

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

OPENING BRIEF FOR THE APPELLANT

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

On July 1, 1997, the Internal Revenue Service ("IRS") issued a notice of deficiency to Sunoco Inc. and Subsidiaries (collectively, "taxpayer") determining deficiencies in federal income tax for the 1979,

1981, and 1983 tax years. (A7.)¹ Within ninety days thereafter, on September 26, 1997, taxpayer timely filed a petition in the United States Tax Court contesting the notice of deficiency. (*Id.*) The Tax Court had jurisdiction pursuant to Sections 6213(a) and 6214(a) of the Internal Revenue Code (26 U.S.C.) (“I.R.C.” or “the Code”).

Taxpayer filed an amendment to its petition alleging that it had overpayments for the tax years at issue, because, among other things, the IRS had failed to pay sufficient interest on overpayments previously refunded to taxpayer or credited to other tax years. (Doc. 5.) The Commissioner moved to dismiss these overpayment claims for lack of subject matter jurisdiction. (Doc. 47.) The Tax Court held that it had jurisdiction over the claims. (Doc. 58.)

On February 12, 2009, the Tax Court entered its decision. (Doc. 91.) The decision resolves all claims of all parties.

¹ “A.” refers to the separately bound appendix, “App.” refers to the documents attached to this brief, and “Doc.” refers to the Tax Court docket sheet entries. Unless otherwise indicated, all section references are to the Internal Revenue Code.

On May 11, 2009, the Commissioner timely filed a notice of appeal from the decision. (App. 1-2.) See Fed. R. App. P. 13(a); I.R.C. § 7483. This Court has jurisdiction pursuant to I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUE

Whether the Tax Court erred in holding that it had jurisdiction pursuant to I.R.C. § 6512(b) to determine that taxpayer is entitled to additional interest on overpayments that were either refunded to taxpayer or credited to other tax years, before the issuance of the notice of deficiency in this case.

STATEMENT OF THE CASE

Taxpayer filed a petition in the Tax Court challenging the IRS's determination of tax deficiencies for the 1979, 1981, and 1983 tax years. (Doc. 1.) The issues underlying the notice of deficiency were resolved by the Tax Court and by the parties' stipulations, and are not at issue in this appeal. (Docs. 31, 55, 57.)

Taxpayer amended its petition to claim overpayments for the years at issue, on the ground, *inter alia*, that it was entitled to additional interest on various overpayments that previously had been refunded and/or credited to other tax years. (Doc. 5.) The

Commissioner moved to dismiss the overpayment claims for lack of jurisdiction. (Doc. 47.) Following a hearing, the Tax Court (Whalen, J.) issued an opinion, reported at 122 T.C. 88, holding that the court had jurisdiction to determine the additional interest sought. (Doc. 58.) The Commissioner filed a motion for reconsideration, which was denied. (Docs. 60, 61, 65.)

The parties entered into a stipulation regarding the proper computation of interest, which the Tax Court incorporated into its final decision. (Doc. 88.) The stipulation preserved the Commissioner's right to appeal the Tax Court's exercise of jurisdiction over the overpayment interest claims. The Commissioner now appeals.

STATEMENT OF FACTS

A. The notice of deficiency and taxpayer's overpayment claims

On July 1, 1997, the Commissioner mailed a statutory notice of deficiency pursuant to I.R.C. § 6212 to taxpayer Sunoco Inc. and Subsidiaries for the taxable years 1979, 1981, and 1983.² (A35-36.) In

² Sunoco Inc. is the common parent of a group of affiliated corporations that filed consolidated federal income tax returns for the
(continued...)

the notice, the Commissioner determined income tax deficiencies in the total amount of \$51,642,965. (A7-8.) The substantive grounds for the deficiency determinations are not pertinent to this appeal.

Taxpayer timely filed a petition for redetermination of the deficiencies in the Tax Court. (A7.) In addition to disputing all of the Commissioner's determinations, taxpayer sought a refund of alleged overpayments of income taxes in the amount of at least \$25,082,591 for 1979, \$6,881,055 for 1981, and \$14,137,311 for 1983, plus interest as allowed by law. (A7-8.) Shortly thereafter, taxpayer amended its petition to allege (as relevant here) that the Commissioner had also "erred in not crediting or refunding overpayments of interest or tax arising out of miscalculations of interest of at least" \$2,637,217 for 1979, \$37,390,963 for 1981, and \$2,466,601 for 1983. (A76.)

The gist of the amended petition was that the Commissioner had charged too much interest on tax underpayments and paid too little interest on tax overpayments. Taxpayer alleged three specific types of errors. First, it said that the Commissioner had "used numerous

²(...continued)
years at issue. (A7.)

incorrect starting and ending dates for the running of interest and numerous incorrect dates in applying payments and credits and making transfers to other accounts” for purposes of calculating interest on certain underpayments and overpayments arising out of issues that were settled before the notice of deficiency was issued. (A76.) Second, taxpayer contended that the Commissioner had “failed to credit or refund the correct amount of interest on [its] overpayments,” with the result that taxpayer had overpaid tax or interest on *underpayments* “in amounts equal to the amounts of interest on overpayments not credited to underpayments.” (A76.) Third, taxpayer faulted the Commissioner for failing to use “netting principles” for “certain times . . . wherein interest was charged on deficiency amounts at the same time was interest was owed [to taxpayer] on overpayment amounts.” (A78.)

In May 1999, the parties executed a stipulation of settled issues. (A95-101.) The stipulation left three issues in dispute, including the interest claims in the amended petition.³ (A99.)

³ The other two unresolved issues, the determination of interest expense for purposes of computing taxpayer’s foreign tax credit limitation and the deductibility of certain expenses at a strip mine,
(continued...)

B. The Commissioner's motion to dismiss taxpayer's claims for additional overpayment interest

In March 2000, the Commissioner moved to dismiss the amended petition to the extent that taxpayer sought additional overpayment interest under I.R.C. § 6611. (A102-78.) The Commissioner contended that "the Tax Court does not have jurisdiction to determine the amount of interest due on overpayments allowed prior to commencement of the case." (A102.) He argued that the "appropriate remedy" for seeking "overpayment interest with respect to amounts that have previously been refunded or credited" would be a timely suit in a federal district court or the Court of Federal Claims.⁴ (A124-25.)

With the motion to dismiss, the Commissioner submitted the affidavit of IRS Appeals Officer Daria Gallen (A132), whose computations showed that the bulk of taxpayer's overpayment claims ..

³(...continued)
were decided in favor of the Commissioner on March 15, 2002 (in 87 T.C.M. (CCH) 111), and February 4, 2004 (in 118 T.C. 111), respectively. Those rulings are unrelated to this appeal.

⁴ Taxpayer filed protective suits in the Court of Federal Claims, which it voluntarily dismissed with prejudice in January 2009. *Sunoco Inc. and Subsidiaries v. United States*, Fed. Cl. Nos. 99-909 & 00-478 (consolidated).

\$2,042,274 for 1979, \$37,159,027 for 1981, and \$2,441,631 for 1983 – consisted of interest allegedly due under I.R.C. § 6611 on “previously allowed overpayments that are not before the [Tax Court].” (A112, 139.) In her affidavit, Gallen explained that the largest proposed adjustment, for 1981, related to interest on a refund that was not issued within 45 days of the filing of the return for that year, while the remainder of the previously allowed overpayments had been “credited against tax liabilities for other years and/or other types of taxes (payroll tax).” (A116, 136-37.)

The Commissioner acknowledged that the Tax Court had jurisdiction to the extent that taxpayer sought the refund of previously assessed and paid deficiency interest, *i.e.*, underpayment interest under I.R.C. § 6601. (A112.) According to Gallen’s affidavit, taxpayer’s claims for a refund of underpayment interest amounted to \$594,943 for 1979, \$231,936 for 1981, and \$24,970 for 1983. (A139.) The Commissioner explained that the Tax Court had jurisdiction under I.R.C. § 6512(b)(1) to determine an “overpayment of tax” for the tax periods covered by a notice of deficiency, and that “excessive [underpayment] interest, once assessed and paid, becomes part of an overpayment, *i.e.*, a payment in

excess of that which is properly due.” (A121-22.) In contrast, the Commissioner reasoned that “[a] claim for additional *overpayment* interest does not constitute a claim for the determination of an overpayment (*i.e.*, that the taxpayer has overpaid an amount that is legally due), but, rather amounts to a claim for additional amounts for which the government is allegedly liable.” (A123, emphasis added.)

Finally, the Commissioner argued that taxpayer’s claims for additional overpayment interest did not come within the Tax Court’s “supplemental jurisdiction” under either I.R.C. § 6512(b)(2), which authorizes the court to order the payment of interest on an overpayment that is not refunded within 120 days after a decision becomes final, or I.R.C. § 7481(c), which permits the court to reopen a case to determine whether a taxpayer has overpaid interest on a deficiency, or the Commissioner has underpaid interest on an overpayment, as set forth in a final decision. (A123, n.6 & A127-29.) Not only were taxpayer’s claims “premature” in the absence of a final decision, the Commissioner observed, but, more importantly, §§ 6512(b)(2) and 7481(c) “are limited by their terms to overpayments determined by the Tax Court.” (A128-29.) “Neither section . . . applies

to interest on overpayments refunded or credited outside the Tax Court proceeding,” the Commissioner argued. (A129.) The Commissioner added that the Tax Court was expressly prohibited by I.R.C. § 6512(b)(4) from reviewing the amount of interest allowed on overpayments that were applied as credits to other tax years, inasmuch as § 6512(b)(4) states that the “Tax Court shall have no jurisdiction under [§ 6512(b)] to restrain or review any credit . . . made by the Secretary under section 6402.” (A125-27.)

Taxpayer opposed the motion to dismiss, arguing that the Commissioner’s “stingy reading of § 6512(b)(1)” was “incompatible with the rationale” for the Tax Court’s holding in *Estate of Baumgardner v. Commissioner*, 85 T.C. 445 (1985), that the court had jurisdiction over overpayments of deficiency interest. (A189.) Taxpayer contended that overpayment interest constitutes an “overpayment” within the jurisdictional grant in I.R.C. § 6512(b)(1) in the same way as deficiency interest, even though overpayment interest is “not in fact ‘paid over’ by the taxpayer.” (A191.) “In either situation,” taxpayer contended, “the Service has overcollected tax and has also enjoyed the time value of that money from the due date of the tax – in the first instance, by

receiving [deficiency] interest from the taxpayer and, in the second instance, by having the use of the tax proceeds.” (A191.)

Taxpayer further asserted that I.R.C. § 6512(b)(2) was “irrelevant,” because “it addresses the unusual situation where the [IRS] has refused to honor a Tax Court decision.” (A194-95.) With respect to I.R.C. § 7481(c), taxpayer argued that “[i]f the Tax Court has broad jurisdictional authority over interest when the Court has itself resolved the underlying tax, the Court should likewise have broad jurisdictional authority over interest when the parties themselves have reached agreement over the underlying tax.” (A195.)

C. The Tax Court’s opinion denying the motion to dismiss

On February 4, 2004, the Tax Court issued an opinion denying the Commissioner’s motion to dismiss the interest claims in the amended petition, and holding that it did have “jurisdiction to determine an overpayment composed of overpayment interest.” (App. 7.) The court said that its “first difficulty” with the Commissioner’s position was that, in the court’s view, it was “mathematically impossible to compute the amount of underpayment interest . . .

separately and apart from the amount of overpayment interest.” (App. 20.) As a result, the court said, it “would be impossible for the Court to exercise overpayment jurisdiction with respect to underpayment interest,” in accordance with *Baumgardner*, “unless the Court also had jurisdiction over overpayment interest.” (App. 22.) The court reasoned that “the underpayment interest charged to, and the overpayment interest allowed on, [taxpayer’s] account are both computed on the basis of the balance of [the] account as of a particular date,” which in turn includes “the underpayment and overpayment interest that was previously computed and combined with the account balance.” (App. 21.) “In order to compute the aggregate amount of underpayment interest,” the court stated, “it is necessary . . . to review the same transactions, and interest thereon, as involved in the computation of overpayment interest.” (App. 22.)

The court concluded that, “under certain circumstances, additional overpayment interest that is allowable under section 6611(a) with respect to an interim overpayment is similar to the underpayment interest involved in *Estate of Baumgardner* and can constitute an overpayment for purposes of section 6512(b).” (App. 29.) The court

explained that the “principal justification” for its holding in *Baumgardner* was “based on the symmetry of [its] overpayment jurisdiction under section 6512(b) and the jurisdiction of the U.S. District Courts and the Court of Federal Claims.” (App. 25.) The court noted its observations in *Baumgardner* that § 6512(a) “provides that the Tax Court should be able to determine an overpayment to the exclusion of the other tax forums,” and it said that “this intent would be frustrated” if the “overpayment” determined by the Tax Court were not “synonymous” with that determined by another forum. (App. 26.)

The Tax Court concluded that the Commissioner’s “view of what constitutes an overpayment for purposes of section 6512(b)” was “too narrow” and did not “square with” *Baumgardner*. (App. 29.)

The court noted that “[m]ost of” taxpayer’s claims for additional overpayment interest involved interim overpayments that had been credited against taxpayer’s liabilities for different years and/or different taxes pursuant to I.R.C. § 6402(a). (*Id.*) “To the extent that overpayment interest under section 6611 is not credited,” the court “believe[d] that it can be considered to have been overpaid by the taxpayer for purposes of section 6512(b).” (App. 31.) “Otherwise,” the

court stated, “our overpayment jurisdiction would not mirror the jurisdiction of the U.S. District Courts and the Court of Federal Claims.” (*Id.*)

The Tax Court also rejected the Commissioner’s argument that I.R.C. § 6512(b)(4) barred its exercise of jurisdiction, stating that “we are not called upon ‘to restrain or review’ the tax liability against which the overpayment is credited, within the meaning of section 6512(b)(4).” (App. 32.) “To the contrary,” the court said, “the only issue in this case is whether the amount of the credit should have been higher by reason of [the Commissioner’s] failure to allow all or a portion of the interest on the overpayment.” (*Id.*)

D. The Commissioner’s motion for reconsideration

The Commissioner moved for reconsideration, *inter alia* on the ground that “the opinion . . . adversely affects tax administration.” (A284.) “By defining a claim . . . for unpaid interest on overpayments as the equivalent of a claim that a tax has been overpaid,” the Commissioner observed, the Tax Court disregarded “the wholly distinct statutory and regulatory frameworks governing the two types of claims.” (A284.) The Commissioner emphasized that the finding of

jurisdiction “allows the circumvention” of the six-year limitations periods in 28 U.S.C. §§ 2401 and 2501 for claims against the United States, and “creates confusion” as to whether those provisions or the two-year period for refund claims in I.R.C. § 6511 applies. (A285-86.) The Commissioner further asserted that the court’s holding was “inconsistent with” I.R.C. § 7481(c), in which “Congress expressly limited” the court’s jurisdiction over claims for unpaid interest under § 6611 “to those overpayments of tax determined in a final decision of the Tax Court.” (A288.) Addressing the court’s conclusion that it could not determine underpayment and overpayment interest separately, the Commissioner pointed out that the court “may properly consider” facts relating to a claim for additional overpayment interest “without acquiring jurisdiction directly over that component,” in the same way that it could consider facts relating to other years under I.R.C. § 6214(a). (A288-89.)

The Tax Court denied the motion for reconsideration on May 23, 2007, more than three years after it was filed. (App. 44-45.) The court found that the motion “overstate[s] the limited nature” of the opinion and “fail[s] to adequately address” the “critical” and

“fundamental” point that computations of overpayment and underpayment interest are “interrelated and cannot be computed separately.” (App. 44.)

E. The stipulations regarding interest

On February 2, 2009, the parties filed a second stipulation of settled issues, limited to the interest calculation issue. (A334.) Under the rubric of the “Deficiency Interest Sub-Issue,” they agreed to the effective dates of a foreign tax credit carryback to 1979, various credit and/or overpayment transfers from 1979 and 1983 to “other related accounts,” a refund for 1979, and the application of a payment for 1981. (A337-38.) They noted that the agreement on this sub-issue would be unaffected by the outcome of an appeal on the “Overpayment Interest Sub-Issue.” (A337.)

With respect to the Overpayment Interest Sub-Issue, the parties noted their intention to “agree to the underlying facts and the computation of interest, if the [Tax] Court’s determination as to jurisdiction is either not appealed or is sustained on appeal, while preserving for potential appeal the legal issue of the Court’s jurisdiction over [taxpayer’s] claim to additional overpayment interest.” (A338-39.)

Under the stipulation, if it is "finally determined" in an appeal that the court lacked jurisdiction over "the determination of underpaid interest on overpayments," the agreement as to overpayment interest will "not be binding on the parties in any future computation or administrative or judicial proceedings concerning the determination of the proper amount of interest with respect to any overpayment due [taxpayer]." (A339-40.) If it is finally determined that the court does have such jurisdiction, the agreement will be binding on the parties. (A340.)

The stipulation specifies the agreed effective dates for additional credit and/or overpayment transfers from the three years in issue to "other related accounts" and the application of a credit to 1981. (A340-42.) The parties further agreed to the periods for which overpayment interest will and will not be allowed on a refund issued in 1982 for the 1981 year, and they agreed that "excessive" amounts of certain tentative refunds for 1981 and 1983 will not reduce any unrelated overpayment that existed on specified dates. (A342-44.)

Subject to a final determination on the jurisdictional issue, the parties agreed to interest calculations as of December 31, 2008, with additional interest thereafter to be assessed and/or credited as provided

by law, and the application of netting (*i.e.*, "the elimination of interest on overlapping periods of tax overpayments and underpayments pursuant to I.R.C. § 6621(d)") as provided by law. (A344-45.) As so computed, the additional overpayment interest totals slightly over \$89 million. (A349, 353, 355.)

Concurrently with the second stipulation of settled issues, the parties filed a stipulation as to the underlying tax liabilities for each of the years in issue, showing an overpayment of \$14,587,489 for 1979, a deficiency of \$287,345 to be assessed and paid for 1981, and a deficiency of \$24,138,971 to be assessed for 1983, of which \$20,104,500 remains to be paid. (A357, 361, 363, 365, 366.) A decision was entered accordingly

SUMMARY OF ARGUMENT

In its amended petition for redetermination of deficiencies for 1979, 1981, and 1983, taxpayer claimed additional interest on overpayments that had previously been refunded and/or credited to other liabilities, before the notice of deficiency was issued. The Tax Court erred as a matter of law in holding that the grant of overpayment jurisdiction in I.R.C. § 6512(b)(1) extended to those overpayment interest claims.

1. The Tax Court is a court of limited jurisdiction, and its jurisdiction to determine overpayments is especially narrowly defined. As relevant here, when the Tax Court has acquired deficiency jurisdiction over a tax year, I.R.C. § 6512(b)(1) permits the court to “find[] that the taxpayer has made an overpayment of income tax for the same taxable year” and grants “jurisdiction to determine the amount of such overpayment.” The Supreme Court has interpreted the term “overpayment” in its usual sense, *i.e.*, to mean any payment in excess of that which is properly due. That meaning plainly does not encompass taxpayer’s claims that it *received* too little interest from the Government. Rather, a claim for overpayment interest is a general

money claim against the United States that must be brought in the district court or the Court of Federal Claims.

2. The Tax Court's reliance on its holding in *Estate of Baumgardner v. Commissioner*, 85 T.C. 445 (1985), that overpaid deficiency interest can give rise to an overpayment within the meaning of § 6512(b)(1), was entirely misplaced. Excess deficiency interest that is paid *by* the taxpayer *to* the Government manifestly gives rise to an overpayment, because the taxpayer has paid more interest than was properly due. But this reasoning does not extend to a claim for additional overpayment interest, because the taxpayer has never paid what it seeks to recover.

The court also erred in exercising jurisdiction on the basis of what it perceived to be the mathematical complexities of this case. The Tax Court believed that it could not, as a practical matter, exercise its undisputed jurisdiction over taxpayer's claims for deficiency interest without also exercising jurisdiction over the claims for additional overpayment interest, because the interest computations were interrelated. But many of the claims are not interrelated and can be computed separately. Where the claims do overlap, the Tax Court

could have considered the facts of the overpayment interest claims, as necessary to compute the overpaid deficiency interest, without actually entering a decision against the Government on the overpayment interest claims. The situation here is analogous to that addressed by I.R.C. § 6214(b), which expressly directs the court to “consider” relevant facts for years not covered by the notice of deficiency, while depriving the court of jurisdiction to “determine” an underpayment or overpayment for such other years.

3. Finally, to the extent the Tax Court determined that additional overpayment interest should have been allowed on overpayments that were applied as credits by the IRS, the Tax Court plainly violated I.R.C. § 6512(b)(4). That section states that “[t]he Tax Court shall have no jurisdiction . . . to restrain or review any credit . . . made by the Secretary under section 6402.” This broad, unqualified prohibition includes the review the Tax Court undertook here, when it decided that certain credits should have been higher by reason of the IRS’s purported failure to allow all or a portion of the interest on the overpayment.

The Tax Court’s decision is erroneous and should be reversed.

ARGUMENT

The Tax Court erred in holding that it had jurisdiction over taxpayer's claims for additional overpayment interest, because such interest is not an overpayment of tax

Standard of review

This Court reviews the Tax Court's rulings of law *de novo*. See *Holof v. Commissioner*, 872 F.2d 50, 52 (3d Cir. 1989).

A. Introduction

It is important to understand from the outset the difference between the two types of interest claims that taxpayer raised in its amended petition. On the one hand, taxpayer claimed that it had paid too much "deficiency interest," meaning interest that was charged to it under I.R.C. § 6601, on tax underpayments that previously existed on its tax accounts for the years at issue. (See A76-78.) On the other hand, taxpayer claimed that it did not *receive* enough "overpayment interest," meaning interest payable to it under I.R.C. § 6611, on tax overpayments that previously existed on its accounts.⁵ The

⁵ Taxpayer's further claim for interest netting under I.R.C. § 6621(d) is not implicated in this appeal and, therefore, is not

(continued...)

Commissioner conceded below that the Tax Court had jurisdiction over the first type of claim under the court's limited overpayment jurisdiction, found in I.R.C. § 6512(b). As explained in more detail herein, when a taxpayer pays too much interest to the IRS, that excess amount is considered to be an "overpayment" to be refunded to the taxpayer or credited against another outstanding liability.

This appeal accordingly centers on whether the Tax Court had jurisdiction over the second type of claim, namely, the allegation that the *Government* did not pay enough interest *to* taxpayer. Before the IRS ultimately determined that taxpayer had income tax deficiencies for the years in issue here, taxpayer had interim overpayments of tax for those years. At various times before taxpayer commenced this suit, the IRS refunded the overpayments or applied them as credits to other tax years and/or taxpayer's liabilities for other types of tax. In an amended petition in this case, taxpayer contended for the first time that the IRS did not pay or credit (as the case may be) enough interest on such overpayments, and that it was entitled to more interest.

⁵(...continued)
addressed in this brief.

As we shall demonstrate, however, the Tax Court lacked jurisdiction to consider the additional interest claims. To be sure, the IRS generally is required to pay interest on overpayments. Section 6611 of the Code states that “[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.” But this overpayment interest is not *itself* an overpayment, for the simple reason that the taxpayer has not paid anything to the IRS. Rather, the taxpayer is owed something more.

Thus, it is well established that a claim for overpayment interest is a general monetary claim against the United States. It is not a tax refund claim, and a taxpayer need not follow the procedures applicable to administrative refund claims and refund suits in order to claim overpayment interest. Nevertheless, such claims must be brought in the federal district courts or the Court of Federal Claims within the six-year limitations period set forth in 28 U.S.C. §§ 2401 and 2501.

In this case, the Tax Court erroneously held that underpaid overpayment interest should be characterized as an “overpayment” subject to its own jurisdiction, in the same way that overpaid deficiency

interest is treated as an overpayment within its jurisdiction. Even though a taxpayer never pays overpayment interest *to* the IRS, but receives it *from* the Government, the Tax Court concluded that “[t]o the extent that overpayment interest under section 6611 is not credited, . . . it can be considered to have been overpaid by the taxpayer for purposes of [jurisdiction under] section 6512(b).” (App. 31.) In exercising jurisdiction over taxpayer’s claims for additional interest, therefore, the Tax Court improperly expanded its jurisdiction beyond what Congress has allowed.

B. The Tax Court’s jurisdiction to determine overpayments and overpayment interest is narrowly circumscribed by the Code

1. It is well established that the Tax Court is a court of limited jurisdiction, possessing only such jurisdiction as is expressly conferred upon it by Congress. I.R.C. § 7442 (“The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.”); *see also Dudley v. Commissioner*, 258 F.2d 182, 183 (3d Cir. 1958) (“The Tax Court is a judicial agency of

the United States with limited statutory jurisdiction.”). As such, the Tax Court “lacks general equitable powers.” *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *See Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943).

The principal basis for jurisdiction in the Tax Court is found in I.R.C. § 6213(a), which vests the court with jurisdiction to redetermine a “deficiency” in income, estate, gift, and certain excise taxes as to which the Commissioner has issued a notice of deficiency pursuant to I.R.C. § 6212(a) and the taxpayer has timely filed a petition for redetermination. Under I.R.C. § 6214(a), the court has such jurisdiction “even if the amount so redetermined is greater than the amount of the deficiency” as set forth in the notice, and its jurisdiction extends to “any additional amount, or any addition to the tax,” asserted by the Commissioner at or before trial.

2. Generally, jurisdiction concerning overpayments (*e.g.*, tax refunds) rests with the federal district courts and the Court of Federal Claims. *See* 28 U.S.C. § 1346(a)(1); 28 U.S.C. § 1491(a)(1); *Baumgardner*, 85 T.C. at 452. “Under limited circumstances,” however,

the Tax Court “may acquire overpayment jurisdiction.” *Baumgardner*, 85 T.C. at 452.

First, under I.R.C. § 6512(b)(1) (*see* Statutory Addendum, App. 46-49), 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 . . . 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.”⁶ *See Bachner v. Commissioner*, 81 F.3d 1274, 1278 (3d Cir. 1996) (I.R.C. § 6512(b)(1) “describes the required jurisdictional path after a finding of no deficiency”); *Baumgardner*, 85 T.C. at 452 (“The Tax Court’s overpayment jurisdiction is limited to situations where a deficiency has been determined and the taxpayer petitions the Court for a taxable period.”). When the Tax Court obtains overpayment jurisdiction, its jurisdiction is exclusive. *See* I.R.C.

⁶ The grant of jurisdiction in I.R.C. § 6512(b)(1) is subject to the limitations periods prescribed by subsection (b)(3), discussed on pp. 53-54, *infra*.

§ 6512(a)(1) (where taxpayer has timely filed a petition in the Tax Court for redetermination of a deficiency, “no credit or refund” of the same tax for the same taxable period “shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except,” as is relevant here, “[a]s to overpayments determined by a decision of the Tax Court which has become final.”).

Second, the Tax Court is given “jurisdiction to enforce” its decisions. Section 6512(b)(2) states that “[i]f, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon . . . , then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest.” I.R.C. § 6512(b)(2) (*see* Statutory Addendum, App. 46-49).

The Code does not define the term “overpayment.” The Supreme Court, however, has “read the word . . . 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 (1947); *accord Binder v. United States*, 590

F.2d 68, 71 (3d Cir. 1978) (“Whatever the reason, the payment of more (taxes) than is rightfully due is what characterizes an overpayment (of taxes).”). “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.” *United States v. Dalm*, 494 U.S. 596, 609 n.6 (1990); *see also* I.R.C. § 6401(a) (“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.”).

The Tax Court’s jurisdiction over overpayments is especially constrained with respect to credits under I.R.C. § 6402. Section 6402(a) provides that “[i]n the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall . . . refund any balance to such person.” The IRS has broad discretion in determining whether to apply an overpayment as a credit toward a different liability of the taxpayer. *See, e.g., Estate of Bender v. Commissioner*, 827 F.2d 884, 887 (3d Cir.

1987). Section 6512(b)(4) explicitly deprives the Tax Court of jurisdiction to review such credits, stating that “[t]he Tax Court shall have no jurisdiction under [§ 6512(b)] to restrain or review any credit or reduction made by the Secretary under section 6402.” (See Statutory Addendum, App. 46-49.)

3. Except in limited circumstances, the Tax Court lacks jurisdiction over issues relating to interest, whether on underpayments or overpayments. See *McCoy*, 484 U.S. at 5-6; *Zfass v. Commissioner*, 118 F.3d 184, 191 (4th Cir. 1997) (citing “several appellate court cases which recognize that the Tax Court does not have jurisdiction regarding interest determinations”); *Melin v. Commissioner*, 54 F.3d 432, 434 (7th Cir. 1995) (“The Tax Court . . . does not have jurisdiction over challenges to interest determinations in most circumstances.”); *Bax v. Commissioner*, 13 F.3d 54, 56 (2d Cir. 1993); *Med-James, Inc. v. Commissioner*, 121 T.C. 147, 152 (2003); *White v. Commissioner*, 95 T.C. 209, 213 (1990). The interest imposed on underpayments by I.R.C. § 6601(a) generally is excluded from the definition of a “deficiency” over which the Tax Court has jurisdiction, see *White*, 95 T.C. at 213; although it is otherwise treated as tax pursuant to I.R.C. § 6601(e)(1)

("[a]ny reference in this title (except subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed this title shall be deemed also to refer to interest imposed by this section").

Nevertheless, as the Tax Court held in *Estate of Baumgardner*, if the Tax Court has obtained jurisdiction over a deficiency for a given year, and if it then finds that the taxpayer has made an overpayment of tax for that year, the court may determine an overpayment consisting of interest paid on the deficiency, so long as the interest accrued and was paid before the overpayment was claimed or arose. 85 T.C. 445. See also *Smith v. Commissioner*, 429 F.3d 533, 538-39 (5th Cir. 2005) (in *Baumgardner*, "the Tax Court held that, at least when interest has been assessed and paid, it has jurisdiction to determine an overpayment of interest as part of its jurisdiction to determine an overpayment of tax on which the interest was paid"); *Heffley v. Commissioner*, 884 F.2d 279, 287 (7th Cir. 1989) (in *Baumgardner*, "[t]he Tax Court held that when it had jurisdiction to determine the overpayment of the tax, it also had jurisdiction to determine the overpayment of interest that the taxpayer paid with the tax.").

4. In this case, the Commissioner has conceded that the Tax Court had jurisdiction to determine overpayments of deficiency interest paid by taxpayer under I.R.C. § 6601. Instead, the dispute concerns additional interest allegedly *due to* taxpayer under I.R.C. § 6611 on overpayments of tax that had already been refunded or credited, before the notice of deficiency was issued. Section 6611(a) provides that “[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.” Interest payable under I.R.C. § 6611 is referred to as “overpayment” or “statutory” interest.

Claims for overpayment interest are not subject to the Code’s requirements (in I.R.C. §§ 6511 and 7422) for claiming a tax refund or a refund of deficiency interest, and there is no provision in the Code specifically dealing with suits for overpayment interest. *See Alexander Proudfoot Co. v. United States*, 454 F.2d 1379, 1384 (Ct. Cl. 1972); *Barnes v. United States*, 137 F. Supp. 716, 718 (Ct. Cl. 1956). Rather, an action for recovery of overpayment interest is a money claim against the United States based on a statute (*i.e.*, I.R.C. § 6611), for which a complaint must be filed with a district court or the Court of Federal

Claims within six years of the accrual of the cause of action. See 28 U.S.C. §§ 1346(a)(2) & 2401 (district courts); 28 U.S.C. §§ 1491(a)(1) & 2501 (Court of Federal Claims). The cause of action accrues on the date of allowance of the refund or credit in respect of the overpayment of tax, meaning the date on which the scheduling of the overassessment is authorized under I.R.C. § 6407. See *General Instrument Corp. v. United States*, 33 Fed. Cl. 4 (1995). The filing of an administrative claim with the IRS for additional overpayment interest does not affect the running of the limitations period. Rev. Rul. 57-242, 1957-1 C.B. 452.

The Code gives the Tax Court jurisdiction over overpayment interest in two limited circumstances, both involving a final decision of the court. The first, mentioned on p. 28, *supra*, pertains to enforcement of a decision. If the Commissioner fails to refund “an overpayment determined by the Tax Court, together with the interest thereon as provided in [§ 6611],” within “120 days after the decision of the Tax Court becomes final,” then I.R.C. § 6512(b)(2) authorizes the court, upon motion by the taxpayer, to “order the refund of such overpayment and interest.”

The second circumstance is when, “within 1 year after the date the decision of the Tax Court becomes final . . . in a case to which [I.R.C. § 7481(c)] applies, the taxpayer files a motion in the Tax Court for a redetermination of the amount of interest involved.” I.R.C. § 7481(c)(1) (*see* Statutory Addendum, App. 46-49). In such a case, the court “may reopen the case solely to determine whether the taxpayer has made an overpayment of such interest or the Secretary has made an underpayment of such interest and the amount involved.” *Id.* *See also ASA Investering's P'ship v. Commissioner*, 118 T.C. 423, 425 n.3 (2002) (I.R.C. § 7481(c) “specifically carves out an exception to the rule on the finality of our decisions; a prerequisite for invoking that exception is a final decision of this Court”). If the Tax Court determines “that the taxpayer has made an overpayment of interest or that the Secretary has made an underpayment of interest, then that determination shall be treated under section 6512(b)(1) as a determination of an overpayment of tax.” I.R.C. § 7481(c)(3). The effect of I.R.C. § 7481(c)(3) is to require that an amount so determined by the Tax Court as owing to the taxpayer “be credited or refunded to the taxpayer” in accordance with I.R.C. § 6512(b)(1), and to bring that

amount within the Tax Court's "jurisdiction to enforce" under I.R.C. § 6512(b)(2).

Thus, the cases to which I.R.C. § 7481(c) applies are limited to those in which the Secretary has made an assessment that includes interest, "the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary," *and* "the Tax Court finds under section 6512(b) that the taxpayer has made an overpayment." I.R.C. § 7481(c)(2); *see Bax*, 13 F.3d at 57 ("The language [of § 7481(c)] is plain and clear: the tax court may make a redetermination of interest in cases where the taxpayer prepays *both* the entire amount of the deficiency and the *interest* claimed by the government on that deficiency."). In other words, Congress "did not expressly grant blanket federal court jurisdiction over interest issues [to the Tax Court] through section 7481(c)." *Melin*, 54 F.3d at 434.

C. There is no basis for the Tax Court's exercise of jurisdiction over taxpayer's claims for overpayment interest in this case

It is undisputed in this case that neither I.R.C. § 6512(b)(2) nor § 7481(c) supplies a basis for the Tax Court's exercise of jurisdiction over taxpayer's claims for additional overpayment interest. (A194-95.) Both of those sections deal with the Tax Court's ability, in a post-judgment proceeding, to enforce the payment of, or to redetermine, interest arising from its decision. The overpayment interest at issue here is not attributable to the Tax Court's decision in this case; indeed, no decision had been entered when taxpayer raised its interest claims. Rather, the interest at issue is attributable to overpayments that were refunded or credited before this case began.

The only possible basis for jurisdiction in the Tax Court, therefore, is I.R.C. § 6512(b)(1). As we explain below, however, that provision does not extend the court's jurisdiction to claims for additional overpayment interest.

1. **Additional overpayment interest sought by the taxpayer is not an “overpayment”**

When the Tax Court has acquired deficiency jurisdiction over a tax year, as it did here (*see* A7), I.R.C. § 6512(b)(1) permits the court to “find[] that the taxpayer has made an overpayment of income tax for the same taxable year,” and grants “jurisdiction to determine the amount of such overpayment.” In *Estate of Baumgardner*, the Tax Court held that “an overpayment of income tax,” for these purposes, also includes an overpayment of interest that the taxpayer paid on the tax pursuant to I.R.C. § 6601. 85 T.C. 445. Contrary to the Tax Court’s holding here, however, such an “overpayment of tax” does not include overpayment interest owed to the taxpayer. *See General Electric Co. v. United States*, 384 F.3d 1307, 1312 (Fed. Cir. 2004) (“[T]he term ‘overpayment,’ as used in the Internal Revenue Code, generally does not incorporate the interest earned on the amount by which the taxpayer has overpaid its taxes.”).

The Tax Court failed to grasp that taxpayer’s claims for additional interest under I.R.C. § 6611 cannot possibly constitute an “overpayment” as that word is “read . . . in its usual sense.” *Liberty*

Glass, 332 U.S. at 531. The gist of the claims is that taxpayer received less interest than it should have on certain refunds and credits. But “the *payment of more than is rightfully due* is what characterizes an overpayment.” *Id.* (emphasis added). “In order to have an overpayment there must, of course, have been a payment.” *Fortugno v. Commissioner*, 353 F.2d 429, 433 (3d Cir. 1965); *see also Malachinski v. Commissioner*, 268 F.3d 497, 509 (7th Cir. 2001) (remittance that was a deposit, rather than tax payment, could not give rise to an overpayment for purposes of I.R.C. § 6512(b)); *United States v. Wynshaw*, 697 F.2d 85, 87 (2d Cir. 1983) (tax liability shown on return with no payment enclosed was not an overpayment, “since it was never paid”); Treas. Reg. § 301.6611-1(b) (26 C.F.R.) (“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 (including any interest, additions to the tax, or additional amount) and the dates of *payment* of all amounts subsequently paid with respect to such tax liability”) (emphasis added).

The Tax Court incorrectly reasoned that when the Government fails to pay the proper amount of interest on a tax overpayment, the

taxpayer will have "overpaid [its] liability by the amount of allowable interest that is not credited." (App. 30.) The court attempted to illustrate this illogic with the following hypothetical:

[A]ssume that, pursuant to section 6402(a), the Commissioner credits an overpayment of \$1,000 against a liability of the same taxpayer for a different taxable year in the amount of \$1,000 but fails to include interest of \$20 computed under section 6611 that is allowable on the overpayment. Under these facts, *the taxpayer would have used \$1,020 to satisfy a liability of \$1,000*. In effect, the taxpayer would have overpaid the liability against which the overpayment is credited by \$20.

(App. 30-31, emphasis added.)

The amount "used" by the taxpayer is irrelevant. The fact remains that overpayment interest that allegedly should have been higher has not been *paid* in any sense. As a result, there is no possible way that the court's hypothetical taxpayer can "use" \$20 that it does not have in order to "satisfy a liability." The fact that the taxpayer may have a claim for \$20 of interest does not convert a \$1,000 credit into a

\$1,020 credit. The credit is what it is, and the Tax Court was wrong to exercise jurisdiction on the basis of a non-existent overpayment.⁷

In the proceedings below in this case, taxpayer argued that, even if overpayment interest is not actually paid over by the taxpayer, there is nevertheless an overpayment, because “the Service has enjoyed the equivalent of that payment by having use of the taxpayer’s money over a specified period of time.” (A192.) But the Government’s use of money to which a taxpayer may be entitled also does not translate into an overpayment of tax. Because of the Tax Court’s limited statutory jurisdiction, the courts of appeals have consistently rejected the arguments of taxpayers that equivalent effects (in the eyes of the taxpayer) are sufficient to confer jurisdiction even when the language of the Code does not. *See, e.g., Boyd v. Commissioner*, 451 F.3d 8, 9-10, 13 (1st Cir. 2006) (holding that procedural protections applicable to a

⁷ The fallacy of the Tax Court’s hypothetical is further shown by the fact that, if that scenario did occur, the \$20 overpayment would exist in a *different* tax year, *i.e.*, the year to which the credit and interest were transferred. But the Tax Court’s overpayment jurisdiction under I.R.C. § 6512(b)(1) is limited to the year(s) covered by the notice of deficiency – in the hypothetical, the year in which the \$1,000 overpayment arose. Thus, even under the court’s reasoning, jurisdiction would be lacking.

“levy” under I.R.C. § 6330 do not apply to an “offset”); *Moretti v. Commissioner*, 77 F.3d 637, 642 (2d Cir. 1996) (“proposed tax assessment letter” did not constitute a “notice of deficiency” sufficient to confer jurisdiction under I.R.C. § 6212(a)). There is nothing in either the Code or the case law to suggest that the Tax Court’s jurisdiction depends on use-of-money principles. *See Marsh & McLennan Cos. v. United States*, 302 F.3d 1369, 1380 (Fed. Cir. 2002) (“Marsh has not called our attention to any case in which the use of money principle has been held to override statutory language requiring a contrary result.”).

That overpayment interest is not itself an overpayment is further demonstrated by I.R.C. §§ 6512(b)(2) and 7481(c). As previously discussed, pp. 33-35, *supra*, those sections authorize the Tax Court to enforce its decisions by ordering a refund of an “overpayment and interest” if the IRS fails to pay (I.R.C. § 6512(b)(2)), and by redetermining the amount of interest paid by the IRS if the taxpayer claims that it was too low (I.R.C. § 7481(c)). If determinations of overpayment interest were subsumed in the court’s overpayment jurisdiction under I.R.C. § 6512(b)(1), both §§ 6512(b)(2) and 7481(c) would be unnecessary, because the court already would be authorized

to determine the amount of interest due along with an overpayment. *See Smith v. Commissioner*, 123 T.C. 15, 51 (2004) (“[i]f Congress had intended that our overpayment decisions under section 6512(b) were to include final interest determinations, there would have been no need to include section 7481(c)(2)(B)”) (Goeke, J. dissenting) (cited with approval by Fifth Circuit in reversing, 429 F.3d at 538). In addition, the fact that the two latter provisions specifically mention interest, separate and apart from the overpayment, indicates that the term “overpayment” is not intended to include interest allowed thereon. *See* I.R.C. § 6512(b)(2) (if “the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon . . . , then the Tax Court . . . shall have jurisdiction to order the refund of such overpayment and interest”); I.R.C. § 7481(c)(3) (providing a “special rule[]” under which “underpayment of interest” “shall be treated under section 6512(b)(1) as a determination of an overpayment of tax”).

In short, there is no principled basis for the Tax Court’s holding that the Government’s potential liability for additional overpayment interest due to a taxpayer is tantamount to an “overpayment” of tax

sufficient to confer jurisdiction under I.R.C. § 6512(b)(1). The decision resulting from that holding was in error and must be set aside.

2. *Estate of Baumgardner* provides no support for the Tax Court's holding

The Tax Court's reliance on *Estate of Baumgardner* (App. 29) was severely misplaced. Under the usual meaning of an "overpayment," it makes sense to treat excess deficiency interest, which was at issue in *Baumgardner*, as part of the overpayment, because the taxpayer will indeed have paid more interest to the IRS than was rightfully due. In holding in *Baumgardner* that "[i]nterest may be part of an overpayment *if* the interest accrued *and was paid* prior to the time the overpayment was claimed or arose," the Tax Court went out of its way to clarify that "[t]his is the type of interest we are considering in this case." 85 T.C. at 452 (emphasis added); *see id.* at 460 ("[o]ur holding [is] that the term 'overpayment' includes assessed and paid interest at the time of overpayment"). The type of interest at issue here is entirely different from the interest at issue in *Baumgardner*. This case does not involve an overpayment of interest *by* the taxpayer, but interest to be

“allowed and paid” to the taxpayer “upon any overpayment in respect of any internal revenue tax.” I.R.C. § 6611.

In extending the holding of *Baumgardner* to include additional overpayment interest due to a taxpayer, the Tax Court ignored longstanding precedent establishing that overpayment interest is fundamentally different from deficiency interest. In the seminal case *Alexander Proudfoot Co. v. United States*, 454 F.2d 1379 (Ct. Cl. 1972), the Court of Claims discussed this difference at length. There, the taxpayer sought a refund of deficiency interest but had not filed a refund claim, arguing that it was not required to do so because suits for interest are general money claims against the United States falling under the provisions of the Tucker Act (28 U.S.C. § 1491). 454 F.2d at 1381-82. In rejecting that argument, the court drew a sharp distinction between deficiency interest under I.R.C. § 6601 and overpayment interest under I.R.C. § 6611.

While “[t]he Code’s design for [deficiency] interest is to assimilate it to the tax itself,” the court said, “so that the taxpayer who pays both . . . can and should proceed to seek to recover both together through one proceeding,” *id.* at 1382, “Congress has distinguished markedly

between a refund of that kind of interest paid by a taxpayer and statutory interest payable by the Government on an overpayment," *id.* at 1385. The court explained that:

the Revenue Code deals quite differently with statutory interest payable by the Government on overpayments. Regulated by §§ 6611-6612, that form of interest is paid by the United States, not as a refund of interest previously paid by the taxpayer on demand of the Service, but simply because the Government has had the use of money found to belong to the taxpayer. Typical is interest on an overpayment . . . Unlike deficiency interest paid by the taxpayer, Congress did not provide that statutory interest to be paid by the United States is to be fully assimilated in treatment to the principal amount of a tax. Nor does the Code extend the refund claim mechanism of § 6511 to such interest, or tie a special limitations period to the filing of such a claim. The result is that the ordinary six-year limitations statute controls . . . and no claim need be filed within the time limits of § 6511.

Id. at 1384 (internal citations omitted); *see also Marsh & McLennan*, 302 F.3d at 1378 (“[T]he tax code differentiates between underpayment and overpayment interest situations. It does not . . . require identical treatment.”).

This distinction has been determinative, not only in cases involving taxpayer attempts to obtain additional interest, *see General*

Electric, 384 F.3d at 1312 (collecting cases), but also to the Government's effort to recoup excessive overpayment interest. In *Pacific Gas & Elec. v. United States*, 417 F.3d 1375 (Fed. Cir. 2005), the Federal Circuit held that excessive overpayment interest that was mistakenly paid to the taxpayer could not be assessed or collected by the IRS in the same manner as a tax and, as a result, could not be part of an offset. The court stated that a "tax deficiency, tax penalty, and deficiency interest . . . are all components of a taxpayer's tax liability. Therefore, these components are taken into account in determining whether an overpayment exists There is no suggestion, however, that statutory [overpayment] interest is a part of, or even related to, a taxpayer's tax liability." *Id.* at 1382-83 (citations omitted).

To the same effect is *E.W. Scripps Co. v. United States*, 420 F.3d 589, 595 (6th Cir. 2005), in which the court noted that I.R.C. § 6601(c) "specifically provides for the treatment of deficiency interest, in most contexts, as part of the underpaid tax," whereas "§ 6611 . . . does not contain a similar provision, which arguably implies that interest on an overpayment of taxes should not be treated as part of the overpaid tax itself." In *Chase Manhattan Bank, N.A. v. Gov't of the Virgin Islands*,

173 F. Supp. 2d 386, 391 (D.V.I. 2001), *rev'd on other grounds*, 300 F.3d 320 (3d Cir. 2002), the district court explained:

this absence of similar language [in I.R.C. § 6611] makes perfect sense because overpayments can bear no tax liability, whereas additions, underpayments, and penalties, are taxes by definition. Since there is nothing taxable about overpayments, they impose no substantive tax liability and sections 6611 and 6621 of the federal income tax law are merely administrative provisions to aid the government in calculating the amount of interest it owes the overpaying taxpayer.

Because overpayment interest is not “a part of, or even related to, a taxpayer’s tax liability,” *Pacific Gas*, 417 F.3d at 1383, the Tax Court should have rejected taxpayer’s contention in this case that the “[t]he key inquiry is whether the taxpayer, when its obligations to the Service are netted against the Service’s obligations to the taxpayer, is in a net refund or deficiency situation.” (A193.) Under taxpayer’s reasoning, if a taxpayer’s correct tax liability for a given year is \$100, but the Government owes the taxpayer \$5 of overpayment interest, the taxpayer could be viewed as owing only \$95 in tax and having overpaid the tax by \$5. But there is no authority for offsetting a tax liability

against overpayment interest due to the taxpayer in this manner.⁸

Because overpayment interest is not a component of a taxpayer's tax liability, overpayment interest owed to the taxpayer does not reduce the taxpayer's liability and therefore does not give rise to an overpayment of tax.

Despite the Tax Court's extensive reliance on *Baumgardner*, the court glossed over its unequivocal statement in *Baumgardner* that "we remain unable to enter a decision for interest on an overpayment." 85 T.C. at 453. In the proceedings below, taxpayer here argued that the *Baumgardner* court was referring only to cases involving interest on overpayments that other courts have reduced to judgment. (A191.) As is clear from the opinion in *Baumgardner*, however, the court was in fact discussing overpayment interest under I.R.C. § 6611 as well as post-judgment interest. See 85 T.C. at 452-53; see also *Harrison v. Commissioner*, 68 T.C.M. (CCH) 1438, 1441 (1994) (interpreting

⁸ The only exception is I.R.C. § 6402(a), which allows the IRS to apply a tax overpayment plus the allowable overpayment interest as a credit against a *different* tax liability, e.g., for another tax year or a different type of tax. Because the principal amount of an overpayment cannot be determined until the correct tax liability for the year is established, it follows that interest on an overpayment cannot be applied to reduce the tax liability for that same year.

Baumgardner as discussing court's lack of jurisdiction over both types of interest). Furthermore, this discussion in *Baumgardner* directly followed the court's statement that "the type of interest" it was considering was interest that "accrued and was paid prior to the time the overpayment was claimed or arose," which can only mean deficiency interest under I.R.C. § 6601. 85 T.C. at 452-53.

In other words, the full context establishes that the *Baumgardner* court was well aware of the difference between an "overpayment," on the one hand, and "interest on an overpayment," on the other hand. The court's holding in *Baumgardner* that it had jurisdiction to determine an overpayment of deficiency interest simply does not support the court's exercising jurisdiction to determine interest on an overpayment in this case.

3. The Tax Court's emphasis on jurisdictional "symmetry" with the district courts and the Court of Federal Claims was misplaced

Because of its failure to appreciate the difference between an overpayment and interest on an overpayment, the Tax Court also failed to recognize (App. 25-26, 31) that this case does not implicate the same considerations of "symmetry" with the district courts and the Court of

Federal Claims that informed the opinion in *Baumgardner*. In *Baumgardner*, the court discerned “a clear statutory intent that, in appropriate circumstances, the Tax Court should be able to determine an overpayment to the exclusion of other tax forums,” and it found that “[t]his intent would be frustrated by a reading of sec. 6512(b) that limits the Tax Court’s jurisdiction to determine an ‘overpayment’ which varied from the ‘overpayments’ that the [district courts and the Court of Federal Claims] could have found.” 85 T.C. at 451. Where overpayment jurisdiction is present, the court in *Baumgardner* went on, “the ‘overpayment’ determined by the Tax Court should be synonymous with that determined by a district court or the Claims Court.” *Id.* at 452. The *Baumgardner* court emphasized that “[t]his is essential because a determination of an overpayment, by any of the three forums, is res judicata.” *Id.*; see I.R.C. § 6512(a).

But as discussed above, a claim for overpayment interest is altogether different from a claim to recover an overpayment, even when litigated in a district court or the Court of Federal Claims. While the latter claim is subject to those courts’ “special framework for tax refund litigation,” the former “is a simple action against the United States for

... money owed.” *Alexander Proudfoot*, 454 F.2d at 1382. Therefore, it does no harm to “symmetry” to construe the term “overpayment” to exclude overpayment interest, because the Tax Court still will have exclusive jurisdiction to “determine an overpayment” as so construed. Put differently, because interest on an overpayment is not part of an overpayment, the district courts and the Court of Federal Claims will not encroach on the Tax Court’s jurisdiction by considering claims for such interest, but will merely be exercising their own jurisdiction over general monetary claims against the United States under 28 U.S.C. §§ 1346 and 1491. *Cf.* H.R. Conf. Rep. No. 105-220, at 733 (“In clarifying the Tax Court’s jurisdiction over interest determinations [under § 7481(c) to include overpayment interest], the conferees do not intend to limit any other remedies that taxpayers may currently have with respect to such determinations, including in particular refund proceedings relating solely to the amount of interest due.”).

Furthermore, the *res judicata* concern that drove the *Baumgardner* court’s insistence on “symmetry” of overpayment jurisdiction, 85 T.C. at 452, is not present in this case. Contrary to the court’s implicit assumption here, a determination of an overpayment by

the Tax Court would *not* be res judicata with respect to a separate claim for additional overpayment *interest*. Cf. I.R.C. § 6512(a) (barring subsequent *refund* suit); see, e.g., *Coca-Cola Co. v. United States*, 87 Fed. Cl. 253, 254-55 (2009) (taxpayer sued for overpayment interest that IRS failed to pay after Tax Court determined an overpayment). Indeed, as the Tax Court acknowledged here (App. 24-25), taxpayer could (and did) file a concurrent suit in the Court of Federal Claims seeking additional overpayment interest.⁹

The *Baumgardner* court also was troubled by the possibility that “[l]ack of jurisdiction . . . would leave taxpayers in a ‘catch-22’ where interest was overpaid and the statute of limitations on claiming the interest had run.” *Id.* at 453. The court reasoned that the taxpayer would need to “foresee . . . that he would ultimately end up with an overpayment . . . and bring an action for the amount of interest overpaid” within the limitations period on refund claims under I.R.C. § 6511, *i.e.*, three years from when the return was filed or two years from when the tax was paid, whichever expires later. *Id.* The court

⁹ Taxpayer voluntarily dismissed that suit with prejudice in January 2009.

was concerned, however, that “[i]t would be difficult, if not impossible, for one to file a specific enough protective claim under these circumstances.” *Id.*

Again, this case presents a very different situation. Taxpayer is seeking additional interest on previously agreed overpayments of tax. Unlike the taxpayer in *Baumgardner*, taxpayer here did not have to foresee that it might end up with an overpayment. It was able to amend its petition to include the interest claim within two months after it initiated the deficiency proceeding. Furthermore, a claim for additional overpayment interest is subject to a six-year limitations period, not the shorter period applicable to a refund claim. *See pp. 32-33, supra.*

Rather than establishing symmetry, the Tax Court’s holding here creates confusion as to what limitations period – if any – now applies to a claim for additional overpayment interest. As discussed on pp. 44-47, *supra*, it has long been held that although claims for additional overpayment interest are not subject to the Code’s refund procedures, suit must be brought within six years of the scheduling of the overpayment. With respect to overpayments determined by the Tax

Court, however, the Code imports the limitations periods applicable to refund claims under I.R.C. § 6511. See I.R.C. § 6512(b)(3) (no “credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid . . . after the mailing of the notice of deficiency,” or within the limitations period provided by I.R.C. § 6511(b)(2), (c), or (d)). I.R.C. § 6511 generally requires an administrative refund claim to be filed within three years of the date the return was filed, or two years of the date the tax was paid, whichever is later.

If the Tax Court acquired jurisdiction under I.R.C. § 6512(b) over taxpayer’s claims for additional overpayment interest, it would follow that the limitations period applicable to taxpayer’s claims would be that set forth in I.R.C. § 6511 (via I.R.C. § 6512(b)(3)), not the six-year limitations period set forth in 28 U.S.C. §§ 2401 and 2501. But that is not what the Tax Court held, and the court wholly failed to explain this anomaly. The untenable result is that the court’s holding simultaneously permits the Tax Court to adjudicate claims that are time-barred in the district court and the Court of Federal Claims (as in this case), and prevents it from considering claims that are time-barred

by I.R.C. § 6511 but remain viable in the district courts or the Court of Federal Claims under title 28.¹⁰

Indeed, it is unclear how the timing rules set forth in I.R.C. § 6511 would even apply to a claim for overpayment interest, inasmuch as an administrative claim under I.R.C. § 6511 never needs to be filed to claim overpayment interest. *See* Rev. Rul. 57-242. It is also unclear what event – the filing of the return, the payment of tax, or the scheduling of the overpayment – would be the relevant event to start the running of the limitations period. The Tax Court, however, failed to acknowledge, much less to resolve, any of these dilemmas.

Finally, to the extent that the Tax Court was motivated by a desire to avoid the bar of the limitations period or the necessity of additional litigation as a matter of convenience to taxpayer (*see* App. 27, quoting *Baumgardner*, 85 T.C. at 457), the court was putting the

¹⁰ The real difficulty for taxpayer here is that its claims for overpayment interest appear to lie outside the six-year limitations period as well. Its largest single claim, for \$37 million of interest on a 1981 tax refund paid in 1982, accrued more than 25 years ago. (A136-37.) The Tax Court's assertion of jurisdiction here effectively insulates claims for overpayment interest from any limitations period at all. The Tax Court did not point to any evidence that Congress intended that result, and such a supposition is doubtful on its face.

cart before the jurisdictional horse. See, e.g., *Transport Mfg. & Equip. Co. v. Commissioner*, 434 F.2d 373, 382 (8th Cir. 1970) (“It seems clear that until the jurisdiction of the [Tax Court] is further enlarged[,] whatever procedural convenience might be attained by having a formal redetermination of [post-assessment interest] in this particular instance must give way to the greater necessity for recognizing and giving effect to the limited statutory jurisdiction of the [court].”) (quoting *Superheater Co. v. Commissioner*, 125 F.2d 514, 516 (2d Cir. 1942)); see also *Ferguson v. Commissioner*, 568 F.3d 498, 506 (5th Cir. 2009) (“The amicus brief . . . contends that to require a taxpayer to wait until a notice of levy has been issued and a collection due process hearing occurs to raise the issue of dischargeability is a waste of time and resources. The amicus may be correct. But that does not permit us to rewrite §§ 6213 or 6214.”); *Heffley*, 884 F.2d at 287 (in rejecting estate’s contention that “if this controversy is ‘bifurcated’ by requiring that the proper computation of interest under 26 U.S.C. § 6166 be litigated as a refund claim, it would force the taxpayer to maintain a second suit resolving a single controversy,” court of appeals reasoned that the interest computation in issue fell outside the Tax Court’s

jurisdiction in any event). In the absence of “general equitable powers,” *McCoy*, 484 U.S. at 7, the Tax Court’s chosen jurisdictional solution to the problems it perceived in this case was contrary to law.

4. Mathematical complexity in the interest computations does not justify the exercise of jurisdiction where none exists

In its order denying the Commissioner’s motion for reconsideration, the Tax Court stated that a “critical” and “fundamental” reason for exercising jurisdiction over taxpayer’s claims for additional overpayment interest was that “the computation of both types of interest [*i.e.*, deficiency interest and overpayment interest] is interrelated and cannot be computed separately.” (App. 44.) In its initial opinion, the court had explained that taxpayer’s “account balance, on any given date, is composed not only of the positive and negative transactions booked to [its] account for the year, such as assessments (positive) and payments (negative), but also of the underpayment and overpayment interest that was previously computed and combined with the account balance.” (App. 21.) The court stated that “[i]f the account balance on a particular date were to change . . .[,] then the amount, and possibly the kind, of interest computed as of that

date would also change.” (*Id.*) “Any such change would ripple through the account,” the court continued, “causing later interim balances, and the interest computed thereon, to change, and further causing a change in the aggregate amount of each type of interest” (*Id.*) The court concluded that “it would be impossible for the Court to exercise overpayment jurisdiction with respect to the underpayment interest, unless the Court also had jurisdiction over overpayment interest.” (App. 22.)

This aspect of the Tax Court’s analysis is wrong for two reasons. First, in this case, the interest computations are not as closely interrelated as the court believed. Second, even if the court were correct, there is no authority whatsoever for extending its jurisdiction merely in order to simplify the math.

Contrary to the Tax Court’s premise, not all of taxpayer’s overpayment interest claims are dependent upon or connected to its deficiency interest claims. The stated ground for taxpayer’s largest claim for overpayment interest (in the amount of \$37 million) was that interest had accrued on a \$26 million tax refund attributable to the 1981 tax year, because the IRS failed to issue the refund within 45 days

of the filing of the return. (A136-37.) *See* I.R.C. § 6611(e) (no overpayment interest accrues on refunds paid within 45 days of filing return). On its face, that claim is entirely unrelated to the calculation of deficiency interest on the 1981 account or for any other tax year.

The same is true for any other overpayment that was wholly or partially refunded to taxpayer. If additional interest had been allowed on the refund, it would have been refunded immediately along with the tax. Any such interest would not have remained on taxpayer's account, and hence it would not factor into the running total of interest on the account. In short, the determination of additional interest due on overpayments that were refunded to taxpayer is not intertwined with the determination of deficiency interest, and those claims would have been outside the Tax Court's jurisdiction even under its faulty approach.

To the extent that the calculations of overpayment interest and deficiency interest are interrelated, the Tax Court nevertheless erred in extending its jurisdiction to include the former. There is no basis for extending the court's statutorily prescribed jurisdiction based on the complexities or equities of a particular case. *See Gooch Milling*, 320

U.S. at 422 (“The Internal Revenue Code, not general equitable principles, is the mainspring of the [Tax Court’s] jurisdiction.”); *McCoy*, 484 U.S. at 7 (“The Tax Court is a court of limited jurisdiction and lacks general equitable powers.”); *L.V. Castle Investment Group Inc. v. Commissioner*, 465 F.3d 1243, 1247 n.4 (11th Cir. 2006) (“Any potential inequities are irrelevant in any case because the Tax Court is a court of strictly limited jurisdiction and cannot assert equitable powers in any way that could be construed as extending its jurisdiction.”); *Boyd v. Commissioner*, 451 F.3d 8, 11 (1st Cir. 2006) (finding “no authority for equitably expanding the Tax Court’s jurisdiction”); *see also Vivenzio v. Commissioner*, 283 Fed. Appx. 40, 43 (3d Cir. 2008) (“The Tax Court generally possesses only such jurisdiction as is expressly conferred upon it by Congress.”). Under the Tax Court’s rationale, jurisdiction should *not* exist in a case where the interest computations are simple or straightforward. But that is not the law, and the court’s jurisdiction must turn on the Code.

Here, the Code imposes an additional jurisdictional restraint, because most of the interest figures that are interrelated involve overpayments that were applied as credits under I.R.C. § 6402. As is

discussed further on pp. 64-67, *infra*, I.R.C. § 6512(b)(4) expressly deprives the Tax Court of jurisdiction “to restrain or review any credit . . . made by the Secretary under section 6402.” In light of this limitation, the Tax Court’s attempt to extend its already narrow overpayment jurisdiction seems all the more extreme. As the Tax Court stated in refusing to exercise overpayment jurisdiction in the context of a collection-due-process case under I.R.C. § 6330:

[G]iven that explicit statutory authority was required before this Court acquired jurisdiction to determine overpayments in deficiency cases, and given that additional explicit statutory authority was required before this Court acquired, decades later, jurisdiction to enforce such an overpayment, and given that Congress later clarified legislatively that this overpayment jurisdiction did not extend to reviewing credits under section 6402 . . . , we do not believe we should assume, without explicit statutory authority, jurisdiction either to determine an overpayment or to order a refund or credit of taxes paid in a section 6330 collection proceeding.

Greene-Thapedi v. Commissioner, 126 T.C. 1, 11 (2006); *see also Ferguson*, 568 F.3d at 504 (“When Congress has thought it necessary to expand the authority of the Tax Court in redetermination proceedings . . . , it has done so expressly.”).

Finally, the Tax Court erred in concluding that it would be “mathematically impossible” to determine the amount of overpaid deficiency interest without exercising jurisdiction over even computationally related overpayment interest. (App. 20.) As the Commissioner explained below (A309-12), the Tax Court could have considered the facts and figures relating to the overpayment interest claims to the extent necessary to determine the amount of overpaid deficiency interest, without formally deciding the amount of additional overpayment interest due to taxpayer. Congress has specifically allowed this in the context of deficiency determinations, providing in I.R.C. § 6214(b) that “[t]he Tax Court in redetermining a deficiency of income tax for any taxable year . . . shall *consider* such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, *but in doing so shall have no jurisdiction to determine* whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.” (Emphasis added.)

The Tax Court explained the application of § 6214(b) in *Lone Manor Farms, Inc. v. Commissioner*, 61 T.C. 436 (1974), *aff'd*, 510 F.2d

970 (3d Cir. 1975). In that case, the issue was whether the taxpayer had a net operating loss for 1969 as a result of events that occurred in 1967. The taxpayer argued that the Tax Court had no authority to recompute its 1967 tax liability. The Tax Court disagreed:

Section 6214(b) says that we have no power to determine an overpayment or underpayment of tax for a year not in issue which would form the basis of a refund suit or an assessment of a deficiency. It does not prevent us from *computing*, as distinguished from "*determining*," the correct tax liability for a year not in issue when such a computation is necessary to a determination of the correct tax liability for a year that has been placed in issue.

61 T.C. at 440 (emphasis added).

Similarly, in this case, the Tax Court could have "considered" or "computed" the correct amount of overpayment interest to the extent necessary to determine overpaid deficiency interest, without "determining" the amount of the overpayment interest -- *i.e.*, without entering a decision against the Government with respect to that amount. As explained in the revenue agent's affidavit, most of taxpayer's interest claims turned on the effective dates of various payments and credits on taxpayer's accounts. (A146-50.) The parties

ultimately reached a stipulation as to those dates. (A340-43.) The Tax Court could have used those dates in performing the interrelated interest computations, while entering a decision only as to the amount of deficiency interest that taxpayer overpaid. By entering a decision that requires the Government to pay additional overpayment interest to taxpayer, the court erred as a matter of law.

D. The Tax Court's exercise of jurisdiction over previously applied credits was expressly prohibited by I.R.C. § 6512(b)(4)

The Tax Court acknowledged that “[m]ost of the overpayments underlying [taxpayer’s] claims for additional interest are interim overpayments that [the IRS] credited against a tax liability of [taxpayer] for a different year and/or a different tax, pursuant to section 6402(a).” (App. 29.) Nevertheless, the court insisted that “[i]n exercising jurisdiction under section 6512(b) with regard to overpayment interest in the case of overpayments credited . . . by the Commissioner,” it was “not acting in derogation of section 6512(b)(4).” (App. 31.) The court reasoned that it was “not called upon to ‘restrain or review’ the tax liability against which the overpayment is credited, within the meaning of section 6512(b)(4).” (App. 32.) “To the contrary,”

the court said, “the only issue in this case is whether the amount of the credit should have been higher by reason of [the IRS’s] failure to allow all or a portion of the interest on the overpayment.” (*Id.*)

The Tax Court’s conclusion flies in the face of the plain language of I.R.C. § 6512(b)(4). That section unambiguously states that “[t]he Tax Court shall have no jurisdiction under this subsection [*i.e.*, I.R.C. § 6512(b)] to restrain or review any credit or reduction made by the Secretary under section 6402.” This broad, unqualified prohibition certainly includes the review the Tax Court undertook here, when it decided whether “the amount of credit should have been higher by reason of [the IRS’s] failure to allow all or a portion of the interest on the overpayment.” (App. 32.) The IRS’s allowance of overpayment interest on a credit expressly falls within its authority under I.R.C. § 6402(a), which states that “[i]n the case of any overpayment, the Secretary . . . may credit the amount of such overpayment, *including any interest allowed thereon*, against any liability [of the taxpayer].” (Emphasis added.) The Tax Court’s review of the amount of interest previously credited was in direct contravention of I.R.C. § 6512(b)(4).

The court's reliance in this context (App. 31-32) on *Savage v. Commissioner*, 112 T.C. 46 (1999), was misplaced. In *Savage*, the taxpayer alleged that the IRS erred in applying an overpayment from his 1993 tax year to his 1990 tax year, because, according to the taxpayer, the IRS had improperly increased his liability for 1990. 112 T.C. at 47. The Tax Court, which had jurisdiction over the 1993 year, held that I.R.C. § 6512(b)(4) deprived it of jurisdiction to review the credit applied to 1990, including the question whether the taxpayer was liable for the additional amounts satisfied by the credit. *Id.* at 48.

Here, the Tax Court apparently believed that because "the tax liability against which the overpayment [was] credited" was not in issue, § 6512(b)(4) was not implicated. (App. 31-32.) But there was no suggestion in *Savage* that the application of § 6512(b)(4) is limited to the fact pattern presented in that case, and other authorities make clear that it is not. *E.g.*, *Smith*, 429 F.3d at 539 (Tax Court prohibited by § 6512(b)(4) from reviewing IRS's offset of unpaid interest against overpayment); *Malachinski*, 268 F.3d at 509 (no jurisdiction "to direct the disposition of an overpayment when that payment has been credited against another year's assessment pursuant to § 6402(a) prior

to the commencement of a tax court proceeding"). Indeed, the Tax Court here read into the statute words that Congress did not write. Section 6512(b)(4) does not merely deny the court jurisdiction "to restrain or review' *the tax liability* against which the overpayment is credited." (App. 32, emphasis added.) Rather, it eliminates jurisdiction "to restrain or review any credit or reduction made by the Secretary under section 6402." I.R.C. § 6512(b)(4).

In sum, to the extent that taxpayer's claims required a review of the amount of interest allowed on overpayments previously credited under I.R.C. § 6402, § 6512(b)(4) expressly deprived the Tax Court of jurisdiction to consider those claims. Most of taxpayer's claims (see App. 29) thus fell outside the court's jurisdiction for that reason alone. As we have shown, *none* of taxpayer's claims for additional overpayment interest comes within the court's jurisdiction on any other ground.

CONCLUSION

For the foregoing reasons, the Tax Court's decision is erroneous as a matter of law and should be reversed.

Respectfully submitted,

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DECEMBER 2009

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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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: December 9, 2009

APPENDIX

Doc. 92	Notice of appeal	App. 1-2
Doc. 91	Tax Court decision	App. 3-5
Doc. 58	Tax Court opinion	App. 6-43
Doc. 65	Order denying motion for reconsideration	App. 44-45
- - -	Statutory addendum	App. 46-49

CERTIFICATE OF SERVICE

It is hereby certified that on December 9, 2009: (1) the original and nine copies of this 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 brief was made upon counsel for the appellees by CM/ECF.

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