No. 09-2423

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

SUNOCO INC. AND SUBSIDIARIES,

Petitioners-Appellees

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

REPLY BRIEF FOR THE APPELLANT

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This reply brief is addressed only to those matters contained in the answering brief of Sunoco Inc. and Subsidiaries (collectively, "taxpayer") that we believe warrant a further response. With respect to matters not discussed herein, we rely on our opening brief.[1]

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[1] "Ans. Br." refers to taxpayer's answering brief, "Comm'r Br." refers to the Commissioner's opening brief, and "A" refers to the joint appendix. "I.R.C." refers to the Internal Revenue Code (26 U.S.C.).

In our opening brief, we explained that the Tax Court erred in asserting jurisdiction to determine that the Government owes taxpayer additional overpayment interest on overpayments of tax that were refunded and/or credited to taxpayer before the notice of deficiency in this case was issued. We pointed out that the Tax Court's jurisdiction with respect to both overpayments and interest determinations is limited, and we showed that there is no statutory basis for the court's exercise of jurisdiction here. (Comm'r Br. 25-43.) In particular, we said that the plain language of I.R.C. § 6512(b)(1), which grants the court jurisdiction to determine an "overpayment of income tax" for the tax years listed in the notice of deficiency, does not encompass a claim for additional overpayment interest, because such amount has not in any sense been *paid*. (Comm'r Br. 36-43.)

We further explained that the Tax Court's holding in *Estate of Baumgardner v. Commissioner*, 85 T.C. 445 (1986), does not justify its exercise of jurisdiction here. (Comm'r. Br. 43-57.) In *Baumgardner*, the court held that it has jurisdiction to determine an overpayment consisting of excess *deficiency* interest paid by the taxpayer to the

Government. We acknowledged that such overpaid interest logically gives rise to an "overpayment," but we distinguished the claims for additional *overpayment* interest in issue here. (Comm'r Br. 43-57.)

We observed that the court's emphasis on the perceived mathematical complexities of this case was misplaced. (Comm'r Br. 57-64.) Finally, to the extent that the court reviewed the amount of overpayment credits previously posted to taxpayer's accounts pursuant to I.R.C. § 6402, we noted that such review was expressly barred by I.R.C. § 6512(b)(4). (Comm'r Br. 64-67).

A. The Tax Court has only such jurisdiction as is expressly conferred on it by Congress

Taxpayer's attempt to depict the Tax Court's jurisdiction as co-extensive with that of the district courts (Ans. Br. 14-15) must fail. I.R.C. § 7442 makes explicit that "[t]he Tax Court . . . shall have such jurisdiction as is conferred on [it]" by the Internal Revenue Code and other specified statutes. Accordingly, it is well recognized that "[a]s a legislative court established under Article I of the Constitution, the jurisdictional authority and powers of the Tax Court are more limited

than in the case of a court established by Congress under Article III."[2] Gerald A. Kafka & Rita A. Cavanagh, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES, ¶2.01[1] (1995 & 1998 supp.). As this Court has stated, "[t]he Tax Court . . . is purely a creature of statute and has only the power given to it by Congress." *Estate of Smith v. Commissioner*, 638 F.2d 665, 669 (3d Cir. 1981).

The Tax Court itself has "pointed out on numerous occasions that its jurisdiction is strictly limited by statute and that it may not enlarge upon that statutory jurisdiction." *Breman v. Commissioner*, 66 T.C. 61, 66 (1976). Indeed, the Tax Court recently reaffirmed that it cannot apply equitable principles "to expand our jurisdiction to cases where we otherwise wouldn't have it." *Pollock v. Commissioner*, 132 T.C. No. 3 (2009), 2009 U.S. Tax Ct. LEXIS 3, *24. In *Pollock*, the Tax Court refused to apply equitable principles to exercise jurisdiction over an untimely petition asserting a meritorious claim for innocent-spouse

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[2] Taxpayer erroneously claims that the Commissioner views the Tax Court as a mere "judicial agency" of the United States, rather than as an Article I court, based on a quotation contained in a "see also" parenthetical on page 25 of the Commissioner's brief. (Ans. Br. 14.) The Commissioner made no such representation in his brief.

relief under I.R.C. § 6015, despite the anomaly that there had been no forum for judicial review of the claim while the filing window was open. *See also Gormeley v. Commissioner*, 98 T.C.M. (CCH) 420 (2009), 2009 Tax Ct. Memo LEXIS 256, *6 ("Petitioner's generalized reliance on 'equity' and 'policy considerations' cannot overcome a jurisdictional defect.").

Taxpayer points to the Tax Court's change of "status" under the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, as evidence that the jurisdictional constraints we have identified are "forty years out of date." (Ans. Br. 14.) As the Fifth Circuit has explained, however, the "circumstance" that the Tax Reform Act of 1969 "decreased the dissimilarities between the Tax Court and the district courts" does not "indicate that Congress intended to obliterate other dissimilarities which it did not explicitly address." *Continental Equities, Inc. v. Commissioner*, 551 F.2d 74, 84 (5th Cir. 1977). On the contrary, "the conclusion that the 1969 Tax Reform Act did not grant the Tax Court equitable jurisdiction is inescapable." *Id.* Indeed, the Tax Court itself has observed that its "basic jurisdiction . . . was not changed by the Tax

Reform Act." *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971). Thus, "[j]urisdiction to exercise the broad common law concept of judicial powers invested in Article III courts is not present in the Tax Court." Kafka, ¶2.01[1].

Taxpayer further argues that the Tax Court's jurisdiction is limited to the realm of federal taxes. (Ans. Br. 15.) Be that as it may, the court plainly lacks plenary jurisdiction over federal tax matters. For instance, the Tax Court has no jurisdiction over traditional excise taxes or employment taxes, which are not subject to deficiency procedures. *See* Kafka, ¶¶1.04[1] & 2.01[3] (listing specific areas of Tax Court jurisdiction). Rather, pursuant to I.R.C. § 7442, the Tax Court has only such jurisdiction as is specifically conferred on it by other provisions of the Internal Revenue Code. As discussed below, no Code section authorizes the Tax Court's exercise of jurisdiction in this case.

B. No statute authorizes the Tax Court to determine additional overpayment interest on overpayments that were refunded to taxpayer prior to, and independent of, this litigation

As was discussed in our opening brief (at pages 24-35), the Tax Court's jurisdiction is particularly narrow insofar as overpayments and

interest determinations are concerned. The Internal Revenue Code gives the Tax Court jurisdiction to determine overpayment interest in two limited circumstances, both of which involve a post-decision proceeding. I.R.C. § 6512(b)(2) allows the Tax Court to enforce a decision by ordering a refund, plus overpayment interest, if the IRS fails to issue the refund within 120 days of the decision's becoming final. I.R.C. § 7481(c) allows the Tax Court to reopen a case after a final decision in order to redetermine the amount of interest arising from the decision.

Here, taxpayer conceded below that neither provision supplies a basis for the Tax Court's jurisdiction over its claim for additional overpayment interest. (A194-95.) Its efforts to identify a statutory basis for jurisdiction in this appeal are unavailing.

1. I.R.C. § 7481(c) has no application because this case does not involve interest on an overpayment that was determined in a final decision of the Tax Court

Although taxpayer now appears to latch on to I.R.C. § 7481(c) as a basis for jurisdiction (Ans. Br. 17-24), that provision is inapplicable on its face. I.R.C. § 7481(c)(1) states that "if, within 1 year after the date

the decision of the Tax Court becomes final . . ., the taxpayer files a motion in the Tax Court for a redetermination of the amount of interest involved, then the Tax Court may reopen the case solely to determine whether . . . the Secretary has made an underpayment of such interest and the amount thereof."[3] But taxpayer's claim for additional overpayment interest here was contained in an amended petition filed at the *beginning* of the case. (Doc. 5; A76.) Furthermore, taxpayer seeks additional overpayment interest on overpayments *previously* refunded or credited to it before this case began, not interest on an overpayment determined by the Tax Court in this proceeding.

Taxpayer argues that I.R.C. § 7481(c) provides a vehicle for reviewing "pre-petition mistakes made by the IRS embedded in the

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[3] Taxpayer argues that I.R.C. § 7481(c)(2) sets forth two distinct circumstances in which the subsection applies, *i.e.,* (A) redeterminations of deficiency interest that has been assessed and paid, and (B) redeterminations of interest on an overpayment determined by the Tax Court. (Ans. Br. 19-20.) On page 35 of our opening brief, we suggested that subsections (A)(i), (A)(ii), and (B) may be read as setting forth three conjunctive criteria, as indicated by the word "and" appearing between (A) and (B). But even if (A) and (B) enumerate two different circumstances in which § 7481(c) applies, neither (A) nor (B) applies in this case, because taxpayer is not seeking a redetermination of interest arising from a final decision of the Tax Court.

computation of interest." (Ans. Br. 20.) Once the Tax Court determines an overpayment of tax, the parties presumably could correct any errors that affect the interest computation on *that* overpayment, such as the date on which a payment was posted to the taxpayer's account. Indeed, when the IRS settles cases, it routinely provides its interest computations to the taxpayer for review, so that the parties can resolve any disagreements at that time. But that process does not entail granting additional interest on *other* overpayments already refunded to the taxpayer well before, and independent of, the Tax Court's decision, and that is what taxpayer seeks here. In any event, I.R.C. § 7481(c) expressly contemplates both a decision and a subsequent motion for relief. Neither predicate is present here.

2. I.R.C. § 6512(b)(1) does not confer jurisdiction to determine overpayment interest

I.R.C. § 6512(b)(1), which sets forth the Tax Court's overpayment jurisdiction, also does not apply. Taxpayer's contention (Ans. Br. 25-27) that the Tax Court's overpayment jurisdiction under I.R.C. § 6512(b)(1) is commensurate with the jurisdiction granted to the district courts in

28 U.S.C. § 1346(a)(1), including jurisdiction over overpayment interest, fails for want of a premise.

The language of I.R.C. § 6512(b)(1) is facially dissimilar from that of 28 U.S.C. § 1346(a)(1). I.R.C. § 6512(b)(1) states that –

> if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

28 U.S.C. § 1346(a)(1) states that the district courts shall have original jurisdiction of –

> [a]ny 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[.]

Unlike the district courts, moreover, the Tax Court is a pre-payment forum whose jurisdiction depends upon the issuance of a notice of deficiency. *See* I.R.C. §§ 6212(a), 6213(a), 6512(b)(1). If the taxpayer seeks pre-payment review of its liability by filing a petition for redetermination of a deficiency in the Tax Court, assessment is generally prohibited until the decision of the Tax Court becomes final, including the period of any appeals. I.R.C. §§ 6213(a), 7481. It makes no sense that the Tax Court would have jurisdiction over amounts that have already been "assessed or collected" within the meaning of 28 U.S.C. § 1346(a)(1).

Taxpayer's reliance in this context (Ans. Br. 26) on *Usibelli Coal Mine v. United States*, 54 Fed. Cl. 373 (2002), *rev'd*, 311 Fed. Appx. 350 (Fed. Cir. 2008), is misplaced. The issue in that case was whether the taxpayer, which had recovered an unconstitutional export tax by bringing a suit for damages rather than a traditional tax refund claim, could obtain overpayment interest on the damages award under 28 U.S.C. § 2411. The court held that the term "overpayment" in 28 U.S.C. § 2411 did not encompass a damages award for taxes. 54 Fed.

Cl. at 386-87. In so holding, the court opined that the term "overpayment" in 28 U.S.C. § 2411 was "essentially coterminous" with the language of I.R.C. § 7422(a) (requiring an administrative refund claim for "any internal revenue tax alleged to have been erroneously or illegally assessed or collected"), such that overpayment interest could be awarded only if the taxpayer had brought suit under I.R.C. § 7422(a). *Id.* at 382-86.

Nothing in the court's opinion in *Usibelli* suggests, as taxpayer here contends, that the phrase "any internal revenue tax" as used in I.R.C. § 7422(a) includes overpayment interest thereon, or that, by extension, the term "overpayment" as used in I.R.C. § 6512(b)(1) includes interest thereon. If anything, the court's statement in *Usibelli* that "it is difficult to envision how an overpayment could result if it did not, in the first instance, involve the assessment or collection of a tax that, in the second instance, proved erroneous, illegal or wrongful," 54 Fed. Cl. at 382, supports the Commissioner's position that a claim for additional overpayment interest is not equivalent to a claim for an

overpayment because the former amount has never been assessed, collected, or paid.

Even if I.R.C. § 6512(b)(1) were comparable to 28 U.S.C. § 1346(a)(1), moreover, taxpayer would still be wrong in contending that 28 U.S.C. § 1346(a)(1) grants the district courts general jurisdiction over claims for overpayment interest. (Ans. Br. 25.) Rather, the district courts' jurisdiction to hear overpayment interest claims that are not ancillary to a tax refund claim is found in 28 U.S.C. § 1346(a)(2), which confers jurisdiction over "[a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon . . . any Act of Congress." *See, e.g., Snyder v. United States*, 260 F.2d 826, 827 n.1 (9th Cir. 1958); *Amoco Production Co. v. United States,* 61 A.F.T.R.2d 88-750 (N.D. Ill. 1988); *see also Cleveland Chair Co. v. United States*, 526 F.2d 497 (6th Cir. 1975).

As taxpayer observes (Ans. Br. 25), a few courts have held – erroneously, in the Commissioner's view – that an overpayment interest claim in excess of $10,000 may be maintained in a district

court pursuant to 28 U.S.C. § 1346(a)(1).[4] But the decisions in those cases do not support taxpayer's attempt to equate jurisdiction under I.R.C. § 6512(b)(1) with that under 28 U.S.C. § 1346(a)(1), because those decisions are primarily based on the portion of 28 U.S.C. § 1346(a)(1) that confers jurisdiction over suits to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." *See E.W. Scripps Co. v. United States*, 420 F.3d 589, 596 (6th Cir. 2005) (declining to resolve whether district court had jurisdiction under "any internal-revenue tax" clause, and finding jurisdiction under "any sum" clause). It is the "any sum" language that has been held to encompass tax and non-tax amounts. *Flora v. United States*, 362 U.S. 145, 149-50 (1960); *Strategic Hous. Fin. Corp. v. United States*, 86 Fed. Cl. 518, 542-44 (2009). But there is no corresponding language in I.R.C. § 6512(b)(1), which restricts the Tax

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[4] The Court of Federal Claims has jurisdiction over monetary claims based upon a statute without regard to amount. 28 U.S.C. § 1491(a)(1). It is the Commissioner's position that a claim for additional overpayment interest that is not ancillary to a tax refund claim is not a claim for "the recovery of" an amount "assessed or collected" within the meaning of 28 U.S.C. § 1346(a)(1), because such interest has never been collected by the Government.

Court's jurisdiction to determine an overpayment to tax deficiency cases. Contrary to taxpayer's assertion (Ans. Br. 26), the language of 28 U.S.C. § 1346(a)(1) is patently broader than I.R.C. § 6512(b)(1).

3. Without more, the term "overpayment" as used elsewhere in the Code does not include overpayment interest

Taxpayer further argues that the term "overpayment" as used in I.R.C. § 6512(b)(1) includes overpayment interest, because numerous other Code sections purportedly give it the same meaning. (Ans. Br. 27-31.) Again, taxpayer is mistaken.

As we explained in our opening brief (at pages 46-47), to the extent that the Code commingles the terms "tax" and "interest," it does so only with respect to deficiency interest. In this regard, I.R.C. § 6601(e) provides that "[a]ny reference in this title . . . to any tax imposed by this title shall be deemed also to refer to interest *imposed by this section* on such tax." (Emphasis added.) Under I.R.C. § 6601(a), the interest in question is imposed "[i]f any amount of tax . . . is not paid on or before the last date prescribed for payment," and it is imposed at "the underpayment rate established by section 6621." The

courts have recognized, however, that there is no parallel provision to § 6601(e) with respect to the overpayment interest imposed by I.R.C. § 6611.[5]

Taxpayer cites I.R.C. § 6402(a), which authorizes the IRS to "credit the amount of such overpayment, including any interest thereon" against certain other liabilities. Taxpayer contends that "[t]he use of the word 'including' implies that the interest on an overpayment is part of the overpayment." (Ans. Br. 27.) To the contrary, the reference to interest "thereon" – *i.e.,* interest on the "overpayment" – establishes that the term "overpayment" refers only to the principal amount, while the interest is distinct. If interest were already part of an overpayment, the "including" clause in I.R.C. § 6402(a) would be superfluous. *See Xerox Corporation v. United States*, 41 F.3d 647, 658 (Fed. Cir. 1994) ("In construing the tax law, as for any statute, the

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[5] In our opening brief, we cited *Chase Manhattan Bank, N.A. v. Gov't of the Virgin Islands*, 173 F. Supp. 2d 386, 391 (D.V.I. 2001), *rev'd*, 300 F.3d 320 (3d Cir. 2002), in support of this point. Taxpayer erroneously states that we cited this case for "the proposition that Internal Revenue Code provisions on accrual of interest on overpayments . . . are not incorporated into the Virgin Island's mirror Internal Revenue Code." (Ans. Br. 52.) We made no such contention.

starting point is the words of the statute, . . . giving full effect to 'every word Congress used.'") (internal citations omitted); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("statutes should not be construed to make surplusage of any provision").

Taxpayer next cites Treas. Reg. § 301.6514(a)-1 (26 C.F.R.) (Ans. Br. 29), but fails to grasp that the regulation can only refer to a refund of *underpayment* interest, because that is the only type of interest that will have been paid by the taxpayer – and hence can be "refunded" – at some earlier time. In any event, inasmuch as the regulation refers separately to "any internal revenue tax (*or* any interest . . .)" (emphasis added), it underscores that interest is distinct from tax. Taxpayer similarly fails to acknowledge that *In re Vendell Healthcare, Inc.*, 222 B.R. 564 (Bankr. M.D. Tenn. 1998) (Ans. Br. 31), involved underpayment interest, not overpayment interest; and it offers no rationale for construing the tax laws by reference to the Bankruptcy Code.

Finally, taxpayer cites I.R.C. §§ 6601(f) and 6621(d) (regarding interest netting) as evidence that the term "overpayment" includes interest thereon. (Ans. Br. 29-31.) But both provisions expressly refer to overpayment interest; neither permits, much less requires, the inference that the term "overpayment" would otherwise include interest thereon. Furthermore, the courts have construed I.R.C. § 6621(d) very narrowly, rejecting the argument that a taxpayer can fall within the "spirit" of the provision without satisfying its terms. *See Computervision Corp. v. United States*, 467 F.3d 1322 (Fed. Cir. 2006); *Fannie Mae v. United States*, 379 F.3d 1303, 1310-11 (Fed. Cir. 2004). Contrary to taxpayer's arguments, therefore, the legislative underpinnings of I.R.C. § 6621(d) provide no basis for an expansive reading of the term "overpayment."

4. Tax Court jurisdiction cannot be premised on legislative history where the statutory language does not clearly confer jurisdiction

In short, taxpayer remains unable to point to a specific statutory provision that clearly authorizes the Tax Court to determine additional overpayment interest under the circumstances of this case. Instead,

taxpayer cobbles together various Code sections and their legislative history to raise an inference that Congress intended that "the Tax Court completely dispose of cases brought before it." (Ans. Br. 15.) However, there is no basis for expanding the Tax Court's jurisdiction beyond the language of the Code based on taxpayer's supposition as to what Congress wanted to achieve. *See, e.g., Ewing v. Commissioner*, 493 F.3d 1009, 1012-14 (9th Cir. 2006) (rejecting Tax Court's exercise of jurisdiction premised on its interpretation of legislative history where the statute contained limiting language).

Taxpayer further suggests that this Court and the Second Circuit have given effect to the intent of Congress by implicitly recognizing broad jurisdiction in the Tax Court to compute overpayment interest, but the authorities on which taxpayer relies in this context (Ans. Br. 15-16) do not support that inference. In *Colt's Mfg. Co. v. Commissioner*, 306 F.2d 929, 932 (2d Cir. 1962), the court of appeals remanded the case to the Tax Court for a recomputation of *tax*, not interest. The court noted that the Tax Court had declined to exercise

"jurisdiction over the amount of interest on the overpayment," *id.* at 933; and it did not indicate that the Tax Court had erred in doing so.

The issue in *Fortugno v. Commissioner*, 353 F.2d 429 (3d Cir. 1965), was whether an overpayment of tax existed at all, a matter that is within the jurisdictional grant of I.R.C. § 6512(b)(1). Again, there was no suggestion that the Tax Court could take the further step of determining the correct amount of overpayment interest as part of its decision. If anything, this Court's holding in *Fortugno* that there was no overpayment, because there had not been any "payment," *id.* at 433, supports the Commissioner's position in this case.

It bears repeating that the Tax Court's jurisdiction is strictly limited by statute (see p. 3-5, *supra*), and Congress's intent must be determined from the plain language of the statute. *See Yusupov v. Attorney General*, 518 F.3d 185, 201 (3d Cir. 2008) ("we must take the statute to mean what it says"). Even if, as taxpayer contends (Ans. Br. 15-17), allowing the Tax Court to determine additional overpayment interest in this case would be "consistent" with Congress's previous acts to enlarge the Tax Court's overpayment jurisdiction, Congress

ultimately stopped short of authorizing the Tax Court to determine overpayment interest beyond the narrow circumstances delineated in I.R.C. §§ 6512(b)(2) and 7481(c). As discussed above and in our opening brief, neither provision applies in this case, and thus there is no statutory basis for the Tax Court's exercise of jurisdiction over taxpayer's claims for overpayment interest.

C. The Commissioner's position in this case does not offend "judicial economy and common sense"

Taxpayer's reliance on perceived practical and policy considerations in expanding the grant of jurisdiction to the Tax Court (Ans. Br. 39) is foreclosed by numerous authorities (*see* Comm'r Br. 55-60) holding that the Tax Court's jurisdiction is not to be equitably enlarged. The cases cited by taxpayer in this context (Ans. Br. 39-41), *Barton v. Commissioner*, 97 T.C. 548 (1991), and *Judge v. Commissioner*, 88 T.C. 1175 (1987), are not to the contrary, because those decisions were not based on such extra-statutory considerations, but on Code provisions that have no application here. In *Barton*, 97 T.C. at 552, the Tax Court held that I.R.C. § 6601(e) allows treating *underpayment* interest as part of an overpaid tax. In *Judge*, 88 T.C. at

1181-83, the court held that former I.R.C. § 6659(a) allowed treating additions to tax as part of an overpaid tax. As discussed above (at pp. 15-18), there is no analogous provision for treating overpayment interest as part of the tax.

Taxpayer argues at length that it would be procedurally complicated to bring a separate suit for overpayment interest before the Tax Court has made a final determination of liability, and it disputes the Commissioner's contention that the interest claims in issue here relate to "agreed overpayments of tax." (Ans. Br. 33-39.) According to taxpayer, there can be "no *definitive* 'agreed overpayments of tax' until completion of the Tax Court case." (Ans. Br. 38; emphasis added.) But taxpayer's quibble is contradicted by the record, as well as by taxpayer's own actions.

As we have already noted (p. 8, *supra*), this case does not concern interest on an overpayment that remains to be determined by the Tax Court. If it did, taxpayer might be correct that it would be impossible to compute the proper amount of interest in a separate suit until the Tax Court determined the existence and amount of the overpayment.

(*See* Ans. Br. 34-35.) In fact, however, the case concerns interest on overpayments that were refunded and/or credited to taxpayer *before* the Tax Court proceeding began. Thus, taxpayer was able to assert its claims for additional interest in its amended petition, and it did not have to wait for a final decision of the Tax Court for its interest claims to ripen.

In its amended petition, taxpayer stated that "[d]uring the examination and appeals process, petitioner and respondent reached various settlements with regard to issues in the tax years 1979, 1981 and 1983," and it alleged that the Commissioner erred "[i]n calculating the interest on underpayments and overpayments *arising out of those settled issues*." (A76; emphasis added.) The IRS analyst who reviewed taxpayer's amended petition confirmed that taxpayer's claims for interest related to "interest on previously determined underpayments and overpayments." (A133.) In an affidavit filed in this case, the analyst repeatedly referred to interest on "previously allowed overpayments," and she explained that many of the overpayments were credited against tax liabilities for other years and/or other types of

taxes, such as employment taxes. (A134-39.) She observed that "[t]he largest proposed adjustment raises the issue whether petitioner is entitled to overpayment interest because the refund claimed on its 1981 tax return was not issued within 45 days of the return's filing date." (A137.) As the Commissioner explained in his pleadings below, "[t]he overpayments for which petitioner claims it is entitled to additional interest were resolved prior to the filing of the petition in this case." (A227.) Consequently, "[t]hese overpayments are not, and never will become, part of any overpayments determined by the Court in this case." (*Id*.)

In other words, the overpayments for which taxpayer now seeks additional interest were determined well before this suit began, and they are entirely independent of the Tax Court proceeding. The principal amount of these overpayments was fixed by the parties' "various settlements" (A76), and taxpayer had six years from the scheduling of the overpayments to claim additional interest thereon.[6]

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[6] As was previously mentioned (p. 9, *supra*), the IRS regularly supplies its interest computations to the taxpayer upon request, so that any dispute regarding the proper amount of interest can be resolved

(continued...)

(*See* Comm'r Br. 32-33.) Indeed, taxpayer itself acknowledges that this case involves allegations of "error in the IRS's computation of overpayment interest *in the period leading up to the Tax Court case*, causing an error in the amount of a refund *that has been paid to the taxpayer or credited against other liabilities of the taxpayer*." (Ans. Br. 46; emphasis added.)

To the extent that the Tax Court's computation of overpaid underpayment interest may be intertwined with the previously allowed overpayments, we explained in our opening brief (at pp. 62-64) that the Tax Court may *consider* facts relating to those overpayments without *determining* that further overpayment interest is due pursuant to I.R.C. § 6214(b). Significantly, taxpayer has offered no response.

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[6](...continued)
before a credit or refund is made. It is hard to swallow taxpayer's complaint that it would be a "big practical obstacle" for a "large corporate taxpayer" such as itself to review these computations in a timely manner. (Ans. Br. 39.)

D. *Baumgardner* is fundamentally different from this case, because it involved excess deficiency interest paid by the taxpayer

Taxpayer's discussion of *Baumgardner* (Ans. Br. 41-46) fails to address the fundamental distinction between that case and this case: namely, that the *deficiency* interest at issue in *Baumgardner* was *paid* by the taxpayer to the Government. Such overpaid deficiency interest logically gives rise to an "overpayment" within the meaning of I.R.C. § 6512(b)(1), whereas a claim for additional overpayment interest plainly does not. This case involves only the latter, and there is nothing "illogical" (Ans. Br. 45) about the Commissioner's position here.

Taxpayer disputes our reading (Comm'r Br. 48-49) of the statement in *Baumgardner* that the Tax Court "remain[ed] unable to enter a decision for interest upon an overpayment," 85 T.C. at 453, contending that the court "was probably just referring to" "a case in which errors in the IRS's computation of interest with respect to an overpayment of tax are determined by the Tax Court." (Ans. Br. 46.) The context of the statement makes clear, however, that the court was speaking more broadly than taxpayer suggests:

> Interest may be part of an overpayment if the interest accrued and was paid prior to the time the overpayment was claimed or arose. This is the type of interest we are considering in this case. Once an overpayment has been determined, either by our Court or one of the "refund forums," interest accrues in accord with section 6611 until the time the overpayment is refunded or reduced to judgment. Once reduced to judgment, interest accrues on the judgment, inclusive of the overpayment (which may include overpaid interest) and interest on the overpayment, all in accord with 28 U.S.C. sec. 2411 (1982). Because our jurisdiction is not derived from Title 28 of the United States Code, we remain unable to enter a decision for interest upon an overpayment.

Baumgardner, 85 T.C. at 452-53. As this statement shows, the court was referring to "interest [that] accrues in accord with section 6611" – *i.e.*, overpayment interest – without limitation.

Finally, taxpayer asserts that the same "catch-22" that concerned the court in *Baumgardner,* 85 T.C. at 453, is present in this case. According to taxpayer, "[i]f the Tax Court lacks jurisdiction to determine overpayment interest as part of its jurisdiction to determine an overpayment of tax, then every taxpayer in Tax Court who has a potential tax refund claim subject to the Tax Court's jurisdiction will be

forced to file parallel actions in district court or the Court of Federal Claims to address the interest on any overpayment addressed in the Tax Court case." (Ans. Br. 44.) This is not so.

If a taxpayer litigates an overpayment claim in the Tax Court, and the court ultimately determines an overpayment, the IRS must refund the overpayment with the proper amount of interest. If the IRS fails to issue the refund in accordance with the Code, the taxpayer can then seek recourse from the Tax Court under I.R.C. § 6512(b)(2) or § 7481(c). The taxpayer need not bring a lawsuit in a different court to obtain the interest, although it could do so if it so chose.[7] In short, the practical considerations underlying the decision in *Baumgardner* are not present in this case.

E. The plain language of I.R.C. § 6512(b)(4) is a further bar to Tax Court jurisdiction in this case

Taxpayer takes issue with our interpretation of I.R.C. § 6512(b)(4), which prohibits the Tax Court from reviewing any credit

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[7] Contrary to taxpayer's numerous statements in its brief (Ans. Br. 34-35), that separate action would not be a "refund" suit. It would be a general money claim against the United States. (*See* Comm'r Br. 32-33.)

made pursuant to I.R.C. § 6402. (Ans. Br. 47-49.) Relying on the legislative history of § 6512(b)(4), taxpayer argues that the provision only affects the Tax Court's ability to review the "merits" or "amounts" of credits or reductions under I.R.C. § 6402, and that it does not preclude review of the issues of "timing" and "accrual dates" that are involved here. Taxpayer is splitting hairs.

The plain language of the statute is different and broader: "The Tax Court shall have no jurisdiction to under [§ 6512(b)] to restrain or review any credit or reduction made by the Secretary under section 6402." I.R.C. § 6512(b)(4). That prohibition certainly encompasses the determination sought by taxpayer and made by the Tax Court in this case, *i.e.*, a determination that the amounts previously credited or refunded to taxpayer were too small. Taxpayer cannot rely on legislative history to limit the unambiguous language of the Code. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 n.6 (2009) ("We do not resort to legislative history to cloud a statutory text that is clear.").

Taxpayer's reliance on *Winn-Dixie Stores, Inc. v. Commissioner*, 110 T.C. 291 (1998), is equally misplaced. (Ans. Br. 48-49.) The court

opined in *Winn-Dixie* that I.R.C. § 6512(b)(4) restricts jurisdiction in "two situations": it "may not restrain or prevent [the IRS] from *reducing* a refund by way of credit or reduction pursuant to section 6402," and it "may not review the validity or merits of any *reduction* of a refund under section 6402 after such a reduction has been made by [the IRS]." *Winn-Dixie*, 110 T.C. at 294 (emphasis added). As taxpayer acknowledges, however, there was no credit or reduction for the court to review in *Winn-Dixie,* because the IRS failed to employ I.R.C. § 6402. *See* 110 T.C. at 293.

Thus, the court's interpretation of I.R.C. § 6512(b)(4) in *Winn-Dixie* was neither necessary to its holding nor a fair reading of the statutory text. I.R.C. § 6512(b)(4) does not merely prohibit the Tax Court from reviewing a *reduction* of a refund or credit, as taxpayer maintains. Rather, the provision plainly bars the Tax Court from "review[ing] *any* credit." I.R.C. § 6512(b)(4) (emphasis added).

Taxpayer fares no better by invoking a witticism of Oscar Wilde to argue that it is "sinfully" wasteful and duplicative to require taxpayers

to bring their claims for overpayment interest in the district courts or the Court of Federal Claims. (Ans. Br. 54-55.) The Commissioner's position in this case is founded upon procedures that Congress put in place more than 90 years ago, and that other taxpayers have managed to follow ever since. It is Congress – not the courts – that makes the federal tax laws. (*See* Ans. Br. 55.) Congress has not given the Tax Court general jurisdiction over claims for overpayment interest, and until this case no court had ever held that the Tax Court has such jurisdiction.

Taxpayer's parade of horribles (Ans. Br. 54-55) is merely a distraction from its real difficulty, to wit, that the statute of limitations for bringing its overpayment interest claims in the proper forum expired long ago. (*See* Comm'r Br. 55 n.10.) That is undoubtedly galling to taxpayer, but it is not a basis for extending the Tax Court's jurisdiction beyond what Congress has seen fit to confer.

CONCLUSION

For the reasons set forth above and in our opening brief, the Tax Court's decision is erroneous and should be reversed.

Respectfully submitted,

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MARCH 2010

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3(d), it is hereby certified that because the attorneys on this brief represent the Federal Government, the requirement that at least one attorney must be a member of the bar of this Court is waived.

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Attorney for the Appellant
Dated: March 5, 2010

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It is hereby certified that on March 5, 2010: (1) the original and nine copies of this reply brief were sent by First Class Mail to the Clerk; (2) a PDF copy was filed electronically by CM/ECF; and (3) service of the reply brief was made upon counsel for the appellees by CM/ECF.

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