entered judgment on October 1, 2014 (App. 1a) and denied Ford's timely petition for rehearing on December 8, 2014 (*id.* at 71a-72a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 6601, 6603, 6401, and 6611 of the Internal Revenue Code (Title 26 of the United States Code) are reproduced at App. 75a-92a. Sections 1346 and 1631 of Title 28 of the United States Code are reproduced at App. 93a-96a. Revenue Procedures 60-17 § 2.01, 1960-2 C.B. 942; 84-58, 1984-2 C.B. 501; and 89-14, 1989-1 C.B. 814 are reproduced at App. 97-116a.

INTRODUCTION

Everyone knows what happens when the IRS determines that the taxpayer did not follow the law. This case concerns what should happen when the IRS does not follow the law—and, relatedly, the hurdles a taxpayer must overcome when it brings suit against the IRS for not following the law. The taxpayer here, Ford, claims that the IRS contravened both a statutory mandate and its own Revenue Procedure in refusing to disgorge some $475 million in interest that the IRS earned on tax *over*payments made by Ford. This Court has already set aside the Sixth Circuit's initial decision in this case denying Ford its statutory right to the overpayment interest at issue, and remanded the case for further consideration. App. 30a-32a. On remand, the Sixth Circuit stuck to the same result. That decision again warrants this Court's review.

As this Court is aware from the last time this case was before it, Ford brought this action in district court asserting jurisdiction under 28 U.S.C. § 1346(a)(1), and advanced a claim under 26 U.S.C. § 6611 for interest on the hundreds of millions of dollars that the government earned on tax *over*payments that Ford made, after the IRS erroneously told Ford it had *under*paid its taxes. Section 6611 unambiguously creates a substantive right to overpayment interest. But the government disputes that such interest begins to accrue on the date that the government receives the funds used to pay the taxes—*i.e.*, the date the funds are deposited with the IRS and placed in the U.S. Treasury. That is the point at which the government enjoys use of the funds and the point at which (all agree) any *under*payment interest would be tolled under 26 U.S.C. § 6601.

In its initial decision, the Sixth Circuit recognized that Ford's interpretation of § 6611 was "strong" (App. 43a), but ultimately sided with the government on the ground that § 6611 was "a waiver of sovereign immunity" that must be "'strictly construe[d]'" in favor of the government, and Ford had not satisfied the rigors of the strict construction rule. App. 52a, 39a (citation omitted). Ford petitioned for certiorari to this Court, arguing that the Sixth Circuit's application of the strict construction canon to § 6611 conflicted with this Court's precedents emphasizing that the canon applies only to waivers of sovereign immunity and not to separate, substantive provisions. *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). In response, the Solicitor General declined to defend seriously the Sixth Circuit's application of the strict construction rule to § 6611 and, instead, argued—for the first time in this case—that § 1346(a)(1) did not supply jurisdiction (and thus waive sovereign immunity) over this action to begin with.

This Court issued a decision vacating the Sixth Circuit's decision and remanding to give that court "the first opportunity to consider the Government's new contention with respect to jurisdiction." App. 32a. Signaling concern about the Sixth Circuit's application of the strict construction rule to § 6611, the Court added: "Depending 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 strictly construed." *Id.*

On remand, the Sixth Circuit adhered to its position that § 1346(a)(1) confers jurisdiction over this action.

App. 6a-7a. Reversing course, the court then held—over the disagreement of one of its members—that the strict construction canon does not apply to § 6611. *Id.* at 12a-13a, 28a-29a. But the court proceeded to reach the same result (with the canon purportedly removed). In the process, the court twisted the text of § 6611 and Revenue Procedure 84-58; flouted settled principles of construction, including the duty to harmonize parallel statutory provisions when possible; and disrupted the complementary statutory scheme that Congress established for overpayment and underpayment interest. Given the contortions in which the court had to engage to rule for the government again, there is only one way to make sense of the Sixth Circuit's decision—it still resisted construing § 6611 on a level playing field, as required by this Court's precedents.

The last time that this case was here, the Solicitor General acknowledged that "'the proper application of the strict construction canon for waivers of sovereign immunity is unquestionably important.'" No. 13-113 Opp. 20 (citation omitted). It still is. And the Sixth Circuit's decision on remand just confirms that further guidance on that issue is needed from this Court. Not only did the court divide on whether the strict construction rule applies to substantive provisions, but it once again slanted its statutory analysis in favor of the government. The Sixth Circuit's decision also conflicts with the decisions of other circuits on a taxpayer's right to rely on the IRS's published guidance materials. Here, Ford expressly relied on IRS Revenue Procedure 84-58 when it deposited hundreds of millions of dollars with the IRS. The IRS now is not only wrongfully attempting to retain the

interest it earned as a result of its error, but going back on what it told taxpayers in its Revenue Procedure.

This Court's review is still needed.

STATEMENT OF THE CASE

A. Statutory And Regulatory Backdrop

This case concerns the interest that a taxpayer is due under § 6611 on amounts that a taxpayer has overpaid to the government. In more complex cases, significant time can pass between when an individual or corporation files and pays its income taxes, and when the IRS completes its audit and assesses tax liability. It can take even longer before the correctness of that liability is finally determined. To address this delay, Congress enacted two parallel provisions governing interest on tax payments, which address in complementary terms the possibility that taxes may be overpaid or underpaid up front. Congress also waived the United States' immunity from suit for actions by taxpayers for the recovery of unpaid interest owed under § 6611. 28 U.S.C. § 1346(a)(1).

Section 6611 provides that, when a taxpayer *overpays* its taxes, the IRS "shall" pay it interest on the overpayment from "the date of the overpayment" to a date within 30 days of the refund check. 26 U.S.C. § 6611(b)(2). Section 6601 provides that, when a taxpayer *underpays* its taxes, it must pay the IRS interest on the amount of underpayment from "the last date prescribed for payment" to "the date paid." *Id.* § 6601(a). Both provisions effectuate the use-of-money principle: taxpayers are "'compensated for the lost time-value of their money when they make overpayments of tax,'" App. 46a (citation omitted), and the IRS is compensated for the lost time value of the government's money when taxpayers do not fully pay

their taxes. *See* I.R.S. Tech. Adv. Mem. 9730005 (Apr. 7, 1997), *available at* 1997 WL 415375. Both provisions express the trigger for interest in the same terms—the date of payment. 26 U.S.C. § 6611(b)(2) ("date of the overpayment"); *id.* § 6601(a) ("date paid").

The IRS adopted a revenue procedure to explain this scheme. Subsection 5.01 of Revenue Procedure 84-58, as in effect at the time of the events at issue, says that *under*payment interest "stop[s] on the date the remittance is received." Rev. Proc. 84-58 § 5.01, 1984-2 C.B. 501. Subsection 5.05 provides the general rule for *over*payment interest: "[r]emittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code." *Id.* § 5.05. It then carves out an exception: When a deposit is "posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02 [a unique situation not presented here], interest will run on an overpayment later determined to be due *only from the date the amount was posted as a payment of tax*." *Id.* (emphasis added).

By contrast, the Revenue Procedure makes clear that interest is not allowed on deposits that are returned. *See* Rev. Proc. 84-58 § 5.04 ("No interest will be allowed or paid on a deposit . . . *returned to a taxpayer*." (emphasis added)); *id.* § 5.01 (If a deposit "is returned at the taxpayer's request, and a deficiency is later assessed . . . , the taxpayer will not receive credit for the period in which the funds were held as a deposit."); *id.* § 2.03 (noting that deposit does not bear interest "if returned to the taxpayer"). The Revenue Procedure thus draws a clear line between deposits,

like Ford's here, that are actually used as payments and deposits that are returned.

In 2004, after the events at issue in this case, Congress enacted 26 U.S.C. § 6603. Section 6603 not only ratifies Congress's longstanding practice of treating the date of remittance as the date of payment for purposes of § 6601 (underpayment interest), but grants taxpayers overpayment interest even on *returned* deposits (although at a lower rate than on deposits, like those at issue in this case, that are used to pay tax liabilities). Congress's enactment of § 6603 closed a gap that had allowed the government interest-free use of deposits that were later returned at the taxpayer's request, and thus reinforces that Congress intended to adopt a complementary interest scheme that compensates both taxpayers and the government alike for the lost time value of money.

B. Overpayment Interest At Issue

The facts are undisputed. Ford seeks interest pursuant to § 6611 on taxes that Ford overpaid for the 1983-89, 1992, and 1994 tax years. After the IRS advised Ford that it had underpaid its taxes for those years, Ford submitted an additional $875 million to the IRS in 1991, 1992, and 1994, as deposits pursuant to Revenue Procedure 84-58. It is undisputed that those remittances stopped the accrual of *under*payment interest under § 6601 on the date that the IRS received them. Ford later advised the IRS that it should treat the deposits as advance payments towards any additional taxes Ford might owe. Several years after that, the IRS actually used Ford's remittances to satisfy tax liabilities it assessed against Ford. Ultimately, however, years later still, the IRS found that Ford had *over*paid its taxes—by hundreds of

millions of dollars—for the years at issue, refunded the overpayments to Ford, and paid Ford some of the overpayment interest it claimed under § 6611 but not the substantial overpayment interest at issue here.

The parties disputed *when* the overpayment interest began to accrue. Ford claimed that, under § 6611 and Revenue Procedure 84-58, interest began to accrue on the date that Ford first remitted the funds to the IRS—the date all agree any underpayment interest would have been tolled under § 6601. Contradicting its own Revenue Procedure and prior pronouncements, however, the IRS paid interest only from the date that Ford told the IRS to treat the deposits as advance payments, not from the date that the IRS enjoyed use of the funds. Because of the large sum Ford overpaid, the difference in interest totals over $475 million.

C. District Court Proceedings

Ford filed suit against the United States in the U.S. District Court for the Eastern District of Michigan, seeking the overpayment interest that the IRS had refused to pay. Ford's complaint invoked the district court's jurisdiction under, *inter alia*, 28 U.S.C. § 1346(a)(1), which grants district courts jurisdiction over claims against the United States for the recovery of erroneously assessed taxes "or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." *Id.*; *see* Complaint for Interest and Jury Demand ¶ 3, *Ford Motor Co. v. United States*, No. 08-cv-12960 (E.D. Mich. filed July 10, 2008). In its Answer, the government did not raise a jurisdictional sovereign immunity defense but rather agreed with Ford that jurisdiction was proper under § 1346(a)(1). United States' Answer to

Complaint ¶ 3, *Ford Motor Co. v. United States*, No. 08-12960 (E.D. Mich. filed Dec. 19, 2008).

The district court granted the government's motion for judgment on the pleadings, ruling—on the merits—that Ford was not entitled to overpayment interest from the dates that it remitted the deposits. App. 69a. The court recognized that there was "merit" to Ford's statutory interpretation and "d[id] not believe the Government addresse[d] sufficiently" § 5.05 of Revenue Procedure 84-58, but the court nevertheless found reasonable the government's interpretation of § 6611 and concluded that it was obliged to defer to that interpretation. *Id.* at 62a-64a. The government has since abandoned an argument for deference.

D. Initial Sixth Circuit Proceedings

The Sixth Circuit affirmed in a signed—yet unpublished—decision. On appeal, both the government and Ford recognized that § 1346(a)(1) supplied subject-matter jurisdiction in the case. *See* Ford Br. 2, No. 10-1934 (6th Cir.); Govt. Br. 1, No. 10-1934 (6th Cir.). Although the court of appeals recognized that § 1346(a)(1) provides a waiver of sovereign immunity (which the government had conceded applies to this case), the court dismissed the relevance of that provision on the ground that it was a "different provision than the one at issue." App. 45a. Instead, the court treated § 6611—the substantive provision governing when "[i]nterest shall be allowed and paid upon any overpayment," 26 U.S.C. § 6611(a)—as the waiver of sovereign immunity and applied the canon of strict construction to that provision.

At the outset, the court stated that, "when interpreting § 6611, we bear foremost in mind that Ford's challenge involves construing a waiver of

sovereign immunity," and that it was "bound to 'strictly construe[]' the waiver" in favor of the government. App. 39a (citation omitted). The court then proceeded to recognize that Ford's interpretation of § 6611 was "strong" (*id.* at 43a); that Ford's interpretation of Revenue Procedure 84-58 was "superior" (*id.* at 50a) to the IRS's "strained" reading of that provision (*id.* at 49a); and that the government's position was "contradicted" by a prior IRS pronouncement (*id.* at 49a n.6). But ultimately, the court sided with the government based on its conclusion that Ford had not overcome the rigors of the strict construction canon. *Id.* at 51a-52a.

E. This Court's Decision

This Court granted certiorari and vacated the Sixth Circuit's decision. The question presented was when, if ever, a court may invoke the strict construction canon applicable to waivers of sovereign immunity to construe a separate statutory provision (here, § 6611) that creates the substantive rights at issue. No. 13-113 Pet. i. This Court did not, however, reach that question in light of the Solicitor General's position—raised in this case for the first time—that § 1346(a)(1) did not supply jurisdiction, and thus did not waive sovereign immunity, over this action. Instead, the Court, in a *per curiam* decision, vacated the Sixth Circuit's decision and remanded the case to give that court "the first opportunity to consider the Government's new contention with respect to jurisdiction." App. 32a. But the Court added: "Depending 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." *Id.*

F. Sixth Circuit Decision Below

On remand, the Sixth Circuit declined this Court's invitation to consider the government's jurisdictional argument in the first instance, and held instead that it was bound by circuit precedent to conclude that § 1346(a)(1) confers jurisdiction over this action. App. 5a-6a (citing *E.W. Scripps Co. v. United States*, 420 F.3d 589 (6th Cir. 2005)). The court declined the government's request to reconsider *Scripps* en banc.

The Sixth Circuit next considered whether, with jurisdiction supplied by § 1346(a)(1), the strict construction canon applies to § 6611. This time—by a 2-1 vote—the court held that the canon does not apply. App. 1a, 12a-13a. The court then addressed the proper interpretation of § 6611—in particular, whether the "date of the overpayment" under § 6611 was the date Ford remitted its deposits, or the date the deposits were converted into advance tax payments. Although the court acknowledged that its "initial opinion relied on the canon of strict construction to tip the scales in favor of the government," *id.* at 8a, it nevertheless proceeded to reach the same result on the merits as in its prior decision—after removing the canon. In doing so, the court refused to interpret § 6611 in harmony with the IRS's longstanding interpretation of § 6601—the complementary underpayment interest provision. Instead, the court held that "the duty of harmonization falls on the IRS, not this court." *Id.* at 20a.

Judge Rogers concurred in that result, but disagreed with the court's holding that the strict construction rule does not apply to substantive

provisions. *Id.* at 28a-29a. Judge Rogers reasoned that the concept of sovereign immunity protects the government not simply "from suit, and from liability." *Id.* at 28. He further stated that "[c]ourts cannot take public funds and give them to private parties unless it is *particularly clear* that Congress intended for the courts to do so." *Id.* at 29a (emphasis added). And, in his view, that clear-statement rule "applies not only to whether a particular court has jurisdiction, but also to whether the private parties are entitled to money." *Id.*

The court denied Ford's petition for rehearing.

REASONS FOR GRANTING THE WRIT

By granting certiorari and vacating the Sixth Circuit's prior decision, this Court has already recognized the importance of this case and indicated its concern over the Sixth Circuit's application of the strict construction canon for waivers of sovereign immunity. For several reasons, certiorari is again warranted.

First, the proper application of the strict construction rule is still a central issue in this case. On remand from this Court's decision, the Sixth Circuit split on whether the strict construction canon applies to § 6611. And while the majority correctly stated that the canon does *not* apply to a substantive interest provision like § 6611, the court's construction of § 6611 is so contorted and contrary to settled principles of interpretation that the only way to understand its decision is that the court still applied a *de facto* strict construction rule—or something like it—to § 6611. The Sixth Circuit's misconception of the proper role and scope of the strict construction canon, moreover, is emblematic of a broader confusion and conflict in the lower courts over when, and how, to apply the canon.

Second, the Sixth Circuit's decision conflicts with the decisions of other circuits on a taxpayer's right to rely on the IRS's published guidance materials. As the Second Circuit has held, "[e]ven when the IRS is not bound to follow . . . a Revenue Procedure, 'an abuse of discretion can occur where the Commissioner fails to observe self-imposed limits on the exercise of his discretion, provided he has invited reliance upon such limitations.'" *Estate of Shapiro v. Commissioner*, 111 F.3d 1010, 1018 (2d Cir. 1997) (citation omitted), *cert. denied*, 522 U.S. 1045 (1998). Here, the IRS invited taxpayer reliance on Revenue Procedure 84-58 when it published it. And Ford expressly relied on that guidance when it deposited some $875 million with the IRS, after the IRS mistakenly told Ford it had *under*paid its taxes. Yet the Sixth Circuit, having recognized that Ford's reading of Revenue Procedure 84-58 was "superior" (App. 50a), refused to give effect to the plain terms of that provision—frustrating the taxpayer's right to rely on that guidance.

Third, the government's position that the Sixth Circuit lacked jurisdiction to issue its flawed decision bolsters the need for this Court's review. As this Court recognized in its prior decision, the jurisdictional issue overlaps with, and informs, the proper application of the strict construction canon in this case. Moreover, the government concedes that, if the Sixth Circuit lacked jurisdiction over this action under § 1346(a)(1), then the proper result would be to vacate the Sixth Circuit's decision and remand this case to the Court of Federal Claims pursuant to 28 U.S.C. § 1631. In other words, if the Solicitor General is right about jurisdiction, then the Sixth Circuit should not have issued its flawed decision in the first place.

Especially given the Court's familiarity with the case already, the decision below provides an excellent vehicle to address the important questions presented.

I. THE SIXTH CIRCUIT'S DECISION UNDERSCORES THE NEED FOR FURTHER GUIDANCE FROM THIS COURT ON WHEN, AND HOW, THE STRICT CONSTRUCTION CANON APPLIES

A. As This Court Has Repeatedly Held, The Strict Construction Canon Applies Only To Waivers of Sovereign Immunity and Not To Separate, Substantive Provisions

Anyone who brings suit against the government must first confront the doctrine of sovereign immunity. Sovereign immunity is a jurisdictional doctrine under which the United States "is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941); *see also* No. 13-113 Pet. 10-11. A court's jurisdiction to entertain a suit against the United States is thus defined by "the terms of [the United States'] consent." *Sherwood*, 312 U.S. at 586-87. As this Court has explained, sovereign immunity is an immunity *from suit*, and a waiver of sovereign immunity is "'a consent *to be sued*.'" *United States v. Bormes*, 133 S. Ct. 12, 16 (2012) (emphasis added).

Courts presented with a suit against the United States must therefore assess the contours of the government's consent to ensure that jurisdiction is proper. That interpretation, all agree, is subject to the longstanding canon "that the Government's consent to be sued 'must be construed strictly in favor of the sovereign.'" *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)). That canon gives a significant

advantage to the government in litigation brought against it because, as the Sixth Circuit observed in this case, the canon "tip[s] the scales in favor of the government" in close cases. App. 8a.

No doubt driven by the enormous benefit that the canon gives it, the government has sought to invoke the canon not only in construing waivers of sovereign immunity, but also the separate, substantive provisions sought to be enforced against the government. In response, this Court has repeatedly held that application of the canon is confined to *waivers of sovereign immunity*—and does not extend to separate, substantive provisions. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983). Nevertheless, the government has persisted in its efforts to extend the canon to substantive provisions, including before this Court. *See* No. 13-113 Pet. 12-15. In this case, the government is at it again.

B. The Sixth Circuit's Decision In This Case Underscores That This Court's Intervention Is Again Needed To Ensure The Proper Application Of The Strict Construction Canon

The lower courts remain confused and conflicted over when, and how, to apply the strict construction canon. *See* No. 13-113 Pet. 18-24. And the Sixth Circuit's decisions in this case are emblematic of the conflict and confusion that still exists.

1. In its prior petition for certiorari, Ford explained the substantial conflict and confusion in the lower courts on the proper application of the strict construction canon in this context. *See* No. 13-113 Pet. 18-27. While trying to underplay that state of disarray,

the Solicitor General conceded that "'the proper application of the strict construction canon for waivers of sovereign immunity is unquestionably important.'" No. 13-113 Opp. 20 (citation omitted). And this Court, in vacating the Sixth Circuit's prior decision, specifically invited the Sixth Circuit to consider "whether or not § 6611 is a waiver of sovereign immunity that should be construed strictly." App. 32a.

In two key respects, the Sixth Circuit's decision below only exacerbates the conflict and confusion that already pervades the lower courts. First, the court split on whether the strict construction canon applies to substantive provisions. The majority held that the strict construction rule does not apply, rejecting the government's reliance on *Library of Congress v. Shaw*, 478 U.S. 310 (1986). App. 11a-13a. But Judge Rogers saw it differently. He took issue with the fundamental proposition that sovereign immunity shields "the government from suit, and not from liability." *Id.* at 28a. Judge Rogers also argued that a clear statement rule applies "not only to whether a particular court has jurisdiction, but also to whether the private parties are entitled to the money." *Id.* at 29a.

Second, the Sixth Circuit's convoluted interpretation of § 6611 shows that—notwithstanding what the court said about the strict construction canon—the court still tipped the scales in favor of the government. Indeed, when the Sixth Circuit first considered this case, it recognized that Ford had the better interpretation of the statute (§ 6611) and revenue procedure (84-58). App. 43a, 49a-50a. But the court ultimately concluded that the strict construction canon required it to rule for the government. *Id.* at 4a. The strict construction canon was the decisive factor in

the court's analysis. As the court put it, the canon "tip[ped] the scales in favor of the government." *Id.* at 8a. In the decision below, the Sixth Circuit held that the strict construction canon does not apply to § 6611, but it still clung to the same result on the merits.

That result is not only counter-intuitive, but (figuratively speaking) it defies the laws of physics. If the scales tip one way because of a weight applied on one side (like the strict construction rule here), then *removing* the weight can only alter the balance. But not in the Sixth Circuit. And the way the Sixth Circuit reached that backward result says it all.

2. To reach its conclusion that the government's interpretation of § 6611 still prevailed in the absence of the strict construction canon, the Sixth Circuit flouted settled principles of statutory interpretation and the decisions of this Court and other circuits applying those principles. The court's statutory analysis defies any semblance of a level playing field.

a. One of the cardinal principles of statutory construction is to harmonize statutory provisions when possible. *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014); *see id.* ("Absent clearly expressed congressional intent to the contrary, it is our duty to harmonize [statutory] provisions . . . ."); *see also FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959) ("[O]ur task is to fit, if possible, all parts [of a statute] into [a] harmonious whole."); *United States v. Gallenardo*, 579 F.3d 1076, 1083 (9th Cir. 2009) ("'Where an appellate court can construe two statutes so that they conflict, or so that they can be reconciled and both can be applied, it is obliged to reconcile them.'" (citation omitted)); *US W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000) (duty to

harmonize parallel statutory provisions applies even if agency suggests a contrary interpretation). And where, as here, the construction involves provisions that were enacted at the same time as part of the same Act, "'the duty to harmonize them is particularly acute.'" *FAG Italia S.p.A v. United States*, 291 F.3d 806, 820 (Fed. Cir. 2002) (citation omitted); *id.* (citing cases); *see Gallenardo*, 579 F.3d at 1083 (same).

This duty of harmonization is a logical extension of the settled principle that "similar language contained within the same section of a statute must be accorded a consistent meaning." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998). Congress used similar language to create a symmetrical interest scheme: underpayment interest runs until the "date paid" (§ 6601) and overpayment interest runs from the "date of the overpayment" (§ 6611). It is undisputed that the IRS has long treated cash deposits—like those at issue here—as *payments* that toll underpayment interest under § 6601 as of the date that the deposits are made (*i.e.*, remitted) to the IRS. *See* App. 19a-21a. Given the textual similarity in the triggers that Congress used in §§ 6601 and 6611, it follows that if a deposit *stops* the accrual of underpayment interest under § 6601, then it also must *start* the accrual of overpayment interest under § 6611.

Without offering any reason why Congress would have intended these similar provisions to have a different meaning, the Sixth Circuit adopted an illogical interpretation of § 6611 under which the exact same deposit will have a different payment date depending on whether the IRS ultimately determines that the taxpayer has underpaid, or overpaid, its taxes. That conclusion not only directly conflicts with the

decisions of this Court and other circuits on the duty to harmonize parallel statutory provisions, but also conflicts with this Court's proclamation that "[i]t will not do to treat the same transaction as payment and not as payment, whichever favors the Government." *Rosenman v. United States*, 323 U.S. 658, 663 (1945).

Even more remarkable, the Sixth Circuit held that "the duty of harmonization falls *on the IRS*, not this court." App. 20a (emphasis added). The court adopted an interpretation that places similar statutory provisions in conflict with one another; then it held that it was the *agency's* duty to harmonize the provisions in the wake of its decision. That rule turns the duty of the *courts* to harmonize parallel statutory provisions on its head and is a recipe for administrative disorder. Indeed, the court's decision casts serious doubt on the IRS's longstanding practice of treating the date of deposit as the "date paid" under § 6601—a practice that was not challenged by either party in this case. Instead of harmonizing the parallel interest provisions, the Sixth Circuit threw the entire scheme into doubt.

The only plausible explanation for this bizarre reasoning and result is that the court was, in fact, strictly construing the statute in favor of the government. Nothing else accounts for the Sixth Circuit's rejection of a symmetrical reading of the key interest provisions—an interpretation that the court itself had previously considered "strong." App. 43a.

b. The Sixth Circuit's decision also contravenes this Court's teaching that statutory interpretation should not be undertaken in a vacuum. *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). Instead, courts must look not only to the language at issue but also to the surrounding provisions and statutory objective.

See id.; *see also McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) ("Examination of purpose is a staple of statutory interpretation . . . ."); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."); *see, e.g.*, *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995) (adopting interpretation that was "consistent with the statute's apparent objective").

Section 6611, and the surrounding statutory provisions, make clear that the intent of Congress in enacting Chapter 67's interest provisions is to account for the lost time value of money—whether it is to ensure that the government is made whole when a taxpayer *underpays* its taxes or that the taxpayer is made whole when it *overpays* its taxes. Numerous courts, including the Sixth Circuit (App. 17a-18a), have recognized this statutory objective. *See, e.g.*, *IBM Corp. v. United States*, 201 F.3d 1367, 1374-75 (Fed. Cir. 2000) ("interest to be paid on certain refunds to allow 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"), *cert. denied*, 531 U.S. 1183 (2001); *MNOPF Trs. Ltd. v. United States*, 123 F.3d 1460, 1465 (Fed. Cir. 1997) ("The purpose of the interest provisions in tax law is to remove the factor of the time value of money from tax procedures, in fairness to the public and to the public fisc."); *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir. 1993) ("Section 6611 attempts to compensate the taxpayer for the time value of money . . . .").

The IRS, in numerous publications, has likewise recognized that the time-value-of-money principle

underlies both §§ 6601 and 6611. In a 1997 Technical Advice Memorandum, for example, the IRS said that "[t]he Code's interest provisions reflect the economic basis for interest, *i.e.*, use of money. . . . The underlying objective [of the provisions] is to determine, in a given situation, who is owed money and how long the other party had the use of it." I.R.S. Tech. Adv. Mem. 9730005 (Apr. 7, 1997), *available at* 1997 WL 415375. The IRS continued: "Generally, under § 6601 of the Code, a taxpayer owes the government interest for the time the taxpayer has the use of the government's money. Similarly, under § 6611, the government pays the taxpayer interest on an overpayment for the time the government has *use* of the taxpayer's money." *Id.* (emphasis added). And the government indisputably has use of the funds on the date that they are deposited with the IRS.

Other IRS guidance materials recognize that the interest provisions are anchored in the time-value-of-money principle as well. *See, e.g.*, Rev. Proc. 60-17 § 2.01(1), 1960-2 C.B. 942 ("Under the general rule, interest is paid on a tax overpayment for the time the government has the use of the taxpayer's money. . . . The underlying objective is to determine in a given situation whose money it is and for how long the other party had the use of it."); *see also* Field Serv. Adv. 200149028 (Sept. 7, 2001), *available at* 2001 WL 1559040 ("Compensation for the use of money is the principal rationale for charging interest with respect to both overpayments and underpayments.").

The Sixth Circuit acknowledged that "'Congress, in enacting 26 U.S.C. § 6611 . . . , has made clear that it believes that taxpayers should be compensated for the lost time-value of their money when they make overpayments of tax.'" App. 17a (alteration in original)

(quoting *Scripps*, 420 F.3d at 597). Yet it construed § 6611 in a manner that flouts that objective. Under the time-value-of-money principle, interest runs from the date the government enjoyed use of the funds—*i.e.*, the date that the funds were remitted to the IRS and deposited in the U.S. Treasury. And that conclusion is consistent with the IRS's longstanding practice of tolling underpayment interest as of the date that the remittances are made (regardless whether they were initially designated as payments or deposits), since that is the date from which the IRS enjoys use of the funds.

In an effort to gloss over the court's refusal to give effect to the time-value-of-money principle, the Sixth Circuit purported to follow the dictionary definition of payment, which it framed in terms of "'paying or giving compensation'" for the "'discharge of a debt or an obligation.'" App. 14a (quoting dictionary). The court concluded that, because the IRS had yet to definitively establish Ford's tax liability, Ford did not make the deposits to discharge a debt or obligation and thus the deposits did not constitute payments. But here again, the Sixth Circuit disregarded the plain intent of Congress. In responding to a prior circuit court decision adopting a similar interpretation of payment, Congress enacted 26 U.S.C. § 6401(c). That provision specifically states that "[a]n amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid." 26 U.S.C. § 6401(c). Section 6401(c) explicitly precludes the Sixth Circuit's interpretation of "payment" here.

The Sixth Circuit's failure to interpret § 6611 in light of its surrounding provisions and objective is further evidenced by the court's treatment of § 6603. App. 26a-27a. The Sixth Circuit refused to give any

weight to § 6603 in interpreting § 6611 simply because Congress enacted that provision after the remittances at issue were made. *Id.* at 28a. But "it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted." *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 786 n.17 (2000). Later enacted statutes are even more probative when, as here, they "more specifically" address "the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Section 6603 is contained in the same chapter as § 6611 and was intended to reinforce the statutory scheme at issue. It was therefore incumbent on the Sixth Circuit to consider § 6603 rather than sweep it aside as irrelevant. Section 6603 not only ratifies the IRS's longstanding practice of treating the date of deposit as the "date paid" for purposes of § 6601, but grants taxpayers overpayment interest even on *returned* deposits. The enactment of § 6603 is consistent with a parallel construction of the interest provisions and the objective of those provisions, but utterly at odds with the Sixth Circuit's reading. It 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. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (statutes should not be interpreted in ways that lead to absurd results). Yet that is the illogical scheme that the Sixth Circuit's decision leaves in its wake.

c. The Sixth Circuit's decision also conflicts with the decisions of this Court and other circuits holding that, "[i]f the words [of the Internal Revenue Code] are doubtful, the doubt must be resolved against the

Government and in favor of the taxpayer." *United States v. Merriam*, 263 U.S. 179, 188 (1923); *see also United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) (referring to "the traditional canon that construes revenue-raising laws against their drafter") (collecting cases); *Exxon Mobil Corp. v. Commissioner*, 689 F.3d 191, 199 (2d Cir. 2012) (same). If the text, parallel structure, and objective of the interest provisions do not compel Ford's interpretation of § 6611, then it is at least *debatable* which interpretation is correct—making this case the kind of close call in which "doubt must be resolved against the Government and in favor of the taxpayer." *Merriam*, 263 U.S. at 188.

Yet, here again, the Sixth Circuit's construction went off the rails. Instead of resolving any doubt *against* the government, the Sixth Circuit repeatedly twisted the conventional rules of statutory construction to find a way to rule *for* the government—the very opposite of what this Court's decisions call for.

3. In the end, the only way to explain the Sixth Circuit's decision on remand is that—notwithstanding its statement that the strict construction rule does not apply—the court still held the taxpayer to a higher burden in construing § 6611. Nothing else explains the court's convoluted statutory analysis and irreconcilable set of opinions—in which the court first invoked the strict construction canon to tip the scales in favor of the government in interpreting what it characterized as an ambiguous provision, and then purportedly removed the canon and yet nevertheless held to the same result.

The Sixth Circuit's paradoxical set of opinions in this case, along with the panel's own internal disagreement over whether the strict construction

canon applies, App. 4a, 28a, only adds to the conflict and confusion that already permeates the lower courts on the proper application of the canon to substantive provisions. *See* No. 13-113 Pet. 18-27.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS ON A TAXPAYER'S RIGHT TO RELY ON IRS GUIDANCE

The Sixth Circuit's decision conflicts with the decisions of other circuits in another important respect: the court disregarded the taxpayer's right to rely on published IRS guidance and endorsed an interpretation of Revenue Procedure 84-58 that the court itself previously recognized is "illogical" (App. 23a). The Sixth Circuit's treatment of the Revenue Procedure not only provides still more evidence that it did not genuinely construe § 6611 on a level playing field, but also provides an independent basis to grant certiorari.

The First, Second, Fifth, and Ninth Circuits have all held that the IRS's revenue procedures are of particular significance when the IRS invites taxpayers to rely on them. The Fifth Circuit has held that "the Commissioner will be held to his published rulings in areas where the law is unclear, and may not depart from them in individual cases." *Estate of McLendon v. Commissioner*, 135 F.3d 1017, 1024-25 (5th Cir. 1998). The Second Circuit has held that the IRS's failure to comply with its revenue procedures can constitute "'an abuse of discretion . . . provided [it] has invited reliance upon [the procedures].'" *Estate of Shapiro*, 111 F.3d at 1018 (citation omitted); *see also United States v. Jobin*, 535 F.2d 154, 159 (1st Cir. 1976) (recognizing "taxpayer's right to rely on the published statements of the IRS"). And the Federal Circuit has stated that

"failure to revoke [a Revenue Procedure] gives rise to a reasonable expectation on the part of the taxpayer that the statements made in a published Revenue Procedure have continued vitality." *Dillon, Read & Co. v. United States*, 875 F.2d 293, 299 (Fed. Cir. 1989).

The IRS invited taxpayer reliance on its revenue procedures in the plainest terms possible—stating that "[t]axpayer[s] generally may rely upon . . . revenue procedures published in the Bulletin in determining the tax treatment of their own transactions." Rev. Proc. 89-14 § 7.01(5), 1989-1 C.B. 814. And when the IRS published Revenue Procedure 84-58—the "only published guidance bearing on the meaning of 'date of the overpayment' in § 6611(b)(1)," App. 46a—it invited taxpayers to rely on that Procedure to decide whether, and how, to deposit money with the IRS, and created a reasonable expectation concerning the interest that taxpayers would be owed on any overpayments.

Multiple subsections of Revenue Procedure 84-58 address when interest is due to a taxpayer under the Code. And those subsections all communicate the same message—that, unless returned, a taxpayer's deposit will accrue interest from the date of remittance. Subsection 2.03 of Revenue Procedure 84-58, for example, states that "[a] deposit in the nature of a cash bond is not a payment of tax, is not subject to a claim for credit or refund, and, *if returned to the taxpayer*, does not bear interest." Rev. Proc. 84-58 § 2.03 (emphasis added). It follows, then, that if a deposit in the nature of a cash bond is not returned to the taxpayer (like the deposits here), it *does* bear interest.

Subsections 5.01 and 5.05 of Revenue Procedure 84-58 confirm that understanding. Subsection 5.01 states that *underpayment* interest "will stop on the date the

remittance is received" without regard to whether it is designated as an advance payment. Rev. Proc. 84-58 § 5.01. Subsection 5.05—the general rule for *overpayment* interest—states: "Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code." *Id.* § 5.05. It then delineates a limited exception: when a deposit is "posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02, interest will run on an overpayment later determined to be due *only from the date the amount was posted as a payment of tax*." *Id.* (emphasis added). That overpayment interest accrues from the date of conversion under the *exception* (not applicable here) shows that the general rule is that overpayment interest accrues from the date of remittance. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) ("converting the exception into the rule" would "distort" statute).

A taxpayer's right to rely on revenue procedures is of greatest importance when the statutory provision at issue is arguably ambiguous or the "law is unclear." *Estate of McLendon*, 135 F.3d at 1024-25. As the Ninth Circuit has explained, "taxpayers have a right to rely on the[] substantive content [of revenue procedures] when other guideposts" are ambiguous. *United States v. Metro Constr. Co.*, 602 F.2d 879, 882 (9th Cir. 1979). There are only two guideposts available for taxpayers with respect to when overpayment interest begins to accrue—the statutory scheme and Revenue Procedure 84-58. The Sixth Circuit concluded in its initial decision that § 6611 is ambiguous on when overpayment interest begins to run. App. 44a. Yet, despite that conclusion, and in direct conflict with the

decisions of other circuits, the Sixth Circuit declined to credit Ford's reliance on the "only published guidance," App. 46a, that addressed that ambiguity.

The Sixth Circuit's failure to account for the taxpayer's right to rely on the IRS's published guidance on §§ 6601 and 6611 in determining whether Ford is entitled to the overpayment interest at issue is another way in which the court stacked the deck in favor of the government. But more than that, it provides an independent reason to grant certiorari.

III. THE SOLICITOR GENERAL'S POSITION ON JURISDICTION HEIGHTENS THE NEED FOR REVIEW BY THIS COURT

Another factor supports this Court's intervention: the Solicitor General's position that the Sixth Circuit lacked jurisdiction in this case under § 1346(a)(1).

1. As relevant here, § 1346(a)(1) grants jurisdiction to the district courts over "[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-revenue laws." 28 U.S.C. § 1346(a)(1) (emphasis added). In *Scripps*, the Sixth Circuit held that the "any sum" clause grants district courts jurisdiction over claims for overpayment interest under § 6611. 420 F.3d at 598. That interpretation squares with this Court's recognition that "any sum" includes interest. *Flora v. United States*, 362 U.S. 145, 149 (1960). Although the Sixth Circuit did not reach the issue in *Scripps* (*see* 420 F.3d at 596), jurisdiction is also proper under the "any internal-revenue" clause of § 1346(a)(1). As the district court in *Scripps* reasoned, "'statutory interest compensates for [the] lost [time] value and therefore should not be considered a sum separate from the

initial overpayment.'" *Scripps*, 420 F.3d at 594-95 (quoting district court decision in *Scripps*).

When this case was last here, the Solicitor General nevertheless took the position that § 1346(a)(1) does not confer jurisdiction over an action, like this one, for the recovery of overpayment interest. In his view, the language of § 1346(a)(1) "does not literally encompass (and, *a fortiori*, does not unambiguously authorize) petitioner's current suit." No. 13-113 Opp. 17. According to the Solicitor General, "[p]etitioner does not seek to recoup any prior payment made to the government that was 'excessive' or 'wrongfully collected,' but instead seeks *additional interest* on an overpayment that already has been refunded." *Id.* Nor, in the Solicitor General's view, does the "any sum" clause of § 1346(a)(1) confer jurisdiction over an action, such as this, to recover overpayment interest. Although the Solicitor General acknowledged that this "phrase might encompass interest that the taxpayer has paid over to the IRS and seeks to recoup," he argued that "[t]he interest the petitioner seeks here . . . was never in petitioner's possession." *Id.*

This Court vacated the Sixth Circuit's prior decision and remanded the case to give the Sixth Circuit "the first opportunity to consider the Government's new contention with respect to jurisdiction in this case." App. 32a. On remand, the government renewed the Solicitor General's argument that the court lacked jurisdiction over this action under § 1346(a)(1). U.S. Supp. Br. 2-4. In addition, the government argued that the Sixth Circuit's prior decision in *Scripps* was wrong and suggested that the Sixth Circuit "reconsider *en banc* the jurisdictional issue decided in *Scripps*." *Id.* at 15. The government further recognized, however, that, "if the full Court

were to overrule *Scripps* and dismiss this case for lack of jurisdiction, Ford would not be left without a remedy" because, at that point, the proper course would be "to transfer the case to the Court of Federal Claims under 28 U.S.C. § 1631." *Id.* at 4, 15.

In its decision below, the Sixth Circuit agreed with Ford that its prior decision in *Scripps* was controlling on the jurisdictional issue and declined to rehear *Scripps* en banc. Indeed, the court declined even "to poll the *en banc* court to gauge its interest in revisiting the issue decided by *Scripps*." App. 7a.

2. For at least three reasons, the government's position that the Sixth Circuit lacked jurisdiction strengthens the case for this Court's review.

First, the doubt that the Solicitor General himself has cast over whether § 1346(a)(1) grants jurisdiction for overpayment interest actions is of significant concern. Section 1346(a)(1) is a bedrock jurisdictional grant for taxpayer claims against the IRS. Among other things, the government's position frustrates the intent of Congress to open Article III courts across the country to taxpayer suits seeking the recovery of overpayment interest and instead consigns taxpayers to a single Article I court, in Washington, D.C. Moreover, as this Court recognized in its prior decision in this case, the question whether § 1346(a)(1) grants jurisdiction over—and thus waives sovereign immunity as to—overpayment interest claims is bound up with the question whether the strict construction rule applies to § 6611. App. 32a.

Second, if the Sixth Circuit did lack jurisdiction to issue its decision, then that decision must be vacated and the proper course—as the government itself has conceded, U.S. Supp. Br. 4—is to order that this case be transferred under § 1631 to the Court of Federal

Claims for it to consider Ford's claim. *See, e.g.*, *United States Marine, Inc. v. United States*, 722 F.3d 1360 (Fed. Cir. 2013); *see also Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002) (vacating and remanding with instructions to transfer the case to the Tenth Circuit under § 1631). In other words, lack of jurisdiction would itself require setting aside the Sixth Circuit's flawed decision below.

And third, the Solicitor General's position that jurisdiction is lacking under § 1346(a)(1) is tantamount to a confession of error. If the Solicitor General is right, then the Sixth Circuit erred in issuing the decision below and that decision must be vacated. A confession of error ordinarily is a sufficient basis for this Court to act. *See Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996) (per curiam). But here, with all the questions swirling around the Sixth Circuit's decision on the merits, the Solicitor General's *de facto* confession of error is a particularly compelling reason for this Court to at least grant further review.

* * * * *

The important questions raised by the Sixth Circuit's decision satisfy this Court's conventional criteria for certiorari. And the facts of this case, and patent unfairness of the IRS's position, make this case an especially strong candidate for review.

In response to the IRS's directive that it had *under*paid its taxes, Ford gave the IRS hundreds of millions of dollars—capital that otherwise would have gone to running and growing its business—to avoid the prospect of crippling underpayment interest penalties. Those funds were immediately deposited in the U.S. Treasury and they were eventually used to pay Ford's tax liability. Come to find out years later, the IRS was

wrong. Ford—also the only U.S. automaker that did not receive billions in bailout money from the federal government—had actually *over*paid its taxes. And to add insult to injury, the IRS now claims it is entitled to retain the time value of the money that Ford deposited with the IRS, about $475 million dollars given the large amount that the IRS mistakenly told Ford it had underpaid. Congress, on behalf of the taxpayers, enacted a complementary interest scheme that precludes that unjust result. The Sixth Circuit's decision allowing it should not be permitted to stand.

No one expects it to be easy for taxpayers to prevail against the government when they claim they have been wronged. But the hurdles that the Sixth Circuit has erected are unwarranted and contrary to the applicable statute, the decisions of this Court, and Congress's intent. Further review is needed, again.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 6, 2015

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APPENDIX

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UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

FORD MOTOR COMPANY, Plaintiff–Appellant,
v.
UNITED STATES OF AMERICA, Defendant–Appellee.

No. 10-1934.
Argued: July 29, 2014.
Decided and Filed: Oct. 1, 2014.
Rehearing En Banc Denied Dec. 8, 2014
768 F.3d 580

Before: BATCHELDER, GIBBONS, and ROGERS, Circuit Judges.

GIBBONS, J., delivered the opinion of the court, in which BATCHELDER, J., joined, and ROGERS, J., joined except for Part III.A. ROGERS, J. (pgs. 594–95), delivered a separate concurring opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Ford Motor Company remitted hundreds of millions of dollars to the United States Treasury after the Internal Revenue Service (IRS) notified Ford that it had underpaid its taxes in prior years. Ford designated the funds as "deposits in the nature of a cash bond" but later asked the government to convert its remittances into "advance tax payments," which are treated differently under the IRS's revenue procedures. When the government subsequently reexamined its computations and determined that Ford had *overpaid* its taxes in the relevant timeframe, the

United States refunded Ford's payments with interest. But the government refused to pay Ford any interest for the period during which the United States held Ford's money as deposits—before the remittances were converted to advance tax payments. Ford demands about $450 million in additional interest from the government. The district court rejected Ford's claim, and so do we.

I.

Corporate tax returns, like individual tax returns, are subject to audit by the IRS. *See generally* 34 Am.Jur.2d Federal Taxation ¶ 70000 *et seq.* When the taxpayer is a large corporation such as Ford, however, it often takes years for the IRS to conduct an audit and to assess the corporation's tax liability for any particular year. That delay can be costly. In the event the IRS ultimately determines that the taxpayer *underpaid* its taxes, federal revenue laws make the taxpayer liable for underpayment interest that accrued while the IRS analyzed the taxpayer's tax liability. 26 U.S.C. § 6601(a). But the risk runs both ways. If the IRS ultimately determines that the taxpayer *overpaid* its taxes for the year under scrutiny, the government is on the hook for overpayment interest, which accrues from "the date of the overpayment." 26 U.S.C. § 6611(b)(2).

Ford remitted approximately $875 million to the United States in the 1990s after the IRS initiated an audit and preliminarily determined that Ford had underpaid its taxes by nearly $2 billion during the preceding decade. Ford sent the money pursuant to Revenue Procedure 84–58, which allows taxpayers to remit funds to stop the accrual of underpayment interest. *See* Rev. Proc. 84–58, 1984–2 C.B. 501,

superseded by Rev. Proc. 2005–18, 2005–1 C.B. 798. The revenue procedure identifies two distinct types of tax remittances: "deposits in the nature of a cash bond" and "advance tax payments." Ford designated each of its payments as a deposit in the nature of a cash bond, which the IRS says is "made merely to stop the running of [underpayment] interest," "is not a payment of tax," and "if returned to the taxpayer, does not bear interest." *Id.* § 2.03. Only later did Ford ask the IRS to treat its remittances as advance tax payments, which do bear interest in the event of an overpayment. *Id.* § 5.05. The IRS complied and converted Ford's deposits into advance tax payments, applying the payments against Ford's outstanding tax deficiency from prior years.

The dispute in this case arose when the IRS subsequently reversed its position and concluded that the monies Ford remitted to the IRS to cover the alleged deficiencies were actually an *overpayment* of taxes due for the years in question. The United States refunded Ford's tax remittances plus overpayment interest, as required under 26 U.S.C. § 6611. Importantly, and at the heart of this dispute, the IRS calculated the amount of overpayment interest from the dates on which Ford requested that its deposits be converted into advance tax payments rather than from the earlier dates on which Ford remitted the deposits. Ford believes the interest started to accrue on the deposit dates.

In July 2008 Ford filed a complaint in federal district court seeking $445 million in unpaid interest. Two years later the district court granted the government's motion for judgment on the pleadings. The district court believed that it had to defer to the

IRS's interpretation of the Internal Revenue Code as long as that interpretation was reasonable. In Revenue Procedure 84–58 the IRS interpreted § 6611 to require the government to pay interest only on overpayments designated as advance tax payments; in its view, taxpayers are not entitled to overpayment interest on remittances held as cash-bond deposits because there can be no overpayment of tax, and therefore no overpayment interest, until a taxpayer converts its cash-bond deposit into an advance tax payment. The district court deemed that interpretation to be reasonable and therefore upheld the IRS's calculation of Ford's overpayment interest. *Ford Motor Co. v. United States*, No. 08–12960, 2010 WL 2231894, at *7 (E.D.Mich. June 3, 2010).

Ford appealed the district court's decision to this court, and although the government abandoned its quest for regulatory deference, we affirmed. *Ford Motor Co. v. United States*, 508 Fed.Appx. 506 (6th Cir.2012), *vacated*, —— U.S. ——, 134 S.Ct. 510, 187 L.Ed.2d 470 (2013). We held that the canon of strict construction applicable to waivers of sovereign immunity required us to interpret § 6611 narrowly. We therefore rejected Ford's attempt to interpret the term "overpayment" in § 6611 to encompass both deposits and advance tax payments, as the IRS defines those terms.

Ford filed a petition for rehearing *en banc*, arguing for the first time that § 6611 was not a waiver of sovereign immunity. Instead, Ford argued that the applicable immunity waiver came from 28 U.S.C. § 1346(a)(1)—the statute that vested the district court with jurisdiction to adjudicate Ford's case. Ford had not raised that argument in its briefs, and both this

panel and the *en banc* court declined to rehear the appeal.

Ford then petitioned the Supreme Court for a writ of *certiorari*. In its opposition to that petition the United States argued that the district court (and therefore this court) lacked jurisdiction to hear this case. The government argued that § 1346(a)(1) does not apply to this claim and that "the only general waiver of sovereign immunity that encompasses [Ford's] claim is the Tucker Act, 28 U.S.C. § 1491(a), which requires that suit be brought in the United States Court of Federal Claims." In a footnote, the government acknowledged that it had not made this jurisdictional argument in the proceedings before this court because the jurisdictional question is foreclosed by *E.W. Scripps Co. v. United States*, 420 F.3d 589 (6th Cir.2005).

The Supreme Court granted Ford's petition for a writ of *certiorari*, vacated the panel's decision, and remanded the case to this court. The Court stated:

> The Sixth Circuit should have the first opportunity to consider the Government's new contention with respect to jurisdiction in this case. Depending 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.

Ford Motor Co. v. United States, —— U.S. ——, 134 S.Ct. 510, 511, 187 L.Ed.2d 470 (2013). Ford's appeal is once again ripe for our review.

II.

At the outset we must consider the question of jurisdiction—one of the two bases on which the Supreme Court remanded the case to this court. Ford invoked the district court's jurisdiction under 28 U.S.C. § 1346(a)(1), which vests the district courts with jurisdiction to hear claims "for the recovery of any . . . sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." In its opposition to Ford's *certiorari* petition the government argued that § 1346(a)(1) does not confer jurisdiction over this claim because Ford does not seek to *recover* money already paid; rather, it demands interest that the IRS steadfastly refuses to pay. The government maintains that "the only general waiver of sovereign immunity that encompasses [Ford's] claim is the Tucker Act, 28 U.S.C. § 1491(a), which requires that suit be brought in the United States Court of Federal Claims."

Although the Supreme Court remanded Ford's appeal to this court "to consider the government's new contention with respect to jurisdiction in this case," both the United States and Ford acknowledge that the government's jurisdictional challenge is foreclosed by *E.W. Scripps Co. v. United States*, 420 F.3d 589 (6th Cir.2005). In *Scripps* this court held that § 1346(a)(1) confers jurisdiction on the federal district courts to adjudicate claims for overpayment interest because the term "recovery of any sum" in that statute includes suits to obtain overpayment interest. 420 F.3d at 597 (citing *Flora v. United States*, 362 U.S. 145, 149, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960)). We concluded that our interpretation of § 1346(a)(1) was consistent with *Library of Congress v. Shaw*, 478 U.S. 310, 314, 106

S.Ct. 2957, 92 L.Ed.2d 250 (1986), where the Court held that the United States is immune from any suit to obtain interest in the absence of express congressional consent to an award of interest. We noted that 26 U.S.C. § 6611, which specifically permits taxpayers to sue the government for overpayment interest, constitutes an express congressional waiver of the government's immunity from suits to recover interest. *Scripps*, 420 F.3d at 597.

The government encourages this panel *sua sponte* to poll the *en banc* court to gauge its interest in revisiting the issue decided in *Scripps*. *See* 6th. Cir. I.O.P. 35(e) ("[A]ny member of the en banc court may sua sponte request a poll for hearing or rehearing en banc before a party files an en banc petition."). We decline the government's invitation and therefore are bound by *Scripps*, which undeniably affirms the district court's jurisdiction to decide this case.

III.

We proceed to the merits. Ford insists that its remittances began to accrue overpayment interest on the date Ford sent them to the government, even though Ford initially designated its remittances as cash-bond deposits rather than advance tax payments. In Ford's view the "conversion" of its deposits into advance tax payments had retroactive effect, and accordingly "the date of the overpayment" under 26 U.S.C. § 6611 was the date that Ford submitted each deposit to the United States. The government disagrees. It argues that there cannot be an overpayment until there is a payment, and both the ordinary meaning of the term "payment" and Revenue Procedure 84–58 make clear that a deposit in the nature of a cash bond is not a payment for purposes of

§ 6611. Both parties offer imaginative and convoluted theories to support their arguments, but the interpretive dispute that we must resolve is ultimately a simple one.

A.

First we return to the canon of strict construction, as the Supreme Court specifically invited us to reconsider whether § 6611 is a waiver of sovereign immunity that must be strictly construed, and the parties ask us to confront that question at the outset. After concluding that both Ford and the United States offered "plausible" interpretations of the term "overpayment" in § 6611, our initial opinion relied on the canon of strict construction to tip the scales in favor of the government. That canon provides that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). But our decision was predicated on the assumption, propounded by the United States and unchallenged by Ford, that § 6611 provided the applicable waiver of sovereign immunity. On remand from the Supreme Court we invited the parties to submit supplemental briefs in this appeal, and the parties have focused their arguments on this question.

A few courts have concluded (some in *dicta*) that § 6611 waives the government's sovereign immunity with respect to suits for interest. *See Exxon Mobil Corp. & Affiliated Cos. v. C.I.R.*, 689 F.3d 191, 202 (2d Cir.2012); *Int'l Bus. Mach. Corp. v. United States*, 201 F.3d 1367, 1371, 1374–75 (Fed.Cir.2000); *Schortmann v. United States*, 82 Fed.Cl. 1, 6 (2008). But Ford argues that § 6611 creates a substantive right to interest

rather than a waiver of the government's sovereign immunity. Ford relies on cases such as *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983), *United States v. Navajo Nation*, 537 U.S. 488, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003), *Gomez–Perez v. Potter*, 553 U.S. 474, 128 S.Ct. 1931, 170 L.Ed.2d 887 (2008), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003), to differentiate between jurisdictional statutes that waive the government's immunity and substantive provisions that establish a right to relief. Because § 6611 defines the scope of a taxpayer's right to sue for interest but does not confer jurisdiction on the courts to adjudicate those claims, Ford argues, the canon of strict construction plays no role in defining the scope of the taxpayer's right to interest under § 6611.

Ford is indeed correct to differentiate between jurisdictional waiver provisions and substantive statutes. In *Mitchell*, the Supreme Court noted that the Tucker Act waived the government's immunity from "suit for claims founded upon statutes or regulations that create substantive rights to money damages" and that "the separate statutes and regulations" creating the substantive rights "need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." 463 U.S. at 218–19, 103 S.Ct. 2961. The Court invoked this same principle in *Navajo Nation* to distinguish the Indian Tucker Act, which "confers jurisdiction upon the Court of Federal Claims," from separate "rights-creating source[s] of substantive law" that entitle claimants to damages but do not constitute separate immunity waivers. 537 U.S. at 503, 123 S.Ct. 1079. And in *White Mountain Apache*

Tribe, another sovereign-immunity case decided the same day as *Navajo Nation*, the Court once again emphasized that the showing required to establish a right to relief under a substantive statute is "demonstrably lower than the standard for the initial waiver of sovereign immunity." 537 U.S. at 472, 123 S.Ct. 1126.

The government contends that interest is different, and indeed it is. Three years after *Mitchell* the Court decided *Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), which held that a suit for interest cannot be sustained against the United States unless there exists an "express congressional consent to the award of interest separate from a general waiver of immunity to suit." The Court referred to the requisite substantive interest provision as a "separate waiver" of sovereign immunity, *id.*, and noted that the United States retains its "immunity from awards of interest" unless Congress specifically authorizes an award of interest in that separate immunity waiver, *id.* at 317. *Shaw* thus appears to require two waivers of sovereign immunity in the context of a suit against the government to obtain interest—one jurisdictional waiver establishing the right to bring suit in an appropriate court, and a second substantive waiver expressly authorizing an award of interest.

Because sovereign-immunity waivers must be strictly construed, the government contends, any doubts about whether Ford's deposits constituted "overpayments" under § 6611 must be resolved in favor of the United States. Properly interpreted, however, *Shaw* does not stand for the proposition that any ambiguity in the scope of a statutory interest provision

must be resolved in the government's favor. It stands instead for the proposition that a litigant may not sue the United States to recover interest unless Congress has expressly authorized suits for interest. *See Missouri v. Jenkins*, 491 U.S. 274, 280, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) ("*Shaw* involved an application of the longstanding 'no-interest rule,' under which interest cannot be awarded against the United States unless it has expressly waived its sovereign immunity."). "[O]nce Congress has waived sovereign immunity over certain subject matter, the [courts] should be careful not to 'assume the authority to narrow the waiver that Congress intended.' " *Ardestani v. INS*, 502 U.S. 129, 137, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991) (quoting *United States v. Kubrick*, 444 U.S. 111, 118, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)).

Shaw did not interpret the scope of an interest provision; rather, it asked whether 42 U.S.C. § 2000e–5(k), which allows the courts to award attorney's fees against the government in civil-rights cases, could fairly be interpreted to authorize an award of interest on those attorney's fees. *Shaw*, 478 U.S. at 319, 106 S.Ct. 2957. To be sure, *Shaw* reiterated the common refrain that the canon of strict construction applies to all waivers of sovereign immunity, adding that the "no-interest rule provides an added gloss of strictness upon" the strict-construction canon. *Id.* at 318–19, 106 S.Ct. 2957. But once one gets past that rote statement of general immunity law, the actual analysis in Shaw reveals that the Court intended those statements to prevent courts from interpreting generally applicable statutes too broadly to permit awards of interest against the government when the statute does not expressly contemplate an award of interest. *See id.* at

318, 106 S.Ct. 2957 ("When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly."). The Court went on to list several statutes that expressly authorize awards of interest against the government, using these statutes as examples of situations where Congress has waived the government's sovereign immunity.

Our interpretation of *Shaw* is consistent with the general purpose of sovereign immunity, which is to shield the government from suit—not from liability. *See United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Sovereign immunity is a jurisdictional doctrine. *Id.* It bars the courts from adjudicating certain types of claims made against the sovereign; it does not require the courts to resolve all ambiguities in substantive statutory provisions in the government's favor. The government's view of *Shaw* would require the courts to draw every possible inference against a litigant seeking interest. That is plainly not what *Shaw* had in mind, and it would drastically distort sovereign-immunity jurisprudence to use the narrowing lens of the canon of strict construction to constrict the meaning of the statutory terms that define a substantive right to relief. *Cf. United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383, 70 S.Ct. 207, 94 L.Ed. 171 (1949) (" 'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.' " (quoting *Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 153 N.E. 28, 29–30 (1926) (Cardozo, J.))).

There is accordingly 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. Nothing about the term "overpayment" suggests that Congress intended to waive the government's sovereign immunity only with respect to remittances designated as advance tax payments. Indeed, the terms "deposit in the nature of a cash bond" and "advance tax payment" did not appear in the Internal Revenue Code when Ford made these remittances. The distinction between those types of remittances was invented by the IRS, not Congress, and the concept of a "deposit in the nature of a cash bond" did not arise until after Congress enacted § 6611. The distinction between deposits and advance tax payments therefore does not implicate the government's sovereign immunity; it relates only to the scope of the substantive right.

B.

We employ the usual tools of statutory interpretation to determine whether "the date of the overpayment" under § 6611 was the date Ford remitted its deposits, as Ford contends, or the date the IRS converted its deposits into advance tax payments, as the government contends. This court begins any statutory-interpretation analysis "by examining the language of the statute itself to determine if its meaning is plain." *Nat'l Air Traffic Controllers Ass'n v. Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir.2011) (internal quotation marks omitted). "Plain meaning is examined by looking at the language and design of the statute as a whole." *Id.* (internal quotation marks omitted). We "must interpret statutes as a whole, giving effect to each word and making every effort not

to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir.1998) (internal quotation marks omitted).

1.

We look first at the plain language of the statute. Section 6611(b)(1) says that the United States must pay overpayment interest from "the date of the overpayment." An overpayment is "any payment in excess of that which is properly due," *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531, 68 S.Ct. 229, 92 L.Ed. 142 (1947), and dictionaries define the word "payment" as "the act of paying or giving compensation: the discharge of a debt or an obligation." Webster's Third New International Dictionary 1659 (1981). That definition focuses on the purpose with which a person or entity sends the funds: A remittance is a payment when it is given to discharge a debt or obligation.[1] Whether Ford's cash-bond deposits were payments

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[1] Black's Law Dictionary uses a slightly different definition that focuses on the intent of the putative payee rather than the payor. *See* Black's Law Dictionary (9th ed.2009) (defining payment as "[p]erformance of an obligation by the delivery of money . . . *accepted in partial or full discharge of the obligation* " (emphasis added)). In the context of interpreting § 6611, however, it would be inappropriate to permit the IRS, as the putative payee, to determine whether a specific remittance constitutes a payment. If, for example, a taxpayer remits funds to the IRS and designates the remittance as an advance tax payment to be allocated to a specific tax deficiency, and the IRS negligently fails to record the remittance as a payment and instead places the funds into some reserve account, the IRS's error should not affect whether the remittance is deemed to be a payment within the meaning of § 6611.

under § 6611 thus turns on whether they were made for the purpose of discharging its estimated tax obligations.

That Ford remitted its deposits before the IRS had finally determined its tax liability is of no moment. The revenue laws are clear (though perhaps verbose) on this point: "An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid." 26 U.S.C. § 6401(c). Thus a corporation such as Ford may "pay" its tax obligations upon receipt of a preliminary notice of tax deficiency, even before the obligations are finalized or otherwise become due.[2]

According to IRS revenue procedures in effect at the time, both cash-bond deposits and advance tax payments stopped the government from charging interest on an estimated tax underpayment while the IRS finalized its tax assessment (as long as the deposit was eventually posted against the assessment.) But the revenue procedures treated deposits and advance tax payments differently in one important respect: A

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[2] This statute is one reason we do not rely on *Rosenman v. United States*, 323 U.S. 658, 65 S.Ct. 536, 89 L.Ed. 535 (1945), to guide our interpretation of § 6611. In *Rosenman*, the Court stated that a deposit in the nature of a cash bond was not a payment, noting that the United States regularly refused to pay overpayment interest on such deposits when the deposit turned out to be in excess of the tax liability eventually assessed. *Id.* at 662–63, 65 S.Ct. 536. But *Rosenman* held that the remittances in question could not be payments in part because the government had not yet assessed any tax. *See id.* at 662, 65 S.Ct. 536. That reasoning is inconsistent with § 6401(c), enacted in response to *Rosenman*, which explicitly rejects the notion that interest cannot accrue until a tax is actually assessed.

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, which take's time. *See* Rev. Proc. 84–85 § 4.02.1. So when Ford sent its remittances, it faced a tradeoff: If a taxpayer remitted a cash-bond deposit but subsequently demanded the deposit's return, the IRS would not pay the taxpayer any interest for the period during which the government held the funds.[3] When a taxpayer demanded a refund of an excessive advance tax payment, by contrast, the IRS allowed the taxpayer to recoup interest. Thus the revenue procedures forced taxpayers to choose: immediate access without interest, or interest without immediate access.

Considered in this context, Ford's purpose comes more sharply into focus, *see Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."), and belies any claim that Ford's purpose in remitting the cash-bond deposits was to discharge its estimated tax obligations. Ford could have designated its remittances as advance tax payments and instructed the IRS to apply its remittances against any tax liability ultimately assessed. Both parties agree that would have been a "payment" because such a remittance would have been made for the purpose of satisfying the estimated tax deficiency. Yet Ford

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[3] This revenue procedure has been abrogated in part by 26 U.S.C. § 6603.

chose instead to designate its remittances as deposits. Ford is a sophisticated taxpayer, and its designation of the remittances was not accidental. A taxpayer's deliberate decision to designate its remittance as a deposit rather than an advance tax payment directly evidences an intent *not* to make a "payment." That purpose is determinative

Ford invokes the use-of-money principle, a general federal policy favoring compensation for the use of taxpayer money, *see Marsh & McLennan Cos. v. United States*, 302 F.3d 1369, 1380 & n. 10 (Fed.Cir.2002), and argues that the principle requires this court to interpret § 6611 to entitle Ford to interest on its deposits. As this court explained in *Scripps*:

> Congress, in enacting 26 U.S.C. § 6611 . . . , has made clear that it believes that taxpayers should be compensated for the lost time-value of their money when they make overpayments of tax. The payment of statutory interest reflects an attempt to return the taxpayer and the Government to the same positions they would have been in if no overpayment had been made. If the Government does not compensate the taxpayer for the time-value of the tax overpayment, the Government has retained more money than it is due, i.e., an "excessive sum."

Scripps, 420 F.3d at 597; *see also Int'l Bus. Mach. Corp.*, 201 F.3d at 1374–75 ("Congress has waived sovereign immunity in both the tax code and the customs laws to permit interest to be paid on certain refunds to allow 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. Congress has considered this to be only fair and proper.").

Yet the use-of-money principle is not absolute. It "is merely a principle of statutory construction" that "cannot be used to trump the specific statutory scheme Congress has devised." *FleetBoston Fin. Corp. v. United States*, 483 F.3d 1345, 1353 (Fed.Cir.2007). Nor does the use-of-money principle trump the IRS's longstanding payment scheme. By enacting § 6611, Congress gave life to the use-of-money principle by allowing taxpayers to earn overpayment interest on remittances paid to the United States before a final tax deficiency is assessed. But Ford opted not to use that procedure and instead remitted deposits in the nature of a cash bond. Ford cannot now invoke the use-of-money principle to argue that the government is improperly refusing to compensate Ford for the time-value of its money. The United States offered to compensate Ford for the time-value of its money on the condition that Ford submit to the IRS's refund procedures, but Ford elected not to accept the government's offer. *Cf. Marsh & McLennan Cos.*, 302 F.3d at 1381 ("The taxpayer could have sought a refund for the excess funds, or left the excess funds as an interest-bearing overpayment. A taxpayer that makes a credit elect has no one to blame but itself for the non-payment of interest on that amount.").

We conclude that Ford's cash-bond deposits were not payments, and therefore were not overpayments, because Ford did not remit those deposits to discharge its estimated tax deficiency. Rather, Ford's decision to designate its remittances as deposits rather than advance tax payments demonstrates that the sole purpose of the remittances was to stop the accrual of

underpayment interest. The IRS properly refused to award Ford any interest for the period during which the United States held Ford's remittances as cash-bond deposits.

2.

Ford suggests that this interpretation is inconsistent with the design of the broader underpayment- and overpayment-interest scheme. To infuse consistency into Congress's scheme, Ford suggests that the "most appropriate starting point" is not the text of § 6611 but instead the language of § 6601, the provision governing *underpayment* interest. Ford contends that these two sections should be interpreted symmetrically because they each use similar language, *compare* § 6601 ("date paid"), *with* § 6611 ("date of the overpayment"), and each relates to the accrual of interest on tax payments. Its basic argument is this: Underpayment interest accrues under § 6601(a) from the date the tax is due until the date the tax is paid. The statute thus requires the IRS to charge taxpayers underpayment interest until the tax deficiency is "paid." And for underpayment purposes, unlike in the overpayment context, the IRS treats cashbond deposits as tax payments; according to section 5.01 of Revenue Procedure 84–58, underpayment interest stops accruing on the date a remittance is received from a taxpayer, irrespective whether the taxpayer designates its remittance as an advance tax payment or a deposit in the nature of a cash bond. To maintain symmetry between these two parallel statutes, Ford argues, a deposit that qualifies as a payment under § 6601 must similarly qualify as a payment under § 6611. In other words, if a deposit

stops the accrual of underpayment interest, a deposit also must *start* the accrual of overpayment interest.

Although Ford's plea for regulatory consistency is facially appealing, examining it beneath the surface reveals its flaws. First, Ford does not explain why our interpretation of § 6611 should turn on the IRS's interpretation of § 6601. A common canon of construction compels courts to interpret statutory terms consistently, *see Sorenson v. U.S. Sec'y of Treasury*, 475 U.S. 851, 860, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986), but Ford seems to believe that a corollary to that canon requires courts to defer to agencies' interpretations of parallel statutory terms. Yet neither Ford nor the government suggests that the IRS is entitled to formal interpretive deference in this case, and neither rule nor canon counsels this court to interpret one statutory provision consistently with an agency's informal interpretation of another. To the extent the IRS's interpretation of §§ 6601 and 6611 needs to be harmonized with this court's interpretation of those statutes, the duty of harmonization falls on the IRS, not this court.

Second, Ford's resolution of the IRS's inconsistent enforcement of §§ 6611 and 6601 is unconvincing. Ford 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, but that tells us nothing about which of the two treatments is correct. Although Ford argues that the IRS's inconsistency means that a deposit should be treated as a payment under § 6611, perhaps the converse is true—*i.e.*, a deposit should *not* be treated as a payment under § 6601, and interest should stop accruing on underpayments only upon receipt of a remittance designated as an advance tax

payment. Despite the persuasiveness of Ford's plea for symmetrical interpretations, it does little to help us understand the proper meaning of the term "overpayment" in § 6611.

Third, no matter how we decide this case, taxpayers will have reason to complain about inconsistencies in the IRS's practices. If the word "payment" includes cash-bond deposits, the IRS has been improperly withholding overpayment interest from taxpayers who designate their remittances as deposits rather than advance tax payments. And if the word "payment" does *not* include deposits, the IRS has been letting taxpayers off the hook by stopping the accrual of underpayment interest as of the date that taxpayers remit a cash-bond deposit. Thus there is nothing we can do to rectify the IRS's inconsistent treatment of cash-bond deposits in this case, and the IRS's practices do not transform our duty to interpret § 6611.

3.

Ford also encourages us to interpret § 6611 through the lens of Revenue Procedure 84–58—or, more specifically, one isolated provision of that revenue procedure. As an initial matter, even if that provision were on point, it is not clear that an interpretation of the term "overpayment" dictated by the IRS's revenue procedures would control our interpretation of that statutory term. The government for good reason does not argue that the revenue procedure is entitled to deference. Revenue procedures are at most interpretive aids, *see Estate of Shapiro v. C.I.R.*, 111 F.3d 1010, 1017 (2d Cir.1997) (citing *Estate of Jones v. C.I.R.*, 795 F.2d 566, 571 (6th Cir.1986)), that do not enjoy the status of law or regulation, do not bind the courts, *Xerox Corp. v. United States*, 41 F.3d 647, 657–

58 (Fed.Cir.1994), and typically do not even bind the IRS itself, *see Shapiro*, 111 F.3d at 1017–18; *Riley v. United States*, 118 F.3d 1220, 1222 (8th Cir.1997). Yet we need not decide whether the IRS's revenue procedures should influence our interpretation of § 6611 because we reject Ford's reading of Revenue Procedure 84–58.

Ford focuses on section 5.05 of Revenue Procedure 84–58, which reads:

> Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code. In the event that [a] deposit in the nature of a cash bond is posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02, interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

In Ford's view the first sentence of section 5.05 establishes the general rule that overpayment interest will be paid on all "[r]emittances treated as payments of tax," regardless whether the IRS treats the remittance as an advance tax payment *upon receipt* or instead later "converts" a cash-bond deposit into an advance tax payment. Ford maintains that the second sentence—which is applicable only when a deposit is converted to an advance tax payment *under section 4.02* and which says that *in those circumstances* interest begins to accrue on the "conversion date" rather than the "deposit date"—is the lone exception to the general rule established in the first sentence. As

Ford tells it, "[b]ecause there would be no need for such an 'exception' if interest can never begin accruing under § 6611 before the conversion date, it follows that the *general rule* must be that interest does accrue from the remittance date on a converted deposit." And because both parties agree that section 4.02 is inapplicable here, Ford argues that the general rule in section 5.05 requires the IRS to treat its converted deposits as advance tax payments from the date of deposit rather than the conversion date.

The government notes in response that the entire concept of "conversion" is foreign to Revenue Procedure 84–58, which nowhere permits the IRS to convert a deposit in the nature of a cash bond into an advance tax payment. Although the government acknowledges that the IRS permits conversions, it suggests that a conversion is actually a "constructive return" of a taxpayer's deposit followed by the taxpayer's immediate re-submission of the deposit as an advance tax payment. Because sections 2.03 and 4.02 of Revenue Procedure 84–58 state that a taxpayer is not entitled to interest on a returned deposit, the government argues, a taxpayer who requests a conversion is not entitled to any pre-conversion interest because the government constructively returned the deposit to the taxpayer.

The government's interpretation is illogical. Section 5.01 of Revenue Procedure 84–58 says that if a taxpayer requests a deposit's return, the taxpayer does not "receive credit" for underpayment-interest purposes for the period that the deposit was held by the government. So if the United States actually "constructively returned" taxpayers' deposits whenever taxpayers requested the conversion of their deposits into advance tax payments, the constructive

return of the deposit would mean the taxpayer would owe interest to the United States for the pre-conversion period that the government held the money as a deposit. But the parties agree that in practice the IRS does not charge interest for tax underpayments when it holds a sufficient deposit—even when the deposit is subsequently converted to an advance tax payment. The IRS therefore cannot be said to effect a "constructive return" of a taxpayer's deposit merely by converting it to an advance tax payment.[4]

Yet Ford's interpretation also cannot be correct. The second sentence of section 5.05 is irrelevant to this case: It applies when a payment is converted under section 4.02, and everyone agrees that is not what occurred here. The question is whether the first sentence of section 5.05 should be interpreted to require the government to apply the conversion retroactively, such that a deposit that is later converted to an advance tax payment will be treated as if it were an advance tax payment the entire time the government held the money. Ford is correct that its interpretation gives meaning to the second sentence of section 5.05, which would otherwise be meaningless. But that is an insufficient basis on which to give legal effect to Ford's creative but unsubstantiated theory of

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[4] Furthermore, it appears that the IRS, in a private-letter ruling, has contradicted the interpretation of Revenue Procedure 84–58 it now advances. *See* I.R.S. P.L.R. 8738041 (June 23, 1987). Specifically, the IRS stated that "[b]ecause the Government will have uninterrupted use of [a] remittance, the remittance will not be deemed to be returned upon redesignation as a payment of tax . . . ." *Id.* This statement appears to cut against the government's contention that converted deposits are constructively returned to the taxpayer.

retroactive conversion. We will not read the theory of retroactive conversion into section 5.05 merely to rescue one sentence from surplusage when that reading would frustrate or violate other provisions of Revenue Procedure 84–58, including the numerous provisions stating that taxpayers are not entitled to overpayment interest on remittances designated as deposits. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (stating that the "preference for avoiding surplusage constructions is not absolute" and should be abandoned where it would lead to an interpretation that is inconsistent with the plain text of the statute).

Nor would Ford's interpretation be consistent with the general policy and structure of Revenue Procedure 84–58, which presumptively treats all remittances as advance tax payments unless the taxpayer specifically requests that its remittance be treated as a deposit. *See* Rev. Proc. 84–58 § 4.01. As noted above, taxpayers face a trade-off when they send remittances: Submit the remittance as a deposit and retain the right to demand its immediate return while sacrificing the right to earn interest in the event the remittance exceeds the taxpayer's ultimate tax liability. Or, conversely, submit the remittance as an advance tax payment to ensure that the payment earns interest, with the risk that, if the IRS revises its proposed tax deficiency downward, the advance tax payment will only be returned through the IRS's formal refund process rather than upon immediate demand by the taxpayer. Ford's interpretation of section 5.05 not only distorts the text, it also would permit taxpayers to obtain the benefits of cash-bond deposits, which constitute an IRS dispensation, without suffering the detriment that

cash-bond deposits entail. That would lay waste to the numerous provisions of Revenue Procedure 84–58 that bar taxpayers from collecting interest on remittances held as deposits.

The better interpretation of section 5.05 is simply that it does not apply to the circumstances of this case. At bottom, the imaginative theories that both parties propound—Ford's argument for interpretive symmetry between §§ 6601 and 6611, the government's theory of constructive return, and Ford's theory of retroactive conversion—are all attempts to tackle the simple fact that the IRS's whimsical treatment of deposits and conversions might be *ultra vires* because the revenue procedures do not contemplate conversions, and the IRS appears to treat deposits differently in the contexts of underpayment and overpayment interest. But this dispute is about the proper interpretation of § 6611; it is not about whether the IRS's conversion of deposits into advance tax payments is *ultra vires*. If the IRS needs to update its revenue procedures to memorialize the practice of converting deposits into advance tax payments in order to eliminate disparities in the treatment of certain types of remittances, it should do so. We will not adopt a strained reading of § 6611 merely to make slightly better sense of contradictory provisions in Revenue Procedure 84–58.

4.

Finally, Ford also claims to find support for its position in the enactment of section 842 of the American Jobs Creation Act of 2004, Pub.L. No. 108–357, 118 Stat. 1418 (codified at 26 U.S.C. § 6603), which 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. Section 6603 provides for a lower interest rate for returned deposits as compared to the general overpayment interest rate applicable under § 6611. *Compare* § 6603(d)(4), *and* § 6621(b), *with* § 6611(a), *and* § 6621(a)(1). Ford contends that because § 6603 allows a taxpayer who requests the return of its deposit to recover interest from the remittance date, it makes little sense to interpret § 6611 to allow a taxpayer who converts a deposit—rather than asking for its return—to recover interest only from the conversion date. A taxpayer who requests the return of a deposit would then be entitled to interest from an earlier date than the taxpayer who requests the deposit's conversion, thus illogically rewarding the taxpayer who seeks the return of its deposit over the taxpayer who actually converts its deposit into an advance payment of tax.

The government responds with its constructive-return theory—that a converted deposit is actually two sequential transactions, a constructive return of the deposit followed by immediate re-submission of that deposit as a tax payment. Under that approach the taxpayer would be paid interest under § 6603 from the deposit date until the date of the constructive return and would then be paid at the higher interest rate established in § 6621(a)(1) from the constructive-return date until the refund date. In other words, the government suggests that § 6603 allows for the payment of interest at two different rates for a converted deposit, while prior to the enactment of § 6603 interest would only be paid from the date of conversion forward.

Both Ford and the United States advance interpretations of § 6611 that would reconcile that statute and § 6603 with the IRS's apparent practice of converting deposits into advance tax payments. Yet § 6603 had not been enacted when Ford remitted its deposits, so we need not concern ourselves with the effect of that statute on the facts of this case. Taxpayers who remit deposits today may conclude that they can maximize their interest by requesting the return of their deposits instead of converting those deposits into advance tax payments. That choice was not available to Ford, however, and we will not adopt a warped interpretation of § 6611 merely to allow Ford to recoup interest that Congress only recently decided to award.

IV.

The district court's decision is affirmed.

ROGERS, Circuit Judge, concurring.

I join the majority's opinion, except for Part III.A. For the compelling reasons given in the remainder of the majority's opinion, the Government does not owe interest on the amounts paid by Ford as a deposit. There is no need at all to address the applicability of the strict construction canon for waivers of sovereign immunity, and I would therefore not do so. *See* Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L.Rev. 1249 (2006).

Unnecessarily addressing the issue is particularly problematic in this instance, where the issue is close and conceptually difficult. I would not say, for instance, that the general purpose of sovereign immunity is only to shield the government from suit, and not from liability. Immunity of the United States

in its own courts is a doctrine that serves separation-of-powers interests, and is not just a matter of court jurisdiction. In our three-branch scheme of government, courts generally have the final power both to say what the law is and to compel compliance with the law. But the legislature has a particularly strong primary responsibility with respect to the allocation of public funds, because of its responsiveness to popular views and its ability to weigh interests. This primary responsibility of the legislature to allocate public funds is reflected in the doctrine of sovereign immunity, which as a modern doctrine is almost entirely limited to money suits. Courts cannot take public funds and give them to private parties unless it is particularly clear that Congress intended for the courts to do so. This limit logically applies not only to whether a particular court has jurisdiction, but also to whether the private parties are entitled to the money. Sovereign immunity thus comprises not only a jurisdictional limit, but a substantive one as well.

SUPREME COURT OF THE UNITED STATES

FORD MOTOR COMPANY

v.

UNITED STATES

No. 13-113

December 2, 2013

134 S. Ct. 510

Opinion

PER CURIAM

When a taxpayer overpays his taxes, he is generally entitled to interest from the Government for the period between the payment and the ultimate refund. See 26 U.S.C. § 6611(a). That interest begins to run "from the date of overpayment." §§ 6611(b)(1), (b)(2). But the Code does not define "the date of overpayment."

In this case, after the Internal Revenue Service advised Ford Motor Company that it had underpaid its taxes from 1983 until 1989, Ford remitted a series of deposits to the IRS totaling $875 million. Those deposits stopped the accrual of interest that Ford would otherwise owe once the audits were completed and the amount of its underpayment was finally determined. See § 6601, Rev. Proc. 84–58, 1984–2 Cum. Bull. 501. Later, Ford requested that the IRS treat the deposits as advance payments of the additional tax that Ford owed. Eventually the parties determined that Ford had overpaid its taxes in the relevant years, thereby entitling Ford to a return of the overpayment as well as interest. But the parties disagreed about when the interest began to run under 26 U.S.C. § 6611(b)(1). Ford argued that "the date of overpayment" was the date that it first remitted the

deposits to the IRS. *Ibid.* The Government countered that the date of overpayment was the date that Ford requested that the IRS treat the remittances as payments of tax. The difference between the parties' competing interpretations of § 6611(b) is worth some $445 million.

Ford sued the Government in Federal District Court, asserting jurisdiction under 28 U.S.C. § 1346(a)(1). The Government did not contest the court's jurisdiction. See Brief in Opposition 3, n. 3. The District Court accepted the Government's construction of § 6611(b) and granted its motion for judgment on the pleadings. A panel of the Court of Appeals for the Sixth Circuit affirmed, concluding that § 6611 is a waiver of sovereign immunity that must be construed strictly in favor of the Government. 508 Fed.Appx. 506 (2012).

Ford sought certiorari, arguing that the Sixth Circuit was wrong to give § 6611 a strict construction. In Ford's view, it is 28 U.S.C. § 1346—not § 6611—that waives the Government's immunity from this suit, and § 6611(b) is a substantive provision that should not be construed strictly. *See Gómez–Pérez v. Potter*, 553 U.S. 474, 491, 128 S.Ct. 1931, 170 L.Ed.2d 887 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472–473, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). In its response to Ford's petition for certiorari, however, the Government contended for the first time that § 1346(a)(1) does not apply at all to this suit; it argues that the only basis for jurisdiction, and "the only general waiver of sovereign immunity that encompasses [Ford's] claim," is the Tucker Act, 28 U.S.C. § 1491(a). Brief in Opposition 3, n. 3. Although the Government acquiesced in jurisdiction in the lower

courts, if the Government is now correct that the Tucker Act applies to this suit, jurisdiction over this case was proper only in the United States Court of Federal Claims. See § 1491(a).

This Court "is one of final review, 'not of first view.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005)). The Sixth Circuit should have the first opportunity to consider the Government's new contention with respect to jurisdiction in this case. Depending 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.

The petition for certiorari is granted, the judgment of the Sixth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FORD MOTOR COMPANY, Plaintiff–Appellant,

v.

UNITED STATES of America, Defendant–Appellee.

No. 10-1934.

Dec. 17, 2012.

508 F. App'x 506

Before: BATCHELDER, Chief Judge; GIBBONS and ROGERS, Circuit Judges.

Opinion

JULIA SMITH GIBBONS, Circuit Judge.

Plaintiff-appellant Ford Motor Company ("Ford") seeks approximately $445 million in interest that it believes has accrued on overpayments of its corporate income taxes. Ford contends that the Internal Revenue Service ("IRS"), under 26 U.S.C. § 6611, was required to calculate overpayment interest from the earlier dates on which Ford submitted deposits to the IRS, rather than from the later dates on which Ford requested that those deposits be converted into advance payments of tax. The district court granted the government's motion for judgment on the pleadings and denied Ford's motion for summary judgment, finding reasonable the government's interpretation of § 6611—that overpayment interest be calculated only from the later dates of conversion. For the reasons that follow, we affirm.

I.

The facts giving rise to Ford's legal claims are not in dispute. On September 9 and 27, 1991, July 6, 1992,

and June 23, 1994, Ford submitted remittances to the IRS. In submitting these remittances, Ford specifically requested that they be treated as deposits in the nature of a cash bond. Ford made these remittances, amounting to several hundred millions of dollars, after it had been audited by and received 30–day letters from the IRS which notified Ford of proposed tax deficiencies incurred during 1983–1989, 1992, and 1994.

Subsequently, Ford requested that the IRS treat these remittances as advance payments—*i.e.*, payments towards proposed (not yet assessed) tax deficiencies—rather than as deposits in the nature of a cash bond. On December 19, 1994, Ford requested that part of the September 9, 1991 deposit be treated as an advance payment. One year later, on December 15, 1995, Ford requested that another portion of its September 9, 1991 deposit; portions of its deposits made on September 27, 1991 and July 6, 1992; and the entire June 23, 1994 deposit also be treated as advance payments. The IRS obliged, and thus Ford effectively converted its deposits that were held in the nature of cash bonds into advance payments towards proposed past-due taxes.

At some point after the deposits were converted, the IRS determined that Ford had in fact *overpaid* its taxes for the years in question and issued refunds to Ford. These refunds included the amount that Ford overpaid and the interest that had accrued on its overpayment. Importantly—and at the heart of this dispute—the IRS calculated the amount of overpayment interest from the dates on which Ford requested that its deposits be converted to advance payments (*i.e.*, the "conversion dates" of December 19,

1994 and December 15, 1995), not from the earlier dates on which Ford remitted the deposits (*i.e.*, the "remittance dates" of September 9 and 27, 1991, July 6, 1992, and June 23, 1994).

On July 10, 2008, Ford filed a complaint seeking approximately $445 million in interest that had allegedly accrued on overpayments of its corporate income taxes for 1983–1989, 1992, and 1994. The United States moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Ford responded and also moved for summary judgment. On June 3, 2010, after conducting a hearing, the district court granted the government's motion for judgment on the pleadings and denied Ford's motion for summary judgment. Although the district court conceded that Ford's argument "may have some merit," it found reasonable the government's position that there could be no overpayment of tax—and therefore no overpayment interest accrual—until Ford actually converted its deposits to advance payments. Thus, the court held that the government had correctly calculated Ford's overpayment interest.

We review *de novo* the district court's grant of judgment on the pleadings and its denial of summary judgment. *Fortney & Weygandt, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 595 F.3d 308, 310 (6th Cir.2010).

II.

Corporate tax returns, like individual tax returns, are subject to audit by the IRS. *See generally* 34 Am.Jur.2d Federal Taxation ¶ 70000 (updated 2012). An audit may reveal that the corporate taxpayer has underpaid or overpaid its taxes for the year in question. If the audit reveals that a taxpayer has overpaid its taxes, then the taxpayer is entitled to the

amount of the overpayment, plus interest on that overpayment. 26 U.S.C. § 6611(a); *see generally* 34 Am.Jur.2d Federal Taxation ¶ 70901 (updated 2012). The "overpayment interest" statute, 26 U.S.C. § 6611, reads as follows:

> **(a) Rate.**—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.
>
> **(b) Period.**—*Such interest shall be allowed and paid* as follows . . .
>
> > **(2) Refunds.**—In the case of a refund, *from the date of the overpayment* to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer . . . .

26 U.S.C. § 6611(a)–(b)(2) (emphases added). Conversely, if a taxpayer has underpaid taxes, he is liable for the amount of underpayment plus interest on that underpayment. The "underpayment interest" statute, 26 U.S.C. § 6601, reads as follows:

> **(a) General rule.**—*If any amount of tax imposed by this title . . . is not paid on or before the last date prescribed for payment, interest* on such amount at the underpayment rate established under section 6621 *shall be paid for the period from such last date to the date paid.*

Id. § 6601(a) (emphases added). Thus, § 6611 (taxpayer entitlement to overpayment interest) and § 6601 (taxpayer liability for underpayment interest) are functionally parallel in that they describe when interest starts and stops accruing.

Because it can take years for the IRS to complete an audit and resolve any administrative appeals related to a return, significant underpayment interest can accrue in the interim if a taxpayer has indeed underpaid. To avoid this possibility, a taxpayer may remit money to the IRS pursuant to Revenue Procedure 84–58—before any tax liability is assessed—which will stop the accrual of underpayment interest in the event that the taxpayer is later found to have underpaid. *See* Rev. Proc. 84–58, 1984–2 C.B. 501, *superseded by* Rev. Proc. 2005–18, 2005–1 C.B. 798. To gain this benefit and stop potential underpayment interest from accruing, a taxpayer must designate the remittance as "a deposit in the nature of a cash bond." *Id.* §§ 4.02; 5.01. A taxpayer who submits a deposit in the nature of a cash bond may request the return of the deposit at any time—but if he does so, he will not be paid interest for the time the IRS had the deposit *and* he will be liable for interest incurred on any underpayment from the date of the remittance. In other words, in addition to not earning interest on his deposit, the taxpayer who requests his deposit's return will lose whatever interest-stopping benefits he gained by submitting a deposit in the first place. *See id.* §§ 5.01, 5.04. Alternatively, after submitting a deposit in the nature of a cash bond, the taxpayer may request that this deposit be converted and applied towards an advance payment of a tax—*i.e.*, a tax that has been proposed but not assessed.[1]

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[1] It appears that there is no provision of the Revenue Procedures that specifically allows a taxpayer to request the "conversion" of its deposit to a payment of tax. But the fact that a taxpayer can request initially that its remittance be treated as a deposit, *see* Rev. Proc. 84–58 § 4.02, or otherwise it will be treated

There is no dispute Ford designated that its remittances be treated as deposits in the nature of a cash bond pursuant to Revenue Procedure 84–58, and thus stopped the accrual of any underpayment interest. Instead, the dispute here involves overpayment interest. Years after Ford submitted remittances pursuant to Revenue Procedure 84–58, Ford requested that the IRS treat these deposits as advance payments on its proposed tax liabilities. But then, years after converting Ford's deposits to tax payments, the IRS recognized that Ford had in fact overpaid its taxes. The IRS therefore refunded Ford the amount of overpayment plus interest on that overpayment, calculating the interest due from the date that Ford requested that its remittances be treated as tax payments. Ford contends that interest should be calculated from earlier dates—the dates on which it initially submitted its remittances. Accordingly, we face the following question: does overpayment interest accrue from the date of the initial remittance or the date when the taxpayer requests the remittance be treated as an advance tax payment?

III.

We begin any statutory-interpretation analysis "by examining the language of the statute itself to determine if its meaning is plain." *Nat'l Air Traffic Controllers Ass'n v. Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir.2011) (internal quotation marks omitted). "Plain meaning is examined by looking at the language and design of the statute as a whole." *Id.* (internal

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as a tax payment, *id.* § 4.03, supports the logical inference that a taxpayer may request conversion from deposit to tax payment. And it is undisputed that Ford's request to convert its deposits was granted.

quotation marks omitted). "[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir.1998) (internal quotation marks omitted). Moreover, "[i]n interpreting the meaning of the words in a revenue Act, we look to the ordinary, everyday senses of the words." *C.I.R. v. Soliman*, 506 U.S. 168, 174, 113 S.Ct. 701, 121 L.Ed.2d 634 (1993) (internal quotation marks omitted).

In addition, when interpreting § 6611, we bear foremost in mind that Ford's challenge involves construing a waiver of sovereign immunity in a suit for interest against the government. It is well established that the "no-interest rule" shields the government from liability in suits for interest unless there is a express statutory waiver of sovereign immunity. *Library of Cong. v. Shaw*, 478 U.S. 310, 317–18, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), *abrogated by statute on other grounds as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *Van Winkle v. McLucas*, 537 F.2d 246, 247–48 (6th Cir.1976); *United States ex rel. Angarica de la Rua v. Bayard*, 127 U.S. 251, 260, 8 S.Ct. 1156, 32 L.Ed. 159 (1888). Where the government has waived sovereign immunity, we are bound to "strictly construe[]" the waiver, "in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); to limit such waivers to their plain language, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 693–94, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983); and to construe any "ambiguities in favor of

immunity." *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L Ed.2d 608 (1995). Although this strict construction principle does not displace other rules of statutory construction, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589, 128 S.Ct. 2007, 170 L.Ed.2d 960 (2008), it is not to be taken lightly: the "no-interest rule provides an added gloss of strictness upon the[] usual rules" governing waivers of sovereign immunity. *Shaw*, 478 U.S. at 318, 106 S.Ct. 2957.

Here, the question is not whether Congress has consented to be sued for interest on tax overpayments; it clearly has. Both § 6611(a) and (b) specifically state that overpayment interest "shall be allowed and paid." 26 U.S.C. § 6611(a) ("Interest shall be allowed and paid upon any overpayment. . . ."); *id.* § 6611(b) ("Such interest shall be allowed and paid as follows. . . ."). Rather, the proper question is the scope of that waiver.[2] And as the Supreme Court has recently reiterated, "[f]or the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign." *F.A.A. v. Cooper*, — U.S. —, 132 S.Ct. 1441, 1448, 182 L.Ed.2d 497 (2012). Thus, for Ford to prevail here, "the scope of Congress' waiver [must] be clearly discernable from the statutory text in light of traditional interpretive

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[2] This dispute does not involve the mere calculation of interest, where principles of sovereign immunity arguably might not apply. *See J.F. Shea Co. v. United States*, 754 F.2d 338, 340 (Fed.Cir.1985). Rather, it involves whether the government can be sued *at all* for overpayment interest accruing from the date of deposit—and therefore necessitates an inquiry into how broadly the government has waived its sovereign immunity, which is fundamentally a question of scope.

tools. If it is not, then we take the interpretation most favorable to the Government." *Id.*[3]

A.

Section 6611 does not define "the date of overpayment" and the tax code generally does not define the term "overpayment." *Gen. Elec. Co. & Subsidiaries v. United States*, 384 F.3d 1307, 1312 (Fed.Cir.2004). However, the Supreme Court has "read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due." *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531, 68 S.Ct. 229, 92 L.Ed.142 (1947); *see United States v. Dalm*, 494 U.S. 596, 609 n. 6, 110 S.Ct. 1361,

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[3] Although the Supreme Court has arguably softened its use of the strict construction principle since the 1990s, *see generally Burch v. Sec'y of Health & Human Servs.*, No. 99-946V, 2010 WL 1676767, at *5–6 (Fed.Cl. Apr. 9, 2010), the Court has done so only when a party sought to apply the strict construction principle to a statute or section of a statute entirely separate from the one that supplied the waiver of sovereign immunity itself. *See Gomez–Perez v. Potter*, 553 U.S. 474, 491, 128 S.Ct. 1931, 170 L.Ed.2d 887 (2008) (refusing to apply strict construction principle to substantive provision of subsection where the waiver of sovereign immunity was contained in another subsection); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472–473, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (holding that where one statute provides for a waiver of sovereign immunity to enforce a separate statute, the latter statute is not subject to the strict construction principle). Here, § 6611 itself waives sovereign immunity for interest on tax overpayments, and both § 6611(a) and (b) specifically state that overpayment interest "shall be allowed and paid" and contain the key word "overpayment." Thus, the strict construction principle applies. *See Schortmann v. United States*, 82 Fed. Cl. 1, 6 (2008) (finding that the language of § 6611 *as a whole* constituted a waiver of sovereign immunity "too explicit to be misunderstood").

108 L.Ed.2d 548 (1990) ("The commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all."). But to define "overpayment" with any precision also requires defining "payment." And the ordinary, commonsense meaning of "payment" is "the act of paying or giving compensation: the discharge of a debt or an obligation." Webster's Third New International Dictionary 1659 (1981); Black's Law Dictionary (9th ed. 2009) (defining payment as "[p]erformance of an obligation by the delivery of money . . . accepted in partial or full discharge of the obligation"); *see Katkin v. C.I.R.*, 570 F.2d 139, 142 (6th Cir.1978) (referring to Webster's and Black's dictionaries in interpreting meaning of "payment" in an unrelated provision of the tax code). Indeed, when interpreting the statutory predecessor to § 6611, one of our sister circuits adopted exactly this definition of "payment." *Busser v. United States*, 130 F.2d 537, 539 (3d Cir.1942).

The government seizes upon the plain meaning of the word "payment," arguing that there can be no overpayment until there has actually been a payment—and there was no payment until Ford requested that its deposits be converted into tax payments. Prior to that point, Ford's remittances were, at its own request, treated as deposits in the nature of a cash bond and Ford could have requested their return at any time. As Revenue Procedure 84–58 § 2.03 clearly states, "[a] deposit in the nature of a cash bond is not a payment of tax." Accordingly, the government argues that it does not owe Ford interest from the date of the original remittances because they were indisputably made only as deposits, not as payments of any tax obligation.

Ford counters that the "most appropriate starting point" is not § 6611, but rather § 6601, the provision that governs *underpayment* interest. First, Ford contends that these two sections should be interpreted symmetrically because they both use very similar language, *compare* § 6601 ("date paid"), *with* § 6611 ("date of the overpayment"), and both deal with the accrual of interest on tax payments. Second, Ford notes that under § 6601(a), only a "payment" stops the accrual of underpayment interest against a taxpayer, and since a deposit in the form of a cash bond stops the accrual of interest from the date it is remitted, Rev. Proc. 84–58 § 5.01, that deposit must be considered a payment under § 6601(a). And because a deposit is treated as a payment for underpayment interest purposes under § 6601, it should also be considered a payment for overpayment interest purposes under § 6611. In other words, if a mere deposit *stops* the accrual of underpayment interest, then a mere deposit must also *start* the accrual of overpayment interest.

Both parties' readings are plausible. The government's interpretation is grounded in the ordinary meaning of the terms "date of the overpayment" and "payment." However, this interpretation ignores that the date of remittance is treated as the date of "payment" under § 6601—a section that uses similar language to § 6611—at least insofar as it stops the accrual of underpayment interest pursuant to Revenue Procedure 84–58. Conversely, Ford makes a strong case for interpreting interest accrual under § 6601 and § 6611 symmetrically. Yet Ford ignores a natural reading of "date of overpayment," and does not account for the fact that

the language the two statutes employ, though similar, is not identical.[4]

In light of the parties' conflicting, plausible readings of § 6611, we find that the text of the statute is ambiguous as to when the accrual of overpayment interest begins.

B.

Because each of the parties' interpretations of § 6611 is plausible, it cannot be said that Congress has "unequivocally expressed" its waiver of sovereign

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[4] Additionally, Ford observes that if the government is correct that a payment only occurs when a deposit is converted to discharge a debt, then the government has unlawfully neglected to collect underpayment interest from remitting taxpayers (who later convert their remittances into payments) for the period from remittance to conversion. This is so, Ford argues, because the IRS must collect interest owed by taxpayers. *See* 26 U.S.C. § 6404(e) (establishing circumstances, not applicable here, under which the IRS can abate interest collection). Ford thus insists that we must either adopt its definition of "payment," or find that the IRS has long been violating the interest statutes.

We do not view the issue in such stark terms. Congress has explained that prior to amending the tax code in 2004, the law of the land was that "[a] deposit in the nature of a cash bond is not a payment of tax . . . ." Staff of the J. Comm. on Taxation, 108th Cong., General Explanation of Tax Legislation Enacted in the 108th Congress, Part Seventeen: American Jobs Creation Act of 2004, at 60 (Comm. Print 2005). That the IRS has long *treated* deposits as payments for underpayment interest purposes under § 6601—a practice which benefits taxpayers, which Congress has long tolerated, and which is neither expressly prescribed nor proscribed by the statutes—does not necessarily mean that these deposits are "payments" under the interest statutes. Thus, even if we assume that the two interest statutes should be interpreted symmetrically, Ford's interpretation of § 6611 does not necessarily prevail.

immunity for claims to overpayment interest accruing between the date a deposit in the nature of a cash bond was remitted and the date that deposit was converted to an advance tax payment. *See United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *see also United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (finding government's "plausible" statutory interpretation was "enough to establish that a reading imposing monetary liability on the Government [was] not 'unambiguous' and therefore should not be adopted"); *Siddiqui v. United States*, 359 F.3d 1200, 1204 (9th Cir.2004) (declining to find that Congress had waived sovereign immunity for punitive damages where statute was subject to two "plausible" interpretations); *Fed. Nat'l Mortg. Ass'n v. United States*, 379 F.3d 1303, 1311 (Fed.Cir.2004) (declining to find that Congress had waived sovereign immunity for overpayment interest where "the language at issue [was] ambiguous, subject to two conflicting interpretations").

Indeed, when we have found a waiver of sovereign immunity in the tax context, Supreme Court precedent interpreting the specific provision at issue has guided our interpretation. In *E.W. Scripps Co. & Subsidiaries v. United States*, 420 F.3d 589, 596–98 (6th Cir.2005), we concluded that Congress had waived the government's sovereign immunity and was subject to district court jurisdiction with respect to suits for overpayment interest under 28 U.S.C. § 1346(a)(1), a different provision than the one at issue here. We found that language in § 1346(a)(1), which allowed taxpayers to recover "*any sum* alleged to have been excessive or in any manner wrongfully collected," represented a waiver of sovereign immunity. *Id.* at 596

(emphasis added). In finding that the scope of "any sum" under § 1346(a)(1) extended to interest on tax overpayments, we relied in no small part upon *Flora v. United States*, 362 U.S. 145, 149, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960), a Supreme Court case that had interpreted the phrase "any sum" in § 1346(a)(1) quite broadly, suggesting that it would include interest on tax overpayments. *E.W. Scripps Co.*, 420 F.3d at 596–97. Although we noted the general principle that "taxpayers should be compensated for the lost time-value of their money when they make overpayments of tax," 420 F.3d at 597, a principle that provides some support to Ford, we only did so *after* grounding our interpretation of "any sum" in Supreme Court jurisprudence. No such strong foothold exists here. In fact, the most relevant Supreme Court case supports, albeit weakly, the government.[5]

Instead, Ford relies heavily on Revenue Procedure 84–58, the only published guidance bearing on the meaning of "date of the overpayment" in § 6611(b)(1).

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[5] In *Rosenman v. United States*, 323 U.S. 658, 662–63, 65 S.Ct. 536, 89 L.Ed. 535 (1945), the Court found that the taxpayer remittances in question were deposits rather than payments, thus providing some support for the government's view. However, *Rosenman's* import is sharply limited because that case involved a statute-of-limitations issue rather than an interest-overpayment issue, and construed a long-defunct tax statute. Thus, as the government conceded at oral argument, *Rosenman's* statements about taxpayer remittances are dicta. In addition, *Rosenman* held that the remittances in question could not be payments at least partly because no tax had yet been assessed, *see id.* at 662, yet the tax code now explicitly rejects the notion that there can be no payment or accrual of overpayment interest until a tax is actually assessed, 26 U.S.C. § 6401(c)—further limiting *Rosenman's* relevance here.

Needless to say, relying upon a Revenue Procedure is quite different from relying upon a Supreme Court decision. A revenue procedure is at most an interpretive aid: it is "well-established that, as a general rule, 'the I.R.S.'s Revenue Procedures are directory not mandatory.' " *Estate of Shapiro v. C.I.R.*, 111 F.3d 1010, 1017 (2d Cir.1997) (quoting *Estate of Jones v. C.I.R.*, 795 F.2d 566, 571 (6th Cir.1986)). A revenue procedure does not enjoy the status of a law or regulation and does not bind courts. *Xerox Corp. v. United States*, 41 F.3d 647, 657–58 (Fed.Cir.1994). Rather, it is a "mere internal procedural guide" that typically does not even bind the IRS itself. *See Shapiro*, 111 F.3d at 1017–18; *see also Riley v. United States*, 118 F.3d 1220, 1222 (8th Cir.1997). Accordingly, "the 'failure to comply with [a] Revenue [Procedure] . . . is not dispositive . . . .' " *Shapiro*, 111 F.3d at 1017 (quoting *Virginia Educ. Fund v. Comm'r*, 799 F.2d 903, 904 (4th Cir.1986)).

Two provisions of Revenue Procedure 84–58 are relevant here. The parties agree that under Revenue Procedure 84–58 § 5.01, underpayment interest *stops* accruing on the date that a remittance is submitted to the IRS, regardless of whether the remittance is treated as a payment of tax or a deposit. However, the parties debate the meaning of Revenue Procedure 84–58 § 5.05, which deals with when interest *starts* accruing for the purpose of overpayments. That provision reads:

> Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under *section 6611* of the Code. In the event that [a]

> deposit in the nature of a cash bond is posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02, interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

Rev. Proc. 84–58 § 5.05.

In Ford's view, the first sentence of § 5.05 establishes the general rule that overpayment interest will be paid on "[r]emittances treated as payments of tax," whether treated as tax payments when initially remitted or when later converted from deposits to tax payments. The second sentence is an exception to this general rule that states that when a deposit is converted to a tax payment pursuant to § 4.02, a section not applicable here, overpayment interest is determined "only from the date the amount was posted as a payment of tax,"—*i.e.*, the conversion date. Ford explains that because "there would be no need for such an 'exception' if interest can never begin accruing under § 6611 before the conversion date, it follows that the *general rule* must be that interest does accrue from the remittance date on a converted deposit."

In response, the government argues that because Revenue Procedure 84–58 "does not even contemplate" a taxpayer's request to convert a deposit to a tax payment, the only way to understand the conversion itself is as a "constructive return" of the deposit to the taxpayer followed by his immediate re-submission of the deposit as a tax payment. Accordingly, when a taxpayer requests a conversion from deposit to payment, he works an effective return of his deposit, which does not bear interest, Rev. Proc. 84–58 §§ 2.03,

4.02, followed by an immediate resubmission in the form of a tax payment, which bears interest from the date it is submitted. In the government's view, the first sentence of § 5.05 only applies to remittances that are treated as tax payments *when they are sent to the IRS*. Because Ford rendered its remittances as deposits, not as payments of tax, it is not entitled to interest from the remittance date.

The government's interpretation is strained. Under its reading, whenever a taxpayer requests conversion of a deposit to a tax payment and there is a "constructive return" of this deposit, the taxpayer should lose any interest-stopping protections gained by remitting the deposit in the first place. *See* Rev. Proc. 84–58 § 5.01. But this did not occur here: the government did not claim that Ford, in requesting that its deposits be converted to tax payments, lost any interest-stopping benefits or owed any underpayment interest as a result of losing these benefits. Indeed, this approach would seem to undercut the entire purpose behind Revenue Procedure 84–58, which is to "provide[] procedures for taxpayers to make remittances in order to stop the running of interest on deficiencies." Rev. Proc. 84–58 § 1. If a taxpayer loses the interest-stopping benefits of making a deposit by requesting that the deposit be converted to a tax payment, then there is little incentive to make a deposit in the first place. In this sense, the government's interpretation strips away from the Revenue Procedure the very protection it was designed to furnish.[6]

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[6] Furthermore, it appears that the IRS, in a private letter ruling, has contradicted the interpretation of Revenue Procedure

Nonetheless, although Ford's interpretation of Revenue Procedure 84–58 § 5.05 is superior to the government's, it is insufficient to render the phrase "date of the overpayment" in 26 U.S.C. § 6611(b)(1) unambiguous. After all, the Revenue Procedure states and the parties agree that Ford's remittances were not payments when they were submitted. Rev. Proc. 84–58 § 2.03 ("A deposit in the nature of a cash bond is not a payment of tax . . . ."). Thus, the most Ford can say is that its remittances were *treated* as payments by the IRS pursuant to Revenue Procedure 84–58 § 5.01 for purposes of 26 U.S.C. § 6601, and thus these remittances should be *treated* as payments pursuant to Revenue Procedure 84–58 § 5.05 for purposes of shedding light on the language used in 26 U.S.C. § 6611. In other words, Ford relies heavily upon the Revenue Procedure to support its argument that § 6601 and § 6611 should be read symmetrically. But we are unwilling to place so much weight upon an interpretive aid that binds neither the IRS nor this court. *See Shapiro*, 111 F.3d at 1017–18; *Xerox Corp.*, 41 F.3d at 657–58; *Jones*, 795 F.2d at 571. Revenue Procedure 84–58 is just that—a statement of procedure or guidance issued by the *executive* branch. It is far from an expression of congressional intent as to the scope of a waiver of sovereign-immunity; indeed, it does not even enjoy the status of an agency regulation.

84–58 it now advances. *See* I.R.S. P.L.R. 8738041 (June 23, 1987). Specifically, the IRS stated that "[b]ecause the Government will have uninterrupted use of [a] remittance, the remittance will not be deemed to be returned upon redesignation as a payment of tax . . . ." *Id.* This statement appears to cut against the government's contention that converted deposits are constructively returned to the taxpayer.

Xerox Corp., 41 F.3d at 657. Thus, however helpful to Ford, Revenue Procedure 84-58 is too weak an indicator of statutory meaning to overcome the strict statutory construction principle to which the language of § 6611 is subject. *See Premo v. United States*, 599 F.3d 540, 547 (6th Cir.2010) ("[I]n analyzing whether Congress has waived the immunity of the United States, we must ... not enlarge the waiver beyond what the language requires" (internal quotation marks omitted)).

Nor do we find any support for Ford's position in subsequent legislative history. In 2004, Congress enacted 26 U.S.C. § 6603, which provides that, contrary to previous practice, taxpayers who deposit funds with the IRS and then request the return of those funds are entitled to interest in certain circumstances. *Compare United States v. Domino Sugar Corp.*, 349 F.3d 84, 87 n. 2 (2d Cir.2003), *with* § 6603(d). Section 6603 provides for a different—and lower—interest rate for returned deposits, when compared to the general overpayment interest rate applicable to overpayments under § 6611. *Compare* § 6603(d)(4), *and* § 6621(b), *with* § 6611(a), *and* § 6621(a)(1).

Ford contends that since § 6603 allows a taxpayer who requests the return of his deposit to recover interest from the remittance date, it makes little sense to interpret § 6611 to allow a taxpayer who converts a deposit—rather than asking for its return—to recover interest only from the conversion date. According to Ford, a taxpayer who requests the return of a deposit would then be entitled to interest from an earlier date than the taxpayer who requests that a deposit be converted, thus illogically rewarding the taxpayer who seeks the return of his deposit over the taxpayer who

actually converts his deposit into an advance payment of tax. The government responds that a converted deposit is actually two sequential transactions—a constructive return of the deposit followed by immediate re-submission of that deposit as a tax payment. Under this reasoning, § 6603 requires that the taxpayer be paid interest from the date of deposit to the date of return under the lower § 6603(d)(4) interest rate, and be paid interest from the date of return (which is also the date of resubmission) to the date of refund under the higher § 6621(a)(1) interest rate. In other words, § 6603 allows for the payment of interest at two different rates for a converted deposit, while prior to the enactment of § 6603, interest would only be paid from the date of conversion forward.

Although the government's "constructive return" theory may be a flawed interpretation of Revenue Procedure 84–58, it does make some sense when read in the context of § 6603, which only deals with the accrual of interest on returned deposits. In any event, the passage of § 6603 does not render the government's interpretation of § 6611 illogical. Thus, subsequent legislative history, which "generally deserves only limited weight," does not alter our analysis here. *See Buck v. Sec'y of Health & Human Serv.*, 923 F.2d 1200, 1207 (6th Cir.1991).

IV.

Because the scope of Congress's waiver of sovereign immunity in § 6611 is not "clearly discernable from the statutory text in light of traditional interpretive tools" so as to allow Ford to recover the overpayment interest it seeks here, *see Cooper*, 132 S.Ct. at 1448, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

FORD MOTOR COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

Case No. 08-12960

June 3, 2010, Filed

2010 U.S. Dist. LEXIS 54987

OPINION AND ORDER

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Ford Motor Company ("Ford") filed this lawsuit against the United States ("Government") under the internal revenue laws, seeking to recover additional interest Ford claims it is due for calendar years 1983-1989, 1992, and 1994. Presently before the Court are the Government's motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and Ford's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). The motions have been fully briefed and the Court held a motion hearing on April 15, 2010.

I. Standard of Review

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(c) is reviewed under the same standard as a motion to dismiss under Rule 12(b)(6). *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295-96 (6th Cir. 2008). Reviewing a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and "determine whether the complaint

contains 'enough facts to state a claim to relief that is plausible on its face.' " *Bledsoe v. Community Health Sys.*, 501 F.3d 493, 502 (6th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1974, 167 L.Ed. 2d 929 (2007)).

Summary judgment pursuant to Rule 56(c) is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L.Ed. 2d 202 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986).

II. Background

A. Ford's Theories of Liability

Ford is seeking relief pursuant to three different theories of liability. The first theory (and Ford's "primary" theory) is set forth in what Ford refers to as its "deposit remittance" counts (Counts I–IX of the Complaint). The second theory is contained in what Ford calls its "carryback recapture" counts (Counts X–XIII); and the third theory is set forth in what Ford refers to as its "carryback allowance" count (Count

XIV). The following describes the tax concepts and procedures relevant to these three theories of liability.

B. Taxes and Interest

Tax returns filed by corporate taxpayers are subject to Internal Revenue Service ("IRS" or "Service") review and audit. These audits can lead the IRS to find additional tax owed by the taxpayer or that the taxpayer has overpaid its taxes for a specific year.

Pursuant to the internal revenue laws, if a taxpayer overpays its tax for a specific year, the Government may owe interest to the taxpayer on the overpayment (in addition to a refund or credit for the amount overpaid). 26 U.S.C. § 6611. This is referred to as "overpayment interest." According to the statute, "[s]uch interest shall be allowed and paid" from the "date of the overpayment" to the date of the refund or credit. *Id.* at § 6611(b).

Conversely, where a taxpayer has underpaid its taxes, the taxpayer may owe interest to the Government on the amount of the underpayment—i.e. "underpayment interest." 26 U.S.C. § 6601. Underpayment interest accrues from "the last date prescribed for payment . . . to the date paid." *Id.* at § 6601(a). Because an audit and related administrative appeals of a return can take years to complete, it is possible for considerable underpayment interest to accrue in the interim.

To address this situation, the IRS has promulgated a mechanism by which taxpayers can remit money to the Service and stop the accrual of underpayment interest. Such a remittance—referred to as a "deposit in the nature of a cash bond"—is set forth in IRS Revenue Procedure 84-58, 1984-33 I.R.B. 9. Section 5 of Revenue Procedure 84-58 provides that "[t]he

running of interest on an assessed tax liability . . . will stop on the date the remittance [i.e. the deposit in the nature of a cash bond] is received by the Service." While a deposit in the nature of a cash bond stops the accrual of underpayment interest from the date the deposit is remitted, the Revenue Procedure states that interest does *not* accrue from that date forward if the deposit subsequently is returned to the taxpayer as a result of an overpayment. In fact, several sections of Revenue Procedure 84-58 specifically provide that a deposit returned to the taxpayer "does not bear interest." *See* Rev. Proc. 84-58 §§ 2.03, 4.02, 5.01.

A taxpayer alternatively can make an advance payment of tax, which the IRS treats as accruing interest from the date it is received by the Service if the payment or a portion thereof is subsequently refunded to the taxpayer. *See id.* § 5.05. However, to obtain a refund or a credit of an advance tax payment, the taxpayer must follow certain refund procedures. Additionally, the taxpayer's request for a refund is subject to the limitations period set forth in 26 U.S.C. § 6511. In comparison, a deposit in the nature of a cash bond will be returned with limited exceptions upon a taxpayer's simple letter request "at any time before the Service is entitled to assess the tax" without the taxpayer having to resort to refund procedures. Rev. Proc. 84-58 § 5.01-5.02; *see also United States v. Domino Sugar Corp.*, 349 F.3d 84, 87 n.2 (2d Cir. 2003). As well, the statute of limitations applicable for filing a refund claim does not apply to a claim for the return of a cash bond. *See Domino Sugar Corp.*, 349 F.3d at 87 (citing cases).

C. Facts Relevant to Ford's "Remittance Deposit" Counts

The facts related to Ford's claims are not in dispute. Ford submitted remittances to the IRS on September 9 and 27, 1991, July 6, 1992, and June 23, 1994, specifically requesting in writing that the remittances be treated as deposits in the nature of a cash bond. These remittances were made after the IRS sent a 30-day letter for tax years 1983-1986 and 1988. A portion of the deposits also applied to tax years 1987, 1989, 1992, and 1994, before 30 day letters were sent for those tax years. A 30-day letter accompanies a Revenue Agent Report proposing additional tax liabilities, and allows the taxpayer 30 days to file a protest with the IRS Appeals Office challenging the proposed liabilities.

Ford subsequently requested that the IRS treat its remittances as advance payments rather than deposits in the nature of a cash bond. Those requests were made on the following dates for the following remittances: (1) December 19, 1994 for the September 9, 1991 deposit; and (2) December 15, 1995 for the September 27, 1991, July 6, 1992, and June 23, 1994 deposits. Sometime after these dates, the IRS determined that Ford had overpaid its tax liabilities for the years at issue. The IRS therefore refunded to Ford the overpayment plus overpayment interest; however, the IRS did not pay interest for the time the remittances were designated by Ford as deposits in the nature of a cash bond. The IRS only paid overpayment interest from the dates when Ford requested that the deposits be converted to advance payments. In its "deposit remittance" theory of liability, Ford argues that overpayment interest should have accrued from

the dates that it made the deposits in the nature of a cash bond.

D. "Carryback Recapture"

A taxpayer experiencing a net operating loss ("NOL") in a given year can "carryback" the NOL to offset the taxpayer's taxable income in an earlier year and achieve a refund for that earlier year. The IRS pays the refund tentatively ("tentative Carryback allowance") but may, after an audit of the year in which the NOL arose, determine that the NOL carryback should be reduced. This reduction is referred to as a "carryback recapture." Because the taxpayer already received a refund for the earlier year based on the carryback, the carryback recapture will result in a tax liability for that earlier year. Underpayment interest related to the amount of the carryback recapture will be owed from the filing date for the year in which the NOL arose until the date on which the taxpayer repays the excessive amount. IRS Notice 88-119, 1988-2 CB 453.

In tax years 1985, 1987, 1988, and 1989, Ford had carryback recaptures. Therefore, Ford was obligated to pay underpayment interest on the amount of the recaptures from the filing date for the year in which the NOL carryback arose until the excessive amount was repaid. Before these liabilities were assessed, however, Ford had made deposits in the nature of a cash bond to stop the accrual of underpayment interest on any tax liabilities. Ford alleges in Counts X-XIII of its Complaint—setting forth its "carryback recapture" theory of liability—that the Government should have applied the necessary portion of its deposits to pay those excessive amounts.

The Government did not do so. Instead, to collect the carryback recapture amount, the Government applied a portion of an overpayment that Ford made for the 1985 tax year which was accruing overpayment interest. As a result, the Government avoided paying continued overpayment interest on that portion of the 1985 refund.

E. "Carryback Allowance"

Ford's "carryback allowance" theory of liability—set forth in Count XIV of its Complaint—relates to a $20.04 million underpayment for the 1984 tax year and the money the Government used to satisfy that underpayment. Specifically, the Government applied a $19.48 million carryback allowance that hit Ford's account on March 15, 1992, rather than deposit remittances Ford had made effective September 9, 1991. Ford contends that by using the carryback allowance instead of the deposit remittances, the Government improperly avoided paying overpayment interest on the amount of the carryback allowance.[1] In other words, if the Government had applied a portion of the deposit remittances to the 1984 underpayment, Ford would have been entitled to overpayment interest on the full amount of the March 15, 1992 carryback allowance.

III. Analysis

A. Deposit Remittance Counts

Ford asserts several arguments to support its claim that deposits in the nature of a cash bond accrue

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[1] Ford acknowledges that the Government did stop the accrual of interest on the $20.04 million underpayment as of the date of the deposit remittances.

interest from the date remitted to the IRS. First, Ford argues that statutory rules of construction require that the payment date in 26 U.S.C. §§ 6601 and 6611 be read symmetrically. Section 6601 provides that interest on an *underpayment* accrues from the last date prescribed for payment "to the date paid." 26 U.S.C. § 6601. Section 6611 provides that interest on an *overpayment* accrues "from the date of the overpayment" to the date a credit or refund is given. Because a deposit in the nature of a cash bond stops the running of underpayment interest for purposes of § 6601 from the date of the deposit's remittance, Ford argues that interest should begin to run for purposes of overpayment interest under § 6611 also on the remittance date. Stated differently, Ford argues that "when interpreting these two statutes, one must ensure that the 'payment' status of a remittance is treated consistently for purposes of **stopping** the accrual of underpayment interest under § 6601 and for **starting** the accumulation of overpayment interest under § 6611." (Doc. 43 at 14 (emphasis in original).)

Ford next argues that Revenue Procedure 84–58 confirms its interpretation of § 6611. Specifically, Ford points to the first sentence of Section 5.01 which states that the running of interest on an assessed tax liability stops on the date a deposit in the nature of a cash bond is remitted. Ford also points to Section 5.05 which states:

> Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code. In the event that [a] deposit in the nature of a cash bond is

> posted to a taxpayer's account as a payment of tax, pursuant to subparagraph 3 of section 4.02,[2] interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

Rev. Proc. 84-58 § 5.05.

Ford interprets the above-quoted section as stating, as a general rule, that overpayment interest will be paid on any remittance treated as a tax payment regardless of whether the remittance was initially made as a tax payment or made as a deposit and subsequently converted to a payment of tax. Ford interprets the second sentence as stating one exception to this general rule. In other words, Ford reads Section 5.05 as meaning that overpayment interest accrues from when a remittance is made, regardless of

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2 Subparagraph 3 of Section 4.02 of Revenue Procedure 84-58 provides, in part:

> Upon completion of an examination, if the taxpayer who has made a deposit does not execute a waiver of restrictions on assessment and collection [of the deficiency] or otherwise agree to the full amount of the deficiency, the Service will mail a notice of deficiency and the taxpayer will have the right to petition the Tax Court. That part of the deposit that is not greater than the deficiency proposed plus any interest that has accrued on the deficiency will be posted to the taxpayer's account as a payment of tax . . . Any amount of the remittance that exceeds the proposed liability will be continued to be considered a deposit and will be returned to the taxpayer without interest subject to the provisions in subparagraph 1 of this section.

whether it is classified as a payment of tax or a deposit in the nature of a cash bond, unless it is a deposit pursuant to subparagraph 3 of Section 4.02.

Ford argues that its interpretation "makes perfect sense" because it penalizes the taxpayer (i.e. by not paying overpayment interest) "[w]here [the] taxpayer makes a deposit and then refuses to execute a waiver of assessment (thereby creating a deficiency and permitting the taxpayer to challenge the assessment in the U.S. Tax Court), ..." (Doc. 43 at 19.) Ford further points out that the exception in the second sentence would be mere surplusage if, as a general rule, overpayment interest only began to accrue from the date a deposit in the nature of a cash bond is converted to a tax payment (rather than on the date the deposit is remitted).

As noted earlier, several provisions of Revenue Procedure 84-58 specifically state that deposits in the nature of a cash bond do not bear interest if returned to a taxpayer. Ford maintains, however, that these provisions are referring to deposits that are never converted to tax payments. Deposits returned to the taxpayer before being converted to tax payments are returned without the taxpayer resorting to refund procedures and are not subject to the limitations period for seeking refunds or credits. Thus Ford maintains that the distinction of whether a deposit in the nature of a cash bond accrues interest from the date remitted should depend on whether the deposit subsequently is returned to the taxpayer or converted to a tax payment.

Even if the Court found merit in Ford's arguments—particularly its interpretation of subsection 5.05 of Revenue Procedure 84–58 which the

Court does not believe the Government addresses sufficiently[3]—the Court must be mindful of the deference it is required to give the IRS' interpretation of the Internal Revenue laws. As the United States Supreme Court has stated:

> "[W]e do not sit as a committee of revision to perfect the administration of the tax laws." *United States v. Correll*, 389 U.S. 299, 306-07, 88 S. Ct. 445, 19 L.Ed.2d 537 (1967). Instead, we defer to the Commissioner's regulations as long as they "implement the congressional mandate in some reasonable manner." *Id.*, at 308, 389 U.S. 299, 88 S. Ct. 445. "We do this because Congress has delegated to the [Commissioner], not to the courts, the task of prescribing all needful rules and regulations for the

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3 In response to Ford's argument based on Section 5.05 of Revenue Procedure 84-58, the Government explains that there are three types of remittances provided for in the revenue procedure: (1) deposits in the nature of a cash bond that are later returned to the taxpayer without the taxpayer resorting to refund procedures; (2) advance tax payments applied to the taxpayer's proposed liabilities at the time of remittance that cannot be refunded without resort to refund procedures; and (3) and deposits in the nature of a cash bond that are converted to payments. The Government contends that, as a general rule, remittances in the third category resulting in an overpayment will earn interest "only from the date the amount was posted as a payment of tax." The second sentence of subsection 5.05, however, refers to a remittance that falls within the third category (i.e. a "*deposit in the nature of a cash bond [that] is posted to a taxpayer's account as a payment of tax* pursuant to subparagraph 3 of section 4.02 . . . " where "an overpayment is later determined to be due"). Revenue Proc. 84-58 (emphasis added).

> enforcement of the Internal Revenue Code." *National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 477, 99 S. Ct. 1304, 59 L. Ed. 2d 519 (1979) (citing *Correll*, 389 U.S. at 307, 88 S. Ct. 445) (citing 26 U.S.C. § 7805(a))). This delegation "helps guarantee that the rules will be written by 'masters of the subject' who will be responsible for putting the rules into effect." 440 U.S., at 477, 99 S. Ct. 1304 (quoting *United States v. Moore*, 95 U.S. 760, 763, 24 L.Ed. 588, 13 Ct. Cl. 542 (1877)).

United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 218-19, 121 S. Ct. 1433, 1444, 149 L. Ed. 2d 401 (2001); *see also Cottage Sav. Ass'n v. Comm'rs of Internal Revenue*, 499 U.S. 554, 111 S. Ct. 1503, 113 L. Ed. 2d 589 (1991). Therefore, provided it is reasonable, this Court must accept the Government's interpretation of § 6611.

When assessing the reasonableness of the Government's interpretation, the Court must further bear in mind that "[e]xaction of interest from the Government requires statutory authority." *Rosenman v. United States*, 323 U.S. 658, 663, 65 S. Ct. 536, 538, 89 L. Ed. 535, 102 Ct. Cl. 851, 1945 C.B. 410, 1945-1 C.B. 410 (1945). Such authority must be strictly construed in favor of the sovereign and "not enlarge[d] beyond what the [statutory] language requires." *See Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S. Ct. 2957, 2963, 92 L. Ed. 2d 250 (1986) (superseded by statute on other grounds).

As set forth previously, § 6611 requires the Government to pay overpayment interest "from the

date of overpayment . . ." Similarly, § 6601 requires a taxpayer to pay underpayment interest from the date prescribed for payment "to the date [the underpayment is] paid." The Internal Revenue Code does not define when an underpayment or overpayment is "paid." The effect of the IRS' promulgation of a procedure by which taxpayers can remit a deposit to stop the accrual of underpayment interest is that the date of payment for purposes of § 6601 is the date a deposit in the nature of a cash bond is remitted. Nevertheless, this does not mean that § 6611 must be similarly interpreted to define "the date of overpayment" as the date the deposit was made. Although courts generally must presume that "'identical words used in different parts of the same act are intended to have the same meaning,' .. the presumption 'is not rigid,' and 'the meaning of the same words well may vary to meet the purposes of the law." *Cleveland Indians Baseball*, 532 U.S. at 213, 121 S. Ct. at 1441 (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S. Ct. 607, 76 L. Ed. 1204 (1932)).

Additionally, as the Government points out, other sections of the Internal Revenue Code (specifically §§ 6213 and 6511) depend upon the date of payment and are not interpreted symmetrically with § 6601. In discussing the Tax Court's jurisdiction under § 6213, Revenue Procedure 84-58 instructs that, when designated as such, "[a] deposit in the nature of a cash bond is not a payment of tax" which as the Supreme Court has noted would wipe out a deficiency and therefore the Tax Court's jurisdiction which depends on the existence of a deficiency. *Baral v. United States*, 528 U.S. 431, 439 n.2, 120 S. Ct. 1006, 1011 n.2,

145 L. Ed. 2d 949 (2000). With respect to § 6511, the Supreme Court explicitly has held that deposits in the nature of a cash bond are *not* payments of tax for purposes of when the statute of limitations for filing a claim for credit or refund begins to run. *Rosenman v. United States*, 323 U.S. 658, 65 S. Ct. 536, 89 L. Ed. 535, 102 Ct. Cl. 851, 1945 C.B. 410, 1945-1 C.B. 410 (1945).

The issue presented in *Rosenman* was whether the three-year limitations period for filing a claim for refund began to run when a deposit in the nature of a cash bond was remitted or when the deposit or a portion thereof was applied to satisfy an assessed tax. The statute of limitations in *Rosenman*, like current § 6511, provided that a claim for a tax refund must be made "within three years next after *the payment of such tax.*" 323 U.S. at 659, 65 S. Ct. at 537 (emphasis added). The Government argued that because the taxpayer's deposit stopped the running of penalties and interest it therefore should to be treated as a payment of tax, rendering the refund claim untimely. *Id.* at 662, 65 S. Ct. at 538. The Supreme Court rejected this argument and held that the statute of limitations did not begin to run until the deposit was applied to a defined tax obligation. In reaching this holding, the Supreme Court specifically noted that the Government had taken the position that such a deposit was "not a 'payment' interest on which is due from the Government if there is an excess beyond the amount of the tax eventually assessed." *Id.*

Consistent with this holding, the Sixth Circuit has concluded that a remittance *made to satisfy a proposed deficiency* and discharge any further tax liability is a "payment" of tax. *Ameel v. United States*, 426 F.2d

1270 (6th Cir. 1970). As the *Ameel* court explained in reaching this holding:

> In general, a tax is considered "paid" for purposes of the running of the period of limitations when a taxpayer files his return, accompanied by his payment. . . . On the other hand, where there is no tax liability computed and proposed, a remittance is to be treated as a cash bond to stop the running of interest on the amount 'dumped,' . . . or deposited until a more definite determination of tax liability is asserted by the Government. . . . In such cases, "payment" occurs when the indefinite tax liability is further defined; such as by a formal assessment of a definite amount.

426 F.2d at 1272 (internal citations omitted). The court also identified specific "factors" that determine what constitutes a "payment":

> "This much is clear: (1) a remittance is not per se 'payment' of the tax; (2) a remittance that does not satisfy an asserted tax liability should not be treated as the 'payment' of a tax; and (3) an essential factor in "payment" before assessment is the satisfaction or discharge of what the taxpayer deems a liability."

Id. (quoting Mertens, Law of Federal Income Taxation, Vol. 10, § 58.27 at 79 (1964 ed.)). Applying those "factors," the Sixth Circuit concluded that the remittance involved in the case before it was "the advance payment of a computed and proposed tax

liability, not the remittance of an estimated or approximated tax liability." *Id.* at 1274.

In this Court's view, the Supreme Court's and Sixth Circuit's decisions alone compel the conclusion that Ford's remittances at issue in this case were not "tax payments" and that, therefore, the Government's interpretation of § 6611 is reasonable. Further supporting this conclusion is the fact that the statute only provides for interest from the Government from the "date of the overpayment." § 6611(b). It is reasonable to conclude, as the IRS has, that there can be no overpayment of tax until the entire tax liability has been paid. *See* 26 C.F.R. § 301.6611-1(b) (providing that, subject to one exception, "there can be no overpayment of tax until the entire tax liability has been satisfied. Therefore, 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.") While Ford's arguments in favor of its interpretation of the statute may have some merit, the Government's interpretation, as set forth before, must be upheld as long as it is reasonable. *Cleveland Indians Baseball*, *supra.*

For the above reasons, the Court concludes that Ford 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. For the reasons that follow, the Court also rejects Ford's other theories of liability.

As a reminder, in its "carryback recapture" counts, Ford complains that the Government wrongfully used an overpayment from the 1985 tax year to collect carryback recaptures for the 1985, 1987, 1988, and 1989

tax years instead of Ford's deposits in the nature of a cash bond that had been remitted before the liabilities were assessed. In its "carryback allowance" count, Ford complains that the Government wrongfully used a carryback allowance to satisfy an underpayment for the 1984 tax year rather than its deposit remittances. Ford, however, cites no legal basis for its claim that the Government was required to apply its deposits to collect these amounts.

As Ford explains in its pleadings, and this Court explained above, the IRS promulgated the procedure for making a deposit in the nature of a cash bond to address the situation in which underpayment interest may accrue before a final tax assessment can be made. Pursuant to this procedure, taxpayers are able to stop the running of interest on potential deficiencies by remitting a deposit. However this Court finds nothing in those procedures—Ford cites no other authority—that would require the Government to apply those remittances to pay an assessed deficiency rather than other monies in the taxpayer's account. Absent any authority requiring the IRS to apply the deposit to satisfy a subsequently assessed liability, the Court finds no reason why the Service cannot choose which monies to use.

IV. Conclusion

For the reasons set forth above, the Court concludes that Ford's challenges to the Government's treatment of its deposits fail as a matter of law.

Accordingly,

IT IS ORDERED, that the Government's motion for judgment on the pleadings is **GRANTED;**

IT IS FURTHER ORDERED, that Ford's motion for summary judgment is **DENIED.**

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

JUDGMENT

Ford Motor Company ("Ford") filed this lawsuit against the United States ("Government") under the internal revenue laws, seeking to recover additional interest Ford claims it is due for calendar years 1983-1989, 1992, and 1994. Subsequently, the Government filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(c) and Ford filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. In an Opinion and Order entered on this date, the Court granted the Government's motion and denied Ford's motion.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED, that Ford's Complaint is **DISMISSED WITH PREJUDICE** and **JUDGMENT** is entered in favor of the Government and against Ford.

DATE: June 3, 2010

No. 10-1934

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 08, 2014
DEBORAH S. HUNT, Clerk

FORD MOTOR COMPANY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

BEFORE: BATCHELDER, GIBBONS and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

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* Judges Cook and Donald recused themselves from participation in this ruling.

Therefore, the petition is denied.

ENTERED BY ORDER
OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

No. 10-1934

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

	FILED *Mar 25, 2013* DEBORAH S. HUNT, Clerk

FORD MOTOR COMPANY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

BEFORE: BATCHELDER, Chief Judge, GIBBONS and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges* of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Judge Kethledge recused himself from participation in this ruling.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT
s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

26 U.S.C. § 6601

§ 6601. Interest on underpayment, nonpayment, or extensions of time for payment, of tax

(a) General rule

If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

(b) Last date prescribed for payment

For purposes of this section, the last date prescribed for payment of the tax shall be determined under chapter 62 with the application of the following rules:

(1) Extensions of time disregarded

The last date prescribed for payment shall be determined without regard to any extension of time for payment or any installment agreement entered into under section 6159.

(2) Installment payments

In the case of an election under section 6156(a)[1] to pay the tax in installments—

(A) The date prescribed for payment of each installment of the tax shown on the return shall be determined under section 6156(b), and

(B) The last date prescribed for payment of the first installment shall be deemed the last

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1 Footnote omitted.

date prescribed for payment of any portion of the tax not shown on the return.

(3) Jeopardy

The last date prescribed for payment shall be determined without regard to any notice and demand for payment issued, by reason of jeopardy (as provided in chapter 70), prior to the last date otherwise prescribed for such payment.

(4) Accumulated earnings tax

In the case of the tax imposed by section 531 for any taxable year, the last date prescribed for payment shall be deemed to be the due date (without regard to extensions) for the return of tax imposed by subtitle A for such taxable year.

(5) Last date for payment not otherwise prescribed

In the case of taxes payable by stamp and in all other cases in which the last date for payment is not otherwise prescribed, the last date for payment shall be deemed to be the date the liability for tax arises (and in no event shall be later than the date notice and demand for the tax is made by the Secretary).

(c) Suspension of interest in certain income, estate, gift, and certain excise tax cases

In the case of a deficiency as defined in section 6211 (relating to income, estate, gift, and certain excise taxes), if a waiver of restrictions under section 6213(d) on the assessment of such deficiency has been filed, and if notice and demand by the Secretary for payment of such deficiency is not made within 30 days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such 30th day and ending with the date of notice

and demand and interest shall not be imposed during such period on any interest with respect to such deficiency for any prior period. In the case of a settlement under section 6224(c) which results in the conversion of partnership items to nonpartnership items pursuant to section 6231(b)(1)(C), the preceding sentence shall apply to a computational adjustment resulting from such settlement in the same manner as if such adjustment were a deficiency and such settlement were a waiver referred to in the preceding sentence.

(d) Income tax reduced by carryback or adjustment for certain unused deductions

(1) Net operating loss or capital loss carryback

If the amount of any tax imposed by subtitle A is reduced by reason of a carryback of a net operating loss or net capital loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss or net capital loss arises.

(2) Foreign tax credit carrybacks

If any credit allowed for any taxable year is increased by reason of a carryback of tax paid or accrued to foreign countries or possessions of the United States, such increase shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which such taxes were in fact paid or accrued, or, with respect to any portion of such credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such increase shall not affect the computation of interest

under this section for the period ending with the filing date for such subsequent taxable year.

(3) Certain credit carrybacks

(A) In general

If any credit allowed for any taxable year is increased by reason of a credit carryback, such increase shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the credit carryback arises, or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, such increase shall not affect the computation of interest under this section for the period ending with the filing date for such subsequent taxable year.

(B) Credit carryback defined

For purposes of this paragraph, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(4) Filing date

For purposes of this subsection, the term "filing date" has the meaning given to such term by section 6611(f)(4)(A).

(e) Applicable rules

Except as otherwise provided in this title—

(1) Interest treated as tax

Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except

subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

(2) Interest on penalties, additional amounts, or additions to the tax

(A) In general

Interest shall be imposed under subsection (a) in respect of any assessable penalty, additional amount, or addition to the tax (other than an addition to tax imposed under section 6651(a)(1) or 6653 or under part II of subchapter A of chapter 68) only if such assessable penalty, additional amount, or addition to the tax is not paid within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000), and in such case interest shall be imposed only for the period from the date of the notice and demand to the date of payment.

(B) Interest on certain additions to tax

Interest shall be imposed under this section with respect to any addition to tax imposed by section 6651(a)(1) or 6653 or under part II of subchapter A of chapter 68 for the period which—

(i) begins on the date on which the return of the tax with respect to which such addition to tax is imposed is required to be filed (including any extensions), and

(ii) ends on the date of payment of such addition to tax.

(3) Payments made within specified period after notice and demand

If notice and demand is made for payment of any amount and if such amount is paid within 21 calendar days (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000) after the date of such notice and demand, interest under this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(f) Satisfaction by credits

If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment. The preceding sentence shall not apply to the extent that section 6621(d) applies.

(g) Limitation on assessment and collection

Interest prescribed under this section on any tax may be assessed and collected at any time during the period within which the tax to which such interest relates may be collected.

(h) Exception as to estimated tax

This section shall not apply to any failure to pay any estimated tax required to be paid by section 6654 or 6655.

(i) Exception as to Federal unemployment tax

This section shall not apply to any failure to make a payment of tax imposed by section 3301 for a calendar quarter or other period within a taxable year required under authority of section 6157.

(j) 2-percent rate on certain portion of estate tax extended under section 6166

(1) In general

If the time for payment of an amount of tax imposed by chapter 11 is extended as provided in section 6166, then in lieu of the annual rate provided by subsection (a)—

(A) interest on the 2-percent portion of such amount shall be paid at the rate of 2 percent, and

(B) interest on so much of such amount as exceeds the 2-percent portion shall be paid at a rate equal to 45 percent of the annual rate provided by subsection (a).

For purposes of this subsection, the amount of any deficiency which is prorated to installments payable under section 6166 shall be treated as an amount of tax payable in installments under such section.

(2) 2-percent portion

For purposes of this subsection, the term "2-percent portion" means the lesser of—

(A)(i) the amount of the tentative tax which would be determined under the rate schedule set forth in section 2001(c) if the amount with respect to which such tentative tax is to be computed were the sum of $1,000,000 and the applicable exclusion amount in effect under section 2010(c), reduced by

(ii) the applicable credit amount in effect under section 2010(c), or

(B) the amount of the tax imposed by chapter 11 which is extended as provided in section 6166.

(3) Inflation adjustment

In the case of estates of decedents dying in a calendar year after 1998, the $1,000,000 amount contained in paragraph (2)(A) shall be increased by an amount equal to—

(A) $1,000,000, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting "calendar year 1997" for "calendar year 1992" in subparagraph (B) thereof.

If any amount as adjusted under the preceding sentence is not a multiple of $10,000, such amount shall be rounded to the next lowest multiple of $10,000.

(4) Treatment of payments

If the amount of tax imposed by chapter 11 which is extended as provided in section 6166 exceeds the 2-percent portion, any payment of a portion of such amount shall, for purposes of computing interest for periods after such payment, be treated as reducing the 2-percent portion by an amount which bears the same ratio to the amount of such payment as the amount of the 2-percent portion (determined without regard to this paragraph) bears to the amount of the tax which is extended as provided in section 6166.

(k) No interest on certain adjustments

For provisions prohibiting interest on certain adjustments in tax, see section 6205(a).

26 U.S.C. § 6603

§ 6603. Deposits made to suspend running of interest on potential underpayments, etc.

(a) Authority to make deposits other than as payment of tax

A taxpayer may make a cash deposit with the Secretary which may be used by the Secretary to pay any tax imposed under subtitle A or B or chapter 41, 42, 43, or 44 which has not been assessed at the time of the deposit. Such a deposit shall be made in such manner as the Secretary shall prescribe.

(b) No interest imposed

To the extent that such deposit is used by the Secretary to pay tax, for purposes of section 6601 (relating to interest on underpayments), the tax shall be treated as paid when the deposit is made.

(c) Return of deposit

Except in a case where the Secretary determines that collection of tax is in jeopardy, the Secretary shall return to the taxpayer any amount of the deposit (to the extent not used for a payment of tax) which the taxpayer requests in writing.

(d) Payment of interest

(1) In general

For purposes of section 6611 (relating to interest on overpayments), except as provided in paragraph (4), a deposit which is returned to a taxpayer shall be treated as a payment of tax for any period to the extent (and only to the extent) attributable to a disputable tax for such period. Under regulations prescribed by the Secretary, rules similar to the rules of section 6611(b)(2) shall apply.

(2) Disputable tax

(A) In general

For purposes of this section, the term "disputable tax" means the amount of tax specified at the time of the deposit as the taxpayer's reasonable estimate of the maximum amount of any tax attributable to disputable items.

(B) Safe harbor based on 30-day letter

In the case of a taxpayer who has been issued a 30-day letter, the maximum amount of tax under subparagraph (A) shall not be less than the amount of the proposed deficiency specified in such letter.

(3) Other definitions

For purposes of paragraph (2)—

(A) Disputable item

The term "disputable item" means any item of income, gain, loss, deduction, or credit if the taxpayer—

(i) has a reasonable basis for its treatment of such item, and

(ii) reasonably believes that the Secretary also has a reasonable basis for disallowing the taxpayer's treatment of such item.

(B) 30-day letter

The term "30-day letter" means the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals.

(4) Rate of interest

The rate of interest under this subsection shall be the Federal short-term rate determined under section 6621(b), compounded daily.

(e) Use of deposits

(1) Payment of tax

Except as otherwise provided by the taxpayer, deposits shall be treated as used for the payment of tax in the order deposited.

(2) Returns of deposits

Deposits shall be treated as returned to the taxpayer on a last-in, first-out basis.

26 U.S.C. § 6401

§ 6401. Amounts treated as overpayments

(a) Assessment and collection after limitation period.

The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b) Excessive credits

(1) In general

If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, D, G, H, I, and J of such part IV), the amount of such excess shall be considered an overpayment.

(2) Special rule for credit under section 33

For purposes of paragraph (1), any credit allowed under section 33 (relating to withholding of tax on nonresident aliens and on foreign corporations) for any taxable year shall be treated as a credit allowable under subpart C of part IV of subchapter A of chapter 1 only if an election under subsection (g) or (h) of section 6013 is in effect for such taxable year. The preceding sentence shall not apply to any credit so allowed by reason of section 1446.

(c) Rule where no tax liability

An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

26 U.S.C. § 6611

§ 6611. Interest on overpayments

(a) Rate

Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

(b) Period

Such interest shall be allowed and paid as follows:

(1) Credits

In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken.

(2) Refunds

In the case of a refund, from the date of the overpayment to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(3) Late returns

Notwithstanding paragraph (1) or (2) in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

[**(c) Repealed.** Pub.L. 85-866, Title I, § 83(c), Sept. 2, 1958, 72 Stat. 1664]

(d) Advance payment of tax, payment of estimated tax, and credit for income tax withholding

The provisions of section 6513 (except the provisions of subsection (c) thereof), applicable in determining the date of payment of tax for purposes of determining the period of limitation on credit or refund, shall be applicable in determining the date of payment for purposes of subsection (a).

(e) Disallowance of interest on certain overpayments

(1) Refunds within 45 days after return is filed

If any overpayment of tax imposed by this title is refunded within 45 days after the last day prescribed for filing the return of such tax (determined without regard to any extension of time for filing the return) or, in the case of a return filed after such last date, is refunded within 45 days after the date the return is filed, no interest shall be allowed under subsection (a) on such overpayment.

(2) Refunds after claim for credit or refund

If—

(A) the taxpayer files a claim for a credit or refund for any overpayment of tax imposed by this title, and

(B) such overpayment is refunded within 45 days after such claim is filed,

no interest shall be allowed on such overpayment from the date the claim is filed until the day the refund is made.

(3) IRS initiated adjustments

If an adjustment initiated by the Secretary, results in a refund or credit of an overpayment, interest on such overpayment shall be computed

by subtracting 45 days from the number of days interest would otherwise be allowed with respect to such overpayment.

(4) Certain withholding taxes

In the case of any overpayment resulting from tax deducted and withheld under chapter 3 or 4, paragraphs (1), (2), and (3) shall be applied by substituting "180 days" for "45 days" each place it appears.

(f) Refund of income tax caused by carryback or adjustment for certain unused deductions

(1) Net operating loss or capital loss carryback

For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a carryback of a net operating loss or net capital loss, such overpayment shall be deemed not to have been made prior to the filing date for the taxable year in which such net operating loss or net capital loss arises.

(2) Foreign tax credit carrybacks

For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a carryback of tax paid or accrued to foreign countries or possessions of the United States, such overpayment shall be deemed not to have been made before the filing date for the taxable year in which such taxes were in fact paid or accrued, or, with respect to any portion of such credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such overpayment shall be deemed not to have been made before the filing date for such subsequent taxable year.

(3) Certain credit carrybacks

(A) In general

For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a credit carryback, such overpayment shall be deemed not to have been made before the filing date for the taxable year in which such credit carryback arises, or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, such overpayment shall be deemed not to have been made before the filing date for such subsequent taxable year.

(B) Credit carryback defined

For purposes of this paragraph, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(4) Special rules for paragraphs (1), (2), and (3)

(A) Filing date

For purposes of this subsection, the term "filing date" means the last date prescribed for filing the return of tax imposed by subtitle A for the taxable year (determined without regard to extensions).

(B) Coordination with subsection (e)

(i) In general

For purposes of subsection (e)—

(I) any overpayment described in paragraph (1), (2), or (3) shall be treated as an overpayment for the loss year, and

(II) such subsection shall be applied with respect to such overpayment by treating the return for the loss year as not filed before claim for such overpayment is filed.

(ii) Loss year

For purposes of this subparagraph, the term "loss year" means—

(I) in the case of a carryback of a net operating loss or net capital loss, the taxable year in which such loss arises,

(II) in the case of a carryback of taxes paid or accrued to foreign countries or possessions of the United States, the taxable year in which such taxes were in fact paid or accrued (or, with respect to any portion of such carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such subsequent taxable year), and

(III) in the case of a credit carryback (as defined in paragraph (3)(B)), the taxable year in which such credit carryback arises (or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, a capital loss carryback, or other credit carryback from a subsequent taxable year, such subsequent taxable year).

(C) Application of subparagraph (B) where section 6411(a) claim filed

For purposes of subparagraph (B)(i)(II), if a taxpayer—

(i) files a claim for refund of any overpayment described in paragraph (1), (2), or (3) with respect to the taxable year to which a loss or credit is carried back, and

(ii) subsequently files an application under section 6411(a) with respect to such overpayment,

then the claim for overpayment shall be treated as having been filed on the date the application under section 6411(a) was filed.

(g) No interest until return in processible form

(1) For purposes of subsections (b)(3) and (e), a return shall not be treated as filed until it is filed in processible form.

(2) For purposes of paragraph (1), a return is in a processible form if—

(A) such return is filed on a permitted form, and

(B) such return contains—

(i) the taxpayer's name, address, and identifying number and the required signature, and

(ii) sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return.

(h) Prohibition of administrative review

For prohibition of administrative review, see section 6406.

28 U.S.C. § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the

District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

28 U.S.C. § 1631

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Internal Revenue Service (I.R.S.)
Revenue Procedure 60-17
1960-2 C.B. 942

SECTION 1. PURPOSE.

The purpose of this Revenue Procedure is to outline the provisions of the Internal Revenue Codes of 1939 and 1954 relating to restricted interest on internal revenue taxes and to set forth the procedure to be followed in the computation of restricted interest.

SEC. 2. AUTHORITY FOR AND GENERAL NATURE OF RESTRICTED INTEREST.

.01 *General provisions*.—The payment of interest is mandatory on underpayments and overpayments of any internal revenue tax unless specifically prohibited by law or by mutual agreement. See section 6601 and 6611 of the Internal Revenue Code of 1954; and sections 292, 294 and 3771 of the Internal Revenue Code of 1939.

(1) Under the general rule, interest is paid on a tax overpayment for the time the government has the use of the taxpayer's money. Interest is collected, similarly, for the time the taxpayer has the use of the government's money. The underlying objective is to determine in a given situation whose money it is and for how long the other party had the use of it.

(2) There are special provisions in law which limit or prohibit interest under certain conditions which the law stipulates. These give rise to the term "restricted interest."

* * *

Internal Revenue Service (I.R.S.)
Revenue Procedure 84-58
1984-2 C.B. 501

SECTION 1. PURPOSE

The purpose of this revenue procedure is to update Rev. Proc. 82-51, 1982-2 C.B. 839, which provides procedures for taxpayers to make remittances in order to stop the running of interest on deficiencies.

SEC. 2. BACKGROUND

.01 Section 6213(a) of the Internal Revenue Code provides the general rule that a taxpayer may file a petition with the Tax Court for a redetermination of a deficiency within 90 days after the notice of deficiency is mailed (150 days if the notice is addressed to persons outside the United States). No assessment of a deficiency may be made until after the expiration of the 90-day or 150-day period, or, if petition is filed, until the decision of the Tax Court is final.

.02 Section 6213(b)(4) of the Code provides an exception to the rule in section 6213(a). If an amount is paid as tax, or in respect of a tax, the amount may be assessed as a payment of tax upon receipt of payment. Additionally, if an amount is paid after the mailing of a notice of deficiency, the payment will not deprive the Tax Court of jurisdiction over the matter.

.03 Rev. Proc. 82-51 updated procedures found in Rev. Proc. 64-13, 1964-1 (Part I) C.B. 674, concerning the making of remittances before assessment. Rev. Proc. 82-51 distinguished between payments made in satisfaction of a tax liability and "deposits in the nature of a cash bond" made merely to stop the running of interest. A deposit in the nature of a cash bond is not a

payment of tax, is not subject to a claim for credit or refund, and, if returned to the taxpayer, does not bear interest. Rev. Proc. 82-51 assured taxpayers of their right to petition the Tax Court in cases in which they had made a deposit in the nature of a cash bond before the mailing of the notice of deficiency. It also provided various rules for computing interest, returning deposits, and allocating payments to tax, penalty, and interest.

.04 Section 344 of the Tax Equity and Fiscal Responsibility Act of 1982, 1982-2 C.B. 462, 579, (TEFRA) made several changes affecting computation of interest, effective January 1, 1983.

1 Section 6622 of the Code was enacted to require the daily compounding of all interest required to be paid under the Code.

2 The "no interest on interest" rule formerly found in former section 6601(e)(2) of the Code was repealed.

.05 Under section 4.04 of Rev. Proc. 83-7, 1983-2 C.B. 583, interest continues to run on accrued interest if a deposit in the nature of a cash bond satisfies all or part of the tax but does not satisfy the interest that has accrued up until the date the deposit was made.

SEC. 3. CHANGES/CLARIFICATIONS

.01 Section 4.01 of this revenue procedure permits the making of a deposit in the nature of a cash bond after mailing of the notice of deficiency.

.02 Paragraph 3 of section 4.02 and section 5.01 provide that a deposit in the nature of a cash bond stops the running of interest at the time the remittance is received.

.03 Paragraph 3 of section 4.02 provides that a deposit in the nature of a cash bond will be posted to

the taxpayer's account as a payment of tax after the mailing of a notice of deficiency unless the taxpayer specifically asks that it continue to be treated as a deposit. See section 3.01.

.04 Paragraph 4 of section 4.02 allows taxpayers to apply a deposit in the nature of a cash bond against other specific liabilities.

.05 Paragraph 1 of section 4.03 and paragraph 3 of section 4.02 provide that payments will normally be "posted" rather than "assessed". Assessments of payments as tax are made discretionary to the Internal Revenue Service by the Code. Posting payments against tax liabilities ultimately determined to be due assures proper credit and has no adverse effect upon taxpayers with respect to the running of interest.

.06 Paragraph 1 of section 4.03 requires that taxpayers specify what portion of the proposed liability they intend to satisfy if a partial payment is made.

.07 Section 5 revises rules on interest to take account of changes imposed by the TEFRA.

.08 Section 6.02 clarifies the rules for allocating payments to tax, penalty, and interest. Taxpayers will not be allowed to designate payments toward interest unless the underlying tax to which the interest relates is paid or the taxpayer agrees to the assessment.

SEC. 4. PROCEDURE

.01 *Post statutory notice remittances*

1 Subject to the provisions of subparagraph 3, a remittance made after the mailing of a notice of deficiency in complete or partial satisfaction of the deficiency will, absent any instructions from the taxpayer, be considered a payment of tax and will be posted to the taxpayer's account as such as soon as

possible. Such a remittance will not deprive the Tax Court of jurisdiction over the deficiency.

2 A remittance made after the mailing of a notice of deficiency but before the expiration of the 90-day or 150-day period, or, if a petition is filed, before the decision of the Tax Court is final, and is specifically designated by the taxpayer in writing as a "deposit in the nature of a cash bond", will be treated as such by the Service. Such a deposit in the nature of a cash bond is not a substitute for a bond to stay assessment and collection described in section 7485 of the Code. Although the amount will be posted to the taxpayer's account, it may be returned to the taxpayer under the conditions in section 4.02 up until the time the Service is entitled to assess the tax.

3 Any remittance made by the taxpayer after the date that the Tax Court files its opinion in an amount greater than the amount of the deficiency determined by the Tax Court, plus any interest that as accrued on that amount at the remittance date, will be treated as a deposit in the nature of a cash bond.

.02 *Deposits in the nature of a cash bond*

1 A remittance made before the mailing of a notice of deficiency that is designated by the taxpayer in writing as a deposit in the nature of a cash bond will be treated as such by the Service. Such a deposit is not subject to a claim for credit or refund as an overpayment. The taxpayer may request the return of all or part of the deposit at any time before the Service is entitled to assess the tax. That amount will be returned to the taxpayer, without interest, unless the Service determines that assessment or collection of the tax determined to be due would be in jeopardy, or that the amount should be applied against any other

liability. In such a case, the deposit will not be returned, but will be applied against a jeopardy or termination assessment or against the other liability.

2 Upon completion of an examination, if taxpayer who has made a deposit executes a waiver of restrictions on assessment and collection of the deficiency or otherwise agrees to the full amount of the deficiency, an assessment will be made and any deposit will be applied against the assessed liability as a payment of tax as of the date the assessment was made. In such a case, no notice of deficiency will be mailed and the taxpayer will not have the right to petition the Tax Court for redetermination of the deficiency.

3 Upon completion of an examination, if a taxpayer who has made a deposit does not execute a waiver of restrictions on assessment and collection or otherwise agree to the full amount of the deficiency, the Service will mail a notice of deficiency and the taxpayer will have the right to petition the Tax Court. That part of the deposit that is not greater than the deficiency proposed plus any interest that has accrued on the deficiency will be posted to the taxpayer's account as a payment of tax at the expiration of the 90 or 150-day period unless the taxpayer rerequests in writing before the date that the deposit continue to be treated as a deposit after the mailing of the notice of deficiency. Any amount of the remittance that exceeds the proposed liability will continue to be considered a deposit and will be returned to the taxpayer without interest subject to the provisions in subparagraph 1 of this section.

4 A taxpayer may elect to have a deposit in the nature of a cash bond that exceeds the amount of tax

ultimately determined to be due applied against another assessed or unassessed liability, subject to the provisions of subparagraph 1 of this section. Thus, a taxpayer under examination for several different years may request that a deposit made for one year be applied to another year. Such requests must be in writing and must be directed to the same office with which the original deposit was made.

5 For deposits in the nature of a cash bond made after the mailing of a notice of deficiency, see subparagraph 2 of section 4.01.

.03 *Payments of tax*

1 A remittance not specifically designated as a deposit in the nature of a cash bond will be treated as a payment of tax if it is made in response to a proposed liability, for example, as proposed in a revenue agent's or examiner's report, and remittance in full of the proposed liability is made. A partial remittance will not be treated as a partial payment of tax unless the taxpayer specifically designates what portion of the proposed liability the taxpayer intends to satisfy. If the remittance is treated as a partial payment of tax, it will be posted to the taxpayer's account as a payment as of the date it is received. That amount may be taken into account by the Service in determining the amount for which a notice of deficiency must be mailed. If the Service is unable to determine whether a partial remittance is intended to be a payment of tax or a deposit in the nature of a cash bond, the Service will treat the remittance as a deposit in the nature of a cash bond and will follow the procedures described in section 4.04 .

2 If the remittance equals or exceeds the proposed liability, no notice of deficiency will be mailed. The

taxpayer will not have the right to petition the Tax Court for a redetermination of the deficiency.

3 Remittances treated as payments of tax will be posted against the taxpayer's account upon receipt, or as soon as possible thereafter, and may be assessed provided that assessment will not imperil a criminal investigation or prosecution. In any case, the remittance will be applied against the taxpayer's account as of the date received by the Service.

4 If the remittance exceeds the assessed liability including any interest and penalty, the balance will be returned to the taxpayer, without interest, provided the taxpayer has no other outstanding liabilities.

.04 *Undesignated remittances*

1 Any undesignated remittance not described in section 4.03 made before the liability is proposed to the taxpayer in writing (e.g., before the issuance of a revenue agent's or examiner's report), will be treated by the Service as a deposit in the nature of a cash bond. Such a deposit is not subject to a claim for credit or refund and the excess of the deposit over the liability ultimately determined to be due will not bear interest under section 6611 of the Code. The taxpayer will be notified concerning the status of the remittance, and may elect to have the deposit returned, without interest, at any time before the issuance of a revenue agent's or examiner's report, subject to the provisions of subparagraph 1 of section 4.02.

2 If the taxpayer leaves an undesignated remittance on deposit until completion of the examination, the Service will follow the procedure described in section 4.02.

SEC. 5. INTEREST

.01 The running of interest on an assessed tax liability satisfied by application of a remittance (whether it was treated as a "payment of tax" or a "deposit in the nature of a cash bond") will stop on the date the remittance is received by the Service, regardless of when the liability is assessed or the remittance actually applied against the taxpayer's account. If the remittance is held as a deposit in the nature of a cash bond, but is returned at the taxpayer's request, and a deficiency is later assessed for that period and type of tax, the taxpayer will not receive credit for the period in which the funds were held as a deposit. If a waiver of restrictions on assessment and collection is executed for the amount covered by the remittance, the running of interest will stop on the date of receipt of the remittance, or 30 days after the waiver is filed with the Service, whichever is earlier.

.02 Taxpayers should be cautioned that the making of either a payment of tax or a deposit in the nature of a cash bond will stop the running of interest on only that amount that is actually remitted. Because of the compounding rules in section 6622 of the Code, interest will continue to accrue on accrued interest even though the underlying tax has been paid. Taxpayers wishing to stop the running of interest on both tax and interest should have a remittance for both the tax and the interest that has accrued as of the date of remittance.

.03 If a remittance is treated as a payment of tax and no notice of deficiency is mailed under sections 4.03 or 4.04, any interest due will be assessed with the tax. If a remittance is made after the mailing of a notice of deficiency under section 4.01, or if the Service mails a notice of deficiency under sections 4.02, 4.03, or 4.04,

any interest due will be assessed after the expiration of the period of time for filing a petition with the Tax Court, or, if a petition is filed, after the Tax Court decision becomes final. Compound interest will continue to accrue on any interest not covered by the remittance under section 4 .02. A taxpayer wishing to stop the running of all interest must make a payment or deposit sufficient to cover all accrued interest as of the date of remittance as well as the entire amount of the underlying tax.

.04 No interest will be allowed or paid on a deposit, or any portion of a deposit, returned to a taxpayer before or after assessment .

.05 Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code. In the event that deposit in the nature of a cash bond is posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02, interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

SEC. 6. ALLOCATION OF REMITTANCES

.01 The Service will allocate any remittance treated as a payment of tax to penalty or interest as designated by the taxpayer if the remittance exceeds the full amount of the underlying tax due. If no designation is made, the remittance will be applied first to tax, then to penalty, and then to interest. If more than one period of tax is involved, the Service will allocate an undesignated remittance so as to satisfy all tax, penalty, and interest for the earliest period before applying any excess to other periods.

.02 If a taxpayer makes a remittance that is treated as a partial payment of tax under section 4.03, the Service will honor the taxpayer's request to allocate all or part of the payment to interest if one of the following conditions is met:

1 The taxpayer agrees to assessment and collection of the liability by executing a waiver of restrictions; or

2 The taxpayer pays the underlying tax with respect to the amount to be designated as interest and the amount designated as interest does not exceed the amount of interest that has accrued on the tax being paid.

.03 Any remittance purporting to be a partial payment of tax that does not meet one of the conditions in section 6.02 will be treated in its entirety as a deposit in the nature of a cash bond and the procedures in section 4.02 will be followed. In such a case, the taxpayer may cure any defects in the designation by redesignating the amount to be allocated as interest.

.04 Taxpayers may not make designations of remittances treated as deposits in the nature of a cash bond. If a liability is ultimately assessed and the deposit applied as a payment of tax, the Service will allocate the payments in accordance with any designation then made by the taxpayer. If no allocation is designated by the taxpayer, the remittance will be applied first to tax, then to penalties, and then to interest.

SEC. 7. EFFECTIVE DATE

This Revenue Procedure is effective for all remittances made on or after October 1, 1984.

SEC. 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 82-51 is superseded, effective with respect to remittances made on or after October 1, 1984.

Internal Revenue Service (I.R.S.)
Revenue Procedure 89-14
1989-1 C.B. 814

SECTION 1. PURPOSE

This revenue procedure supercedes Rev. Proc. 86-15, 1986-1C.B. 544, and makes the changes described in section 2 below. The revenue procedure restates the objectives of, and sets forth the standards for, the publication of revenue rulings and revenue procedures in the Internal Revenue Bulletin.

SECTION 2. CHANGES

Section 7.01(5) of Rev. Proc. 86-15 provides that because each revenue ruling represents the conclusion of the Service as to the application of the law to the entire statement of facts involved, taxpayer, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. This caution, which now appears in section 7.01(6) of this revenue procedure, has been clarified. It now explicitly warns that, if from the facts, legal analysis, or other discussion it is clear that the federal tax law conclusion of the revenue ruling or revenue procedure is predicated upon a certain provision or interpretation of law other than federal tax law, then those seeking to rely on that conclusion must check to see whether such relevant nontax law has changed materially from that used in the revenue ruling or revenue procedure.

Section 7.01(7) of the revenue procedure is revised to add a statement which encourages all interested parties to submit suggestions of generic issues that would be appropriately addressed in revenue rulings or revenue procedures.

Section 8*l*01 is revised to reflect the fact that the Assistant Commissioner (Taxpayer Service and Returns Processing) is now responsible for publishing the Internal Revenue Bulletin.

SEC. 3. DEFINITIONS

01 A 'revenue ruling' is an official interpretation by the Service of the internal revenue laws and related statutes, treaties, and regulations, that has been published in the Bulletin. Revenue rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Service officials, and others concerned.

02 A 'revenue procedure' is an official statement of a procedure published in the Bulletin that either affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code and related statutes, treaties, and regulations or, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.

SEC. 4. BACKGROUND

01 The Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for the publication of official rulings and procedures of the Service, including all rulings and statements of procedure that supercede, revoke, modify, amend, or affect any previously published ruling or procedure. The Service also announces in the Bulletin the Commissioner's acquiescence or nonacquiescence in decisions of the United States Tax court (other than decisions in memorandum opinions), and publishes Treasury Decisions, Executive Orders, tax conventions, legislation, court decisions, and other items considered to be of general interest.

02 The Bulletin is published weekly. In order to

provide a permanent reference source, the contents of the Bulletin are consolidated semiannually into an indexed Cumulative Bulletin. These materials are sold by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325.

SEC. 5. OBJECTIVES

The purpose of publication of revenue rulings and revenue precedures in the Bulletin is to promote uniform application of the tax laws by Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, and regulations, and statements of Service procedures affecting the rights and duties of taxpayers.

SEC. 6 PUBLICATION STANDARDS

01 It is the policy of the Service to publish in the Bulletin issues and answers involving substantive tax laws under the jurisdiction of the Service, except those involving -

(1) Issues answered by statute, treaties, or regulations;

(2) Issues answered by rulings, opinions, or court decisions previously published in the Bulletin;

(3) Issues that are of insufficient importance or interest to warrant publication;

(4) Determinations of fact rather than interpretations of law;

(5) Informers and informers' rewards; and

(6) Disclosure of secret formulas, processes, business practices, and similar information.

02 It is the policy of the Service to publish in the Bulletin procedures affecting taxpayers' rights or

duties that relate to matters under the jurisdiction of the Service.

SEC. 7. FORM AND EFFECT OF PUBLICATION

01 Revenue Rulings.

(1) Rulings and other communications involving substantive tax law published in the Bulletin are published in the form of revenue rulings. The conclusions expressed in a revenue ruling will be directly responsive to, and limited in scope by, the pivotal facts stated in the revenue ruling. Revenue rulings arise from various sources, including rulings to taxpayers, technical advice to district offices, court decisions, suggestions from tax practitioner groups, publications, etc.

(2) If the revenue ruling arises from the circumstances of a particular taxpayer, the Service published as much as is necessary for an understanding of the position stated. However, identifying details, including the names and addresses of persons involved, and information of a confidential nature are not included, to prevent unwarranted invasions of personal privacy and to comply with statutory provisions, such as 18 U.S.C. section 1905 and 26 U.S.C. sections 6103 and 7213, dealing with disclosure of information obtained from members of the public.

(3) A revenue ruling, other than one relating to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, applies retroactively, unless it includes a specific statement indicating, under the authority of section 7805(b) of the Code, the extent to which it is to be applied without retroactive effect. When revenue rulings revoke or modify rulings previously published in the Bulletin, the authority of section 7805(b) ordinarily is invoked to provide that the

new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers. Section 7805(b) provides that the Secretary of the Treasury may prescribe the extent to which any ruling is to be applied without retroactive effect. That authority has been delegated to the Commissioner and has been delegated to the Associate Chief Counsel (Technical), the Associate Chief Counsel (International), and the Assistant Commissioner (Employee Plans and Exempt Organizations) and to each of their deputies. The exercise of this authority requires an affirmative action. For the effect of revenue rulings on determination letters and opinion letters issued with respect to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, see section 13 of Rev. Proc. 80-30, 1980-1 C.B. 685.

(4) Revenue rulings published in the Bulletin do not have the force and effect of Treasury Department regulations (including Treasury Decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No published ruling or decision will be relied on, used, or cited, by any officer or employee of the Service as a precedent in the disposition of other cases.

(5) Taxpayer generally may rely upon revenue rulings and revenue procedures published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published revenue ruling or revenue procedure to the facts of their particular cases. However, taxpayer, Service personnel, and other concerned are also cautioned to determine whether a

revenue ruling or revenue procedure on which they seek to rely has been revoked, modified, declared obsolete, distinguished, clarified, or otherwise affected by subsequent legislation, treaties, regulations, revenue rulings, revenue procedures or court decisions.

(6) Each revenue ruling represents the conclusion of the Service as to the application of the law to the entire statement of facts involved. Therefore, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. For example, occasionally, from the facts, legal analysis, or other discussion it is clear that the federal tax law conclusion of the revenue ruling or revenue procedure is predicated upon a certain provision or interpretation of law other than federal tax law. If so, taxpayers, Service personnel, and others concerned are also cautioned to determine whether such relevant nontax law has changed materially from that used in the revenue ruling or revenue procedure on which they seek to rely. In some cases, if the conclusion of a revenue ruling or revenue procedures is so predicated on such nontax law, the ruling or procedure may caution taxpayers by referring to this paragraph of this revenue procedure. Any absence, however, of such a caution does not prevent the principles stated here from applying to that revenue ruling or revenue procedure.

(7) All interested parties, including teachers, professional associations, and trade or business groups are encouraged to submit suggestions of generic issues that would be appropriately addressed in revenue rulings or revenue procedures. Also, comments and suggestions from taxpayer, taxpayer groups, or other

interested parties, on revenue rulings or revenue procedures being prepared for publication in the Bulletin may be solicited if justified by special circumstances. Conferences on revenue rulings or revenue procedures being prepared for publication will not be granted except when the Service determines that such action is justified by special circumstances.

02 Revenue Procedures. When revenue procedures reflect the contents of internal management document, it is Service practice to publish as much of the internal management document as is necessary for an understanding of the procedure. When publication of the substance of a revenue procedure in the Federal Register is required pursuant to 5 U.S.C. section 552, it will usually be accomplished by an amendment of the Statement of Procedural Rules (26 C.F.R. Part 601).

SEC. 8. RESPONSIBILITIES

01 The Chief Counsel is responsible for administering the Service's revenue ruling and revenue procedure publication program including the standards for style and format revenue rulings and revenue procedures. The Assistant Commissioner (Taxpayer Service and Returns Processing) is responsible for publishing the Internal Revenue Bulletin weekly and for consolidating the contents of the Bulletin semiannually into an indexed Cumulative Bulletin.

02 In accordance with the standards set forth in section 6 of this revenue procedure, the Associate Chief Counsel (Technical), the Associate Chief Counsel (International), and the Assistant Commissioner (Employee Plans and Exempt Organizations) are responsible for the preparation and appropriate referral for publication of revenue rulings reflecting

interpretations of substantive tax law made by their respective offices.

03 In accordance with the standards set forth in section 6 of this revenue procedure, all Assistant Commissioners and the Chief Counsel are responsible for the determination of whether procedures established by any office under their jurisdiction should be published as revenue procedures and for the initiation, content, and appropriate referral for publication of such revenue procedures.

SEC. 9. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 86-15 is superseded.

TAM 9730005 (IRS TAM)
Internal Revenue Service (I.R.S.)
Technical Advice Memorandum
Issue: July 25, 1997
April 7, 1997
1997 WL 415375

* * *

ISSUE

Whether, for interest purposes, a redetermination under § 905(c) of the Internal Revenue Code reduces an overpayment for the period prior to the foreign tax refund.

FACTS

The taxpayer, a domestic corporation, timely filed its 1982 United States income tax return and claimed a credit for taxes paid to foreign countries in 1982.[1] In 1985, the taxpayer filed a claim for refund for the 1982 taxable year based on a foreign tax credit carryback from the 1984 taxable year. The Service did not issue the refund until 1994 because of an ongoing examination of the 1984 taxable year.

On July 13, 1992, a foreign taxing authority refunded, without interest, a portion of the foreign taxes paid by the taxpayer in 1982. The refund caused a redetermination of the taxpayer's tax liability for 1982 under § 905(c) of the Code and resulted in tax due for 1982. On August 7, 1992, the taxpayer paid the tax due with interest for the period from July 13, 1992,

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[1] Although the request for technical advice covers the 1980-88 taxable years, the taxpayer and the district have agreed to use 1982 as a representative year.

until August 7, 1992.

APPLICABLE LAW

Section 905(c) of the Code generally provides that if accrued foreign taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any foreign tax paid is refunded in whole or in part, the taxpayer shall notify the Secretary, who shall redetermine the amount of the tax for the year or years affected. The amount of tax due on such redetermination, if any, shall be paid by the taxpayer on notice and demand by the Secretary, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with subchapter B of chapter 66 (§ 6511 and following).

The last sentence of § 905(c) of the Code provides that no interest shall be assessed or collected on any amount of tax due on any redetermination by the Secretary, resulting from a refund to the taxpayer, for any period before the receipt of such refund, except to the extent interest was paid by the foreign country or possession of the United States on such refund for such period.

Section 6601(a) of the Code generally provides that if any amount of tax is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under § 6621 shall be paid for the period from such last date to the date paid.

Section 6611(a) of the Code provides that interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under § 6621.

Section 6611(g) of the Code provides that for purposes of § 6611(a), if any overpayment of tax results

from a carryback of tax paid or accrued to foreign countries or possessions of the United States, such overpayment shall be deemed not to have been paid or accrued prior to the filing date (as defined in § 6611(f)(3)) for the taxable year in which such taxes were in fact paid or accrued.

Section 301.6611-1(b) of the Regulations on Procedure and Administration provides, in pertinent part, that there can be no overpayment of tax until the entire tax liability has been satisfied.

In Manning v. Seeley Tube & Box Co., 338 U.S. 561 (1950), the Supreme Court held that a net operating loss carryback that abates a deficiency does not abate the portion of interest previously assessed on that deficiency from the year the tax was due until the year the carryback arose. The Court explained that the taxpayer, by failing "to pay taxes owed, had the use of funds which rightfully should have been in the possession of the United States." Id. at 566.

RATIONALE

The Code's interest provisions reflect the economic basis for interest, i.e., use of money. Generally, under § 6601 of the Code, a taxpayer owes the government interest for the time the taxpayer has the use of the government's money. Similarly, under § 6611, the government pays the taxpayer interest on an overpayment for the time the government has use of the taxpayer's money. The underlying objective is to determine, in a given situation, who is owed money and how long the other party had the use of it. See Manning v. Seeley Tube & Box Co., 338 U.S. 561 (1950).

Under the facts presented, there are two adjustments to the 1982 taxable year. One is due to a credit carryback that creates an overpayment; the

other is due to a refund that results in a redetermination of the tax liability under § 905(c) of the Code. Since § 301.6611-1(b) of the regulations provides that there can be no overpayment until the entire tax liability has been satisfied, the question arises whether, for interest purposes, the redetermination under § 905(c) reduces the overpayment for the period prior to the foreign tax refund.

Section 905(c) of the Code contains a special exception to the general interest rules. Section 905(c) restricts underpayment interest on tax due as a result of a redetermination for the period prior to the foreign tax refund. The intent of § 905(c) is to ensure that, to the extent no interest is paid on the foreign refund, the United States, not the taxpayer, absorbs the loss of the use of money for the period during which the foreign government had the use of the tax due. Pursuant to § 905(c), the United States effectively waives its right to the use of money for the period prior to the foreign refund to the extent the taxpayer receives no interest on the refund.

Section 6611 of the Code requires the United States to pay interest for the use of the taxpayer's money. In this case, the United States had the use of the overpayment that existed prior to the foreign tax refund from the due date of the return for the 1984 taxable year until the date of the foreign tax refund.

Under § 905(c), the taxpayer owes no interest on the tax liability created by the foreign tax refund for the period prior to the refund because the foreign government did not compensate the taxpayer for the use of money. However, the taxpayer is entitled to interest on the full 1982 overpayment created by the 1984 credit carryback from the due date of the 1984

taxable year until the date of the foreign tax refund. To conclude otherwise would be contrary to the intent of § 905(c) of the Code. Accordingly, for interest purposes, the redetermination under § 905(c) does not reduce the overpayment for the period prior to the foreign tax refund.

CONCLUSION

We conclude that, for interest purposes, a redetermination under § 905(c) of the Code does not reduce an overpayment for the period prior to the foreign tax refund. Therefore, the taxpayer is entitled to interest on the full amount of the overpayment existing prior to the foreign tax refund from March 15, 1985, the due date for the return for the 1984 taxable year, to July 13, 1992, the date of the foreign tax refund.

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

[Office of Chief
Counsel seal omitted]

September 7, 2001

Number: **200149028**
Release Date: 12/7/2001
CC:PA:APJP:BR 1
TL-N-5198-00
UILC: 6611.00-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL HEAVY MANUFACTURING, CONSTRUCTION, AND TRANSPORTATION CC:LM:MCT:DET

FROM: John J. McGreevy
Assistant to the Branch Chief, Branch 1
Administrative Provisions & Judicial Practice

SUBJECT: TL-N-5198-00

This Chief Counsel Advice responds to your memorandum dated June 8, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

* * *

ISSUES

(1) Whether Company is entitled to overpayment interest on abated deficiency interest before Date 8.

(2) Whether Company may apply overpayment interest as a credit in full payment of a subsequent deficiency arising from a carry back recoupment for the same year and type of tax.

CONCLUSIONS

(1) Company is not entitled to overpayment interest on abated deficiency interest before Date 8.

(2) Company may not apply overpayment interest as a credit in full payment of a subsequent deficiency arising from a carry back recoupment for the same year and type of tax.

FACTS

Issue (1):

Company filed a claim requesting a refund in excess of X regarding an interest computation of its Year 4 tax liability. This recomputation resulted from the Year 15 resolution of a claim involving foreign tax credit carry back from the Year 8 taxable year. The primary basis for Company's claim is that the Internal Revenue Service's ("Service") Year 15 recomputation of its Year 4 tax liability improperly applied credits from Year 4 to Year 1, Year 5, and Year 8 to pay off both the tax and accrued, but unposted deficiency interest.

The origin of this claim was Company's timely filing of its Year 4 federal income tax return, Form 1120, in Year 5 with a tax of Z. The Service is certain that the tax in the amount of Z was timely paid.

As a result of a pending Service adjustment to the Year 4 tax liability, Company made an advance payment totaling M on Date 1. This payment was

posted to Company's account and put Company's Year 4 tax module in a credit balance position for the first time. In July and August of Year 11, the Service assessed an additional K of tax and H of deficiency interest. This deficiency interest was posted on Date 1, and the tax was posted on Date 2. After this assessment of tax and deficiency interest, Company's Year 4 tax module had a zero balance.

On Date 5, Company again made an advance payment totaling C, which posted to Company's account on that same date. On Date 6, the Service assessed tax of B and deficiency interest of A for a total of C. At this time, Company's Year 4 tax module was again in zero balance.

In Year 15, the Service reached agreement on Company's refund claim for the Year 4 tax period, which involved carry backs and carry forwards encompassing the Year 1 through Year 10. This claim resulted in a total tax abatement of E for Company's Year 4 tax year. The abatement was a combination of a general tax abatement and the allowance of a Year 5 carry back. At the time of the Year 15 adjustment, the Examination, Support, and Processing Division ("ESP") attempted to correct the "previously assessed" deficiency interest. The "previously assessed" deficiency interest then totaled I. ESP recomputed the "corrected" deficiency interest on the Date 2 deficiency, after reducing by this subsequent E abatement of tax. ESP's recomputed "corrected" deficiency interest totaled F. ESP took the difference of the "previously assessed" and "corrected" interest, and abated D of deficiency interest.

These Year 15 postings left Company's Year 4 tax module with a credit balance of G. No interest was

paid on this credit. Instead the credit balance was transferred out of the Year 4 tax module to pay off the debit balances (tax and accrued, but unposted interest) on the Years 1,5,6 and 8 tax modules. The Year 4 credit was transferred out to these other modules using the availability dates of the last payments coming into the Year 4 module.

Both the Service and Company agree that only amounts needed to satisfy tax deficiencies for Years 1,5,6 and 8 should have reduced the G credit balance in the Year 4 tax module. Thus, a credit balance should have remained in Company's Year 4 module as of the module credit availability dates of Dates 1 and 5. However, D of this credit balance represented abated deficiency interest.

Issue (2):

Company filed a refund claim for L pertaining to its Year 12 tax liability. This claim arises from a dispute concerning mechanically when unposted allowable interest can be credited against a debit balance for the same taxable year and the same type of tax. Company asserts it may offset a debit "tax" balance with accrued and unposted allowable interest, as of the date the account goes back into debit balance. The Service asserts that no overpayment can exist until all the liability is satisfied, and thus, unposted allowable interest is not available to satisfy the deficiency.

Company's Year 12 tax module started with a debit balance of J on Date 3. Deficiency interest started running on Date 3, as the Company's Year 12 refund was issued on Date 3. On Date 4, the Year 12 module went into credit balance because of an allowed carry back from Year 13. The adjustment and the associated credit-interest on the Year 13 carry back of Y to Year

12 was not processed by the Service until Date 9.

As a result of the recouped carry back from Year 14, Company's Year 12 module went back into debit balance on Date 7. Company's claim asserts that credit interest for Year 12 accruing for the period it had a credit balance, i.e., Date 4 until Date 7, is available to pay off the debit balance created by the recoupment of the Year 14 carry back. Company's proposed offset puts the module back into a credit balance position, and as a result, no additional deficiency interest would accrue.

LAW AND ANALYSIS

Issue (1):

Section 6611(a) of the Internal Revenue Code states that interest shall be allowed and paid on any overpayment at the overpayment rate established under § 6621. Section 301.6611-1(g) of the Regulations on Procedure and Administration provides that interest shall not run on an overpayment until the date of the overpayment. Interest on a subsequently abated deficiency represents an overpayment and the overpayment date on abated deficiency interest is the date the original payment was made. See, Treas. Reg. § 301.6611-1(c), Examples 1 and 2.

Conversely, pursuant to § 6601(a) of the Code, an underpayment of tax begins to accrue interest from the last date prescribed for payment of the tax without regard to any extensions. Generally, interest on unpaid tax is treated in a similar fashion as unpaid tax, in accordance with § 6601(e)(1) of the Code. However, no interest shall accrue on unassessed interest before December 31, 1982. See, Treas. Reg. § 301.6611-1(h)(2)(v).

Compensation for the use of money is the principle rationale for charging interest with respect to both overpayments and underpayments. See, Manning v. Seeley Tube & Box Co., 338 U.S. 488 (1950); Avon Products, Inc. v. United States, 588 F.2d 342 (2d Cir. 1978); May Department Stores Co. v. United States, 36 Fed. Cl. 680 (1996). Section 6601(f) of the Code provides for the suspension of interest in certain circumstances:

> If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

Thus, if an underpayment is satisfied with an overpayment, no interest is imposed on the portion of the underpayment that is satisfied by the offsetting application of the overpayment, for any period during which interest would have accrued on the overpayment had the overpayment been refunded to the taxpayer rather than credited against the underpayment. See, Rev. Proc. 60-17, 1960-2 C.B. 942, 949. Similarly, no overpayment interest is paid to the taxpayer with respect to the offset amount and period. Section 6601(f) precludes imposing underpayment interest during the period interest would have been allowable under section 6611 if the credit had not been made. However, if interest is allowable under section 6611, then section 6601(f) does not preclude imposing interest. Moreover, pursuant to § 6402(a) of the Code, the Service has discretion whether to apply

overpayments to underpayments or refund them to the taxpayer. See, Northern States Power Co. v. United States, 73 F.3d 764, 767 (8th Cir. 1996), cert. denied, 117 S.Ct. 168 (1996); Pettibone Corp. v. United States, 34 F.3d 534, 536 (7th Cir. 1994).

Therefore, if Company were to be allowed interest on the overpayment resulting from the D of abated deficiency interest during the offset period running from Date 1 to Date 8, the Service would likewise be permitted deficiency interest on the amount of the underpayment during the offset period. To allow Company overpayment interest without the Service receiving underpayment interest during the same period would violate the principle that interest is meant to compensate for use of the money.

Issue (2):

Company may not apply overpayment interest as a credit in full payment of a subsequent deficiency arising from a carry back recoupment for the same year and type of tax. Section 6402 of the Code provides that the Secretary may credit the amount of any overpayment, including interest allowed thereon, against any tax liability on the part of the person who made the overpayment. As such, it is within the sole discretion of the Secretary to determine whether Company's overpayment interest may be credited to a subsequent deficiency for the same tax year. See, Northern States Power Co. v. United States, supra.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS

The question of whether the use of the money principle can be utilized in the manner described in Issue (1) is not entirely free from doubt and is involved in pending

litigation (United States v. St. Joe Minerals Corp., Case No. 4:93CV001380 (E.D. Missouri)). That case is expected to go to trial in November. In addition, it should be noted that if interest is payable and allowable for the disputed period of time, then interest netting under section 6621(d) should be considered.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please contact Rob Desilets, Jr. at 202-622-4910 if you have any further questions.